

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, : Case No. 2002-1377
v. : Common Pleas Case No. CR 2002 0010
JERONIQUE CUNNINGHAM, : THIS IS A DEATH PENALTY CASE
Appellant. :

APPLICATION FOR REOPENING PURSUANT TO S.CT. PRAC.R. XI(6)

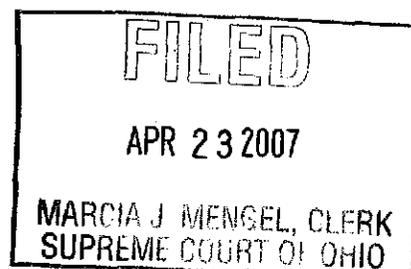
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Now comes Appellant Jeronique Cunningham, by and through counsel, and moves this Court for reopening of his direct appeal pursuant to S.Ct. Prac.R. XI(6) (“*Murnahan* Application”). As the Propositions of Law presented below demonstrate, prior appellate counsel failed to raise meritorious issues on Mr. Cunningham’s behalf in his direct appeal as of right to this Court.¹ These failures constitute ineffective assistance of counsel. The following Propositions of Law undoubtedly constitute “a *colorable* claim of ineffective assistance of appellate counsel” in order to reopen the appeal. *State v. Murnahan*, 63 Ohio St.3d 60, 66 (1992); S.Ct. Prac.R. XI(6). See Exhibit A, Affidavit of William S. Lazarow, attached hereto.

1. **Mr. Cunningham’s Application for Reopening is timely and does not require a showing of good cause.**

This Court appointed counsel to prepare and file this Application on January 23, 2007. *State v. Ahmed*, 2007 Ohio 225, 112 Ohio St.3d 1435 (2007). Since Mr. Cunningham is entitled to counsel to prepare and file this Application, the time for filing does not begin to run until the appointment of counsel. Mr. Cunningham’s application is timely filed.

¹The arbitrary page limit imposed by the Court’s rules prevent adequate development of Mr. Cunningham’s claims.

2. There is good cause for the untimely filing of this Application.

This Court has never defined “good cause” to justify a filing of a *Murnahan* Application. As such, it is impossible for Mr. Cunningham to know what constitutes good cause. If this Court requires a showing of good cause for the filing of this Application, Mr. Cunningham asserts that good cause exists. First, Mr. Cunningham has a right to appointed counsel to prepare and file this Application. Therefore, any delay caused by the lack of appointed counsel constitutes good cause.

Counsel were not appointed until January 23, 2007. This Court has routinely reviewed *Murnahan* Applications when filed within 90 days of the appointment of counsel. *See State v. White*, 89 Ohio St.3d 1467 (2000); *State v. Brooks*, 92 Ohio St.3d 537 (2001); *State v. Getsy*, 90 Ohio St.3d 1469 (2000); and *State v. Mack*, 101 Ohio St.3d 397 (2004). *See also State v. Fox*, 83 Ohio St.3d 514, 515 (1998). The right to appointed counsel is rendered meaningless if that counsel is not given adequate time to properly review, investigate, and prepare the Application. *McFarland v. Scott*, 512 U.S. 849, 855 (1994).

Therefore, Mr. Cunningham’s Application should be reviewed by the Court and deemed timely as a matter of law or for good cause.

PROPOSITION OF LAW NO. I

ERRORS IN JURY SELECTION DEPRIVED MR. CUNNINGHAM OF A FAIR TRIAL AND SENTENCING PROCEEDING IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. II

THE DENIAL OF THE OPPORTUNITY TO LIFE QUALIFY THE JURY DEPRIVED MR. CUNNINGHAM OF A FAIR AND PROPER *VOIR DIRE* IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. III

MR. CUNNINGHAM'S CONFRONTATION RIGHTS WERE DENIED IN VIOLATION OF THE FOURTH, FIFTH, SIXTH EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. IV

THE STATE COMMITTED PROSECUTORIAL MISCONDUCT BY SUPPRESSING TWO EXCULPATORY STATEMENTS BY OCCURRENCE WITNESSES IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. V

TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO INVESTIGATE, OBTAIN AND USE BALLISTIC EVIDENCE DEMONSTRATING THAT JERONIQUE CUNNINGHAM WAS NOT THE ACTUAL KILLER IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. VI

THE STATE'S IMPROPER CLOSING ARGUMENTS AT BOTH THE GUILT AND SENTENCING PHASES OF MR. CUNNINGHAM'S CAPITAL TRIAL, CONSTITUTED PROSECUTORIAL MISCONDUCT IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. VII

TRIAL COUNSEL WAS INEFFECTIVE AT SENTENCING FOR FAILING TO INVESTIGATE AND PRESENT IMPORTANT MITIGATING EVIDENCE, FOR CAUSING THE SUBMITTED MITIGATION EVIDENCE TO BE OVERLOOKED AND UNDERSTATED, AND FOR PRESENTING AN INADEQUATE CLOSING ARGUMENT, THEREBY DEPRIVING MR. CUNNINGHAM OF HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. VIII

THE JURY INSTRUCTIONS DEPRIVED MR. CUNNINGHAM OF HIS RIGHT TO DEFEND AGAINST THE STATE'S CHARGES, TO CONFRONT THE STATE'S WITNESSES, HIS RIGHT TO A RELIABLE SENTENCE, AS WELL

AS HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. IX

THE TOTAL BREAKDOWN IN OHIO'S CAPITAL SENTENCING PROCESS DEPRIVED MR. CUNNINGHAM OF HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. X

MR. CUNNINGHAM'S SENTENCE OF DEATH IS INAPPROPRIATE, ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. XI

PERVASIVE PRETRIAL PUBLICITY DEPRIVED MR. CUNNINGHAM OF HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. XII

THE ADMISSION OF IRRELEVANT, REPETITIVE, AND INFLAMMATORY PHOTOGRAPHS DEPRIVED MR. CUNNINGHAM OF HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. XIII

OHIO'S DEATH PENALTY SCHEME VIOLATES ARTICLE VI AND THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. XIV

THE CUMULATIVE IMPACT OF THE ERRORS ADDRESSED IN THIS APPLICATION RENDER MR. CUNNINGHAM'S CONVICTION AND SENTENCE UNRELIABLE AND UNCONSTITUTIONAL IN VIOLATION OF ARTICLE VI AND THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

MR. CUNNINGHAM WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

Trial counsel committed numerous errors during Mr. Cunningham's trial. These errors were professionally unreasonable and prejudice Mr. Cunningham and deprived Mr. Cunningham of his constitutional right to counsel. *Strickland v. Washington*, 466 U.S. 668 (1984).

Counsel erred by failing to:

1. Adequately object to all of the errors raised in Propositions of Law Nos. I through XIV, *infra*;
2. Adequately and properly investigate and prepare for the culpability phase of the case;
3. Adequately and properly investigate and prepare for the mitigation phase of the case;
4. Properly present the nature and circumstances of the offense as a mitigator and not as an aggravating factor.

Quoting the ABA standards, *Wiggins* stresses that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), *quoting* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.(C), p.93 (1989). Counsel's performance at trial was deficient and Mr. Cunningham was prejudiced by this error. *Wiggins*. This deprived Mr. Cunningham his Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments rights to a fair trial, due process, and a fair and reliable sentencing proceeding.

PROPOSITION OF LAW NO. XV

MR. CUNNINGHAM WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

For the above stated reasons, Mr. Cunningham was denied the effective assistance of counsel on appeal. *Strickland v. Washington*, 466 U.S. 668 (1984). Appellate counsel also failed to

challenge the deficient performance of trial counsel in failing to object to the above errors. The Court must reopen Mr. Cunningham's direct appeal as of right. This deprived Mr. Cunningham his Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments rights to a fair trial, due process, and a fair and reliable sentencing proceeding.

DEMAND FOR DISCOVERY AND EVIDENTIARY HEARING

Mr. Cunningham requests full discovery and an evidentiary hearing on these claims in order to properly and fully litigate these claims. *Morgan v. Eads*, 2004 Ohio 6110 (2004). In *Morgan* this Court abandoned the clear holding of prior cases that the taking of new evidence is not permitted in *Murnahan* proceedings. *State v. Burke*, 97 Ohio St.3d 55 (2002); *State v. Hooks*, 92 Ohio St.3d 83 (2001); *State v. Moore*, 93 Ohio St.3d 649 (2001). Therefore, Mr. Cunningham hereby demands this newly created right to conduct discovery in support of his claims and to have an evidentiary hearing on this matter. The failure to provide discovery and hearing will deny Mr. Cunningham a full and fair opportunity to litigate his claims and deny him due process of law.

CONCLUSION

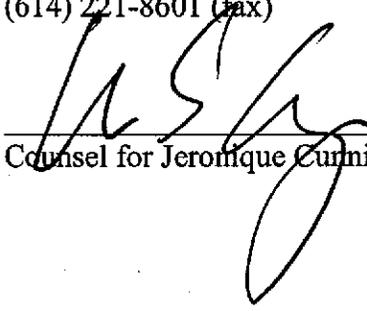
For the above state reasons, Mr. Cunningham requests this Court grant his application for reopening and reopen his direct appeal to this Court. Further, the Court must permit discovery and conduct an evidentiary hearing on the claims raised in this Application.

Respectfully submitted,

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COUNSEL OF RECORD

and

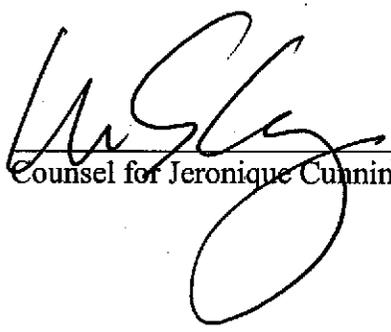
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Counsel for Jeronique Cunningham

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPLICATION FOR REOPENING PURSUANT TO APP.R. 26(B) was forwarded by regular U.S. Mail to David Bowers and Jana Gutman, Allen County Prosecutor, Court of Appeals Building, Suite 302, 204 North Main Street, Lima, Ohio 45801 on this 23rd day of April, 2007.



Counsel for Jeronique Cunningham

Exhibit A

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,)	
)	
Appellee,)	Case No. 2002-1377
)	
-vs-)	
)	Common Pleas Case No. CR 2002 0010
JERONIQUE CUNNINGHAM,)	
)	THIS IS A DEATH PENALTY CASE
Appellant.)	

AFFIDAVIT OF WILLIAM S. LAZAROW

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, William S. Lazarow, after being duly sworn, hereby state as follows:

1) I am an attorney licensed to practice law in the state of Ohio since 1972, and am currently engaged in the private practice of law in Columbus, Ohio. I was an Assistant State Public Defender in Ohio from 1989 to 2001 where I was assigned to the Death Penalty Unit. I was also a Deputy Federal Public Defender in the Capital Habeas Units in the Central District of California and District of Arizona from 2002 to 2006. My primary area of practice is capital litigation. I am certified under Sup. R. 20 as appellate counsel and trial co-counsel in capital cases.

2) Due to my focused practice of law and my attendance at death-penalty seminars, I am aware of the standards of practice involved in the appeal of a case in which the death sentence was imposed or recommended.

3) The Due Process Clause of the Fourteenth Amendment guarantees effective assistance of counsel on an appeal as of right. *Evitts v. Lucey*, 469 U.S. 587 (1985).

4) The initial responsibility of appellate counsel, once the transcript is filed, is to ensure that the entire record has been filed with this Court. Appellate counsel has a fundamental duty in every criminal case to ensure that the entire record is before the reviewing courts on appeal. Ohio R. App. P. 9(B); Ohio Rev. Code Ann. § 2929.05 (Anderson 1995); *State ex rel. Spirko v. Judges of the Court of Appeals, Third Appellate District*, 27 Ohio St. 3d 13, 501 N.E. 2d 625 (1986).

5) After ensuring that the transcript is complete, counsel must then review the record for purposes of issue identification. This review of the record not only includes the transcript, but also the pleadings and exhibits.

6) For counsel to properly identify issues, they must have a good knowledge of criminal law in general. Most trial issues in capital cases will be decided by criminal law that is applicable to non-capital cases. As a result, appellate counsel must be informed about the recent developments in criminal law when identifying potential issues to raise on appeal. Counsel must remain knowledgeable about recent developments in the law after the merit brief is filed.

7) Since the reintroduction of capital punishment in response to the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the area of capital litigation has become a recognized specialty in the practice of criminal law. Numerous substantive and procedural areas unique to capital litigation have been carved out by the United States Supreme Court. As a result, anyone who litigates in the area of capital punishment

must be familiar with these issues in order to raise and preserve them for appellate and post-conviction review.

8) Appellate representation of a death-sentenced client requires recognizing that the case will most likely proceed to the federal courts at least twice: first on petition for Writ of Certiorari in the United States Supreme Court, and again on petition for Writ of Habeas Corpus filed in a federal district court. Appellate counsel must preserve all issues throughout the state court proceedings on the assumption that relief is likely to be sought in federal court. The issues that must be preserved are not only issues unique to capital litigation, but also case-and fact-related issues, unique to the case, that impinge on federal constitutional rights.

9) It is a basic principle of appellate practice that to preserve an issue for federal review, the issue must be exhausted in the state courts. To exhaust an issue, the issue must be presented to the state courts in such a manner that a reasonable jurist would have been alerted to the existence of a violation of the United States Constitution. The better practice to exhaust an issue is to cite directly to the relevant provisions of the United States Constitution in each proposition of law and in each assignment of error to avoid any exhaustion problems in the federal courts.

10) It is important that appellate counsel realize that the capital reversal rate in the state of Ohio is eleven percent on direct appeal and less than one percent in post-conviction. It is my understanding that forty to sixty percent (depending on which of several studies is relied upon) of all habeas corpus petitions are granted. Therefore, appellate counsel must realize that in Ohio, a capital case is very likely to reach federal court and, therefore, the real audience of the direct appeal is the federal court.

11) Based on the foregoing standards, I have identified fourteen propositions of law that should have been presented to this Court by appellate counsel. The propositions of law identified in this application for reopening and further discussed in this affidavit, were either not presented, or not fully presented, to this Court.

12) Based on my evaluation of the record and understanding of the law, I believe that if these propositions of law had been properly presented for review, this Court would have granted relief. Also, those errors would have been preserved for federal review.

13) Therefore, Jeronique Cunningham was prejudiced as a direct result of the deficient performance of his appellate counsel on his direct appeal to this Court.

PROPOSITION OF LAW NO. I

ERRORS IN JURY SELECTION DEPRIVED MR. CUNNINGHAM OF A FAIR TRIAL AND SENTENCING PROCEEDING IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. THE PRESENCE OF A BIASED JUROR DEPRIVED MR. CUNNINGHAM OF A FAIR TRIAL.

14) Juror Nichole Mikesell, aka Juror # 21, was the foreperson of the jury. She worked at Allen County Children's Services as an investigator. As a result of her employment she was aware of extra-judicial information regarding Jeronique Cunningham and she had already formed an opinion about his worth as a human being and logically whether he should be sentenced to death. According to information presented in post-conviction Ms. Mikesell relied on evidence outside of the trial to form the opinion that "Jeronique is an evil person. She said that some social workers worked with Jeronique in the past and were afraid of him. She also said that if you observe one of the veins starting to bulge in his head, watch out and stay away because he might try to kill you. She also stated that Jeronique has no redeeming qualities." Ms. Mikesell's ability to be a fair and impartial juror was obviously compromised by her personal knowledge of information that was extraneous to the evidence presented at Cunningham's trial. Her knowledge of this highly prejudicial information -- communicated to her by her colleagues at Allen County Children's Services -- was never divulged to the Court or counsel during *voir dire* or in her jury questionnaire. Her failure to divulge the information constitutes juror misconduct and Cunningham was thereby prejudiced. *Williams v. Taylor*, 529 U.S. 420 (2000).

15) The presence of Nichole Mikesell on the jury violated his rights to a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution; *Turner v. Louisiana*, 379 U.S. 466, 472 (1965); *Mattox v. United States*, 146 U.S.

140, 150 (1892); *White v. Mitchell*, 431 F.3d 517 (6th Cir. 2005); *In re Beverly Hills Fire Litigation*, 695 F.2d 207, 215 (6th Cir. 1982), and due process of law guaranteed under the Fifth and Fourteenth Amendments. The presence of Mikesell may have also contaminated the remainder of the jury if she exposed other jurors to this highly prejudicial information that was not developed in the courtroom.

16) The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” U.S. Const. Amend. VI. The right to an impartial jury is applicable to the states via the Fourteenth Amendment. *See Turner v. Louisiana*, 379 U.S. 466 (1965); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). *See also Morgan v. Illinois*, 504 U.S. 719, 726-27 (1992). In essence, the right to jury trial guarantees to the criminal accused a fair trial by a panel of impartial, ‘indifferent’ jurors.” *Irvin*. The presence of even a single biased juror deprives a defendant of his right to an impartial jury. *Morgan*, 504 U.S. at 729. A claim of juror misconduct must focus on the jurors who were actually seated and not those excused. *Ross v. Oklahoma*, 487 U.S. 81 (1988).

17) The “presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.” *Hughes*, at 453 (quoting *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000) (citations omitted)). The presence of a biased juror is a “structural defect in the constitution of the trial mechanism” that defies harmless error analysis, *Hughes*, at 453 (quoting *Johnson v. Armontrout*, 961 F.2d 748, 756 (8th Cir. 1992) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991))).¹

¹ The corollary to this is that if actual bias is discovered during *voir dire*, the trial court *must* excuse the prospective juror. *Hughes*, at 459.

18) In *Miller v. Webb*, 385 F.3d 666, 677 (6th Cir. 2004), a biased juror was similarly allowed to sit on a jury. In ordering the granting of the writ, the Court focused on the juror's "feelings" noting that Aas in *Wolfe [v. Brigano]* when Juror Bell stated, "I think I can be fair. But . . .[,] there was an absence of an affirmative and believable statement that Juror Bell could set aside her opinion and decide the case on the evidence and in accordance with the law. See also *White v. Mitchell*, 431 F.3d 517 (6th Cir. 2005).

19) "A juror is impartial if he or she can lay aside any previously formed 'impression or opinion as to the merits of the case' and can 'render a verdict based on the evidence presented in court.'" *United States v. Polan*, 970 F.2d 1280, 1284 (3d Cir. 1992) (citing *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)). Mikesell was not impartial, and her ability to be impartial was substantially impaired. *White*.

20) Applying the proper analytical framework, Mikesell's conduct clearly raised a presumption of partiality and the perfunctory and rote answers she gave to be fair were not to be believed, and cannot be the last words defining the court's analysis of her impartiality. *Witherspoon* and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath. *Morgan*, 504 U.S. at 734-735. Especially since Mikesell failed to reveal her extra-judicial information.

21) The lack of full, fair, and proper *voir dire* exacerbated this error. Had the trial court permitted the *voir dire* required, see *Morgan*, it is possible that Mikesell's lack of impartiality, exposure to extra-judicial information, and inability to be fair would have been discovered and she could have been removed. See Proposition of Law No. II. The lack of proper *voir dire* deprived Mr. Cunningham of his due process rights. *Morgan*.

22) Mikesell's presence on the jury is also the result of ineffective assistance of counsel. If defense counsel performed any investigation into Mr. Cunningham's background, reviewed any of the records of Mr. Cunningham's life, or considered mitigation strategy prior to *voir dire* they would have known of the extensive contact with Allen County Children's Services. Mikesell admitted that she worked for this agency but did not disclose the fact that she had information about Jeronique Cunningham. Her admission should have put counsel on notice to inquire about extrajudicial information she had about this matter and the failure to adequately *voir dire* Mikesell was unreasonable and Mikesell's presence on the jury was prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Morgan v. Illinois*, 504 U.S. 719 (1992). The right to effective assistance of counsel extends to the *voir dire* process. *Johnson v. Armontrout*, 961 F.2d 748, 754-56 (8th Cir. 1992). *Voir dire* is counsel's opportunity to ensure that a jury will be impartial and indifferent to the extent provided by the Sixth Amendment. *Morgan*, 504 U.S. at 719. Although the content of *voir dire* does not have to conform to a particular framework, counsel must cover specific subjects in order to afford the defendant a fair trial. *Mu'Min v. Virginia*, 500 U.S. 415, 422-23 (1991). As a result of counsels' failure to conduct a reasonable *voir dire*, Mr. Cunningham was deprived of his Constitutional right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated and he was prejudiced.

B. DISMISSING SENIOR CITIZENS FROM THE JURY VENIRE DENIES A CAPITAL DEFENDANT A JURY POOL DRAWN FROM A REPRESENTATIVE AND FAIR CROSS-SECTION OF THE COMMUNITY AS WELL AS VIOLATES THE EQUAL PROTECTION CLAUSE.

23) During the selection of the jury in Mr. Cunningham's capital trial, the trial court excused nineteen members of the venire in whole or in part because they were senior citizens. Venire members 9, 24, 36, 39, 40, 52, 62, 70, 88, 89, 95, 101, 106, 111, 121, 139, 141, 149, 185.

The prosecutors and defense counsel did not object to the dismissal of these venirepersons and actively engaged in the age discrimination. The practice of excusing otherwise qualified jurors because of their age violates the most basic concepts of justice. *See Taylor v. Louisiana*, 419 U.S. 522 (1975) (gender discrimination); *Neal v. Delaware*, 103 U.S. 370 (1881) (racial discrimination); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (racial discrimination); *Hernandez v. State of Texas*, 347 U.S. 475 (1954) (ancestry or national origin). The practice of excluding senior citizens systematically excludes a distinctive group of the community and no such jury pool can be representative of the community.

24) The Sixth and Fourteenth Amendments to the Constitution of the United States guarantee Mr. Cunningham the right to a fair and impartial jury. *Glasser v. United States*, 315 U.S. 60 (1942); *Smith v. Texas*, 311 U.S. 128 (1940). In order to comply with this constitutional guarantee, the jury must be selected from a source that is fairly representative of the community. *See Taylor v. Louisiana*, 419 U.S. 522 (1975); *Swain v. Alabama*, 380 U.S. 202 (1965), overruled on other grounds by *Batson v. Kentucky*, 476 U.S. 79 (1986); *State v. Johnson*, 31 Ohio St.2d 106 (1972). "A fair trial in a fair tribunal is a basic requirement of due process." *In Re Murchison*, 349 U.S. 133, 136 (1955). The failure to provide a fair and impartial jury is such a structural defect as to be *per se* prejudicial. *Duren v. Missouri*, 439 U.S. 357 (1979); *Tomey v. Ohio*, 273 U.S. 510 (1927) (right to impartial judge). *See also Arizona v. Fulminante*, 499 U.S. 279 (1991).

25) This blatant disregard for one of our most basic and fundamental rights cannot be corrected by engaging in harmless error analysis or a review for prejudice. *Vasquez v. Hillery*, 474 U.S. 254 (1986); *Arizona v. Fulminante*, 499 U.S. 279 (1991). The jury is the truth-seeking body in a jury trial. The invalid composition of the truth-seeking body is not subject to a

harmless error standard. *Rose v. Clark*, 478 U.S. 570, 587 (1986) (Stevens, J., concurring in judgment). The fact that the jury was not properly constituted tainted all aspects of Mr. Cunningham's trial.

26) Mr. Cunningham must demonstrate a *prima facie* violation of the right to a fair cross-section of the community, and the facts of this case clearly satisfy this requirement. In *Duren v. Missouri* the Supreme Court outlined a three prong test to make a *prima facie* showing. *Id.*, 439 U.S. at 364. First, there must be a showing that the excluded group is a "distinctive" group in the community. Second, there must be a showing that there is a disproportionate, underrepresentation of this "distinctive" group. Third, there must be a showing that this underrepresentation is due to a systemic exclusion of the group. *Id.*

27) As to the first prong, clearly senior citizens are a distinctive group of the community. It is not necessary that this "distinctive" group be a "protected class" such as minorities or women. Age however is a protected class. Ohio has consistently provided equal protection on the classification of age as for race or gender. *See* Revised Code Sections 125.11 (government contracts), 1738.23 (conversion of health care contracts), 3113.36 (qualifications for funding), 3301.53 (minimum standards), 3937.38 (renewal of insurance), 4101.17 (employment), 4111.17 (wages), 4112.021 (credit), and 4112.02 (employment). It is enough if this distinctive group is simply an identifiable group of the community. *Duren*. A group is a distinctive group by virtue of its size and ability to be readily identified. The members of this group are readily identifiable simply by the jury questionnaire asking for either age or date of birth. Mr. Cunningham has satisfied this first prong.

28) Alternatively to the first prong, *Batson* and *J.E.B.* clearly includes discrimination based on age. The Supreme Court of the United States held under the Age Discrimination in

Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. Section 621 et seq., that ADEA prohibits discrimination based on age. *O'Conner v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-312 (1996). In *O'Conner*, the Court held that the ADEA "does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older." *Id.* The trial court's outright excusal of any prospective juror who was a senior citizen discriminated against those eligible jurors because of their age alone.

29) As to the second prong, of the distinctive group of citizens precluded from jury service, 100% of the group was precluded. In *Duren*, 85% of the eligible women were excluded and this number was not "fair and reasonable" in relation to the number of women in the community. *Id.*, 439 U.S. at 366. Every venire member whose age was mentioned was over the age of 60 and every one of those were excused. Clearly 100% exclusion satisfies the second prong.

30) As for the third prong, the exclusion of senior citizens was a structural part of the jury selection process. The exclusion occurred automatically if the juror in any way indicated his or her age. As in *Taylor* and *Duren*, the exclusion of a juror violates the fair cross-section requirement. This exclusion is a systemic exclusion of the entire group and is not permissible. Mr. Cunningham has satisfied this third prong.

31) Once a *prima facie* showing of an infringement of the right to a fair cross-section is made, the burden shifts to the State to justify the infringement. *Duren*, 439 U.S. at 368. In this case, the State offered absolutely no justification, excuse, or explanation as to why older citizens were discriminated against and removed from jury service. *Taylor*, 419 U.S. at 537. The exemption of senior citizens is not a reasonable exemption and serves no legitimate state interest.

In fact, with America getting older the exemption is contrary to public policy and any legitimate state interest as it excludes an ever growing number of Americans from jury service.

32) A defendant's constitutional right to equal protection is violated when the state dismisses eligible jurors in a discriminatory manner. "All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions." *J.E.B. v. Alabama*, 511 U.S. 127, 141-42 (1994). A statute that excludes eligible jurors from the venire denies equal protection under the constitution. *Batson v. Kentucky*, 476 U.S. at 88. In *Batson*, the Court held that the state may not use peremptory challenges in a discriminatory manner to excluded jurors on the basis of race. *Id.* Furthermore, the intentional exclusion of one gender in the use of peremptory challenges in the jury selection violates the equal protection clause. *J.E.B.*, 511 U.S. 127. Just as a party may not exclude an eligible juror for any discriminatory manner based on race or gender, one may not exclude an eligible juror because of age.

33) Individual jurors have a right to nondiscriminatory jury selection procedures. *J.E.B. v. Alabama*, 511 U.S. at 139-140; *See also, Powers v. Ohio*, 499 U.S. 400, 410 (1991) (gender based peremptory challenge defenses are the very stereotype the law condemns); *Ballard v. United States*, 329 U.S. 187 (1946) (if women or men were totally excluded a "flavor, a distinct quality is lost"). The American judicial system thrives on American citizens participating in the administration of justice. The automatic exclusion of eligible jurors from jury service because of membership in a certain class, denies not only the defendant a cross-representation of the community but also denies the class of potential jurors their constitutional right to participate in the administration of justice. *Peters v. Kiff*, 407 U.S. 493, 499 (1972). In *Peters*, the Court held:

[T]hat other constitutional values are implicated. In *Strauder*, the Court observed that the exclusion of Negroes from jury service injures not only defendants, but also other members of the excluded class: it denies the class of potential jurors the 'privilege of participating equally . . . in the administration of justice,' 100 U.S. at 308, and it stigmatizes the whole class, even those who do not wish to participate, by declaring them unfit for jury service and thereby putting "a brand upon them, affixed by law, an assertion of their inferiority." *Ibid.*

Peters, 407 U.S. at 499. A defendant need not be from the class excluded to be injured because the excluded class denies any defendant a representative cross-section of the community. *Peters*, 407 U.S. at 500. *See also Batson*, 476 U.S. at 87.

34) Excluding eligible jurors who happen to be senior citizens denies those jurors the opportunity to participate in the administration of justice and label's them unfit for jury duty and brands them, affixed by law, inferior to perform their civic duty. Automatic exclusion of eligible jurors from the jury pool is as if the eligible jurors were systematically excluded from the jury pool. *See Taylor*, 419 U.S. at 538. The exclusion of eligible jurors in Mr. Cunningham's juror pool denied Mr. Cunningham the opportunity of a trial by a jury composed of a fair and cross representation of his community and violated clearly established equal protection principles.

35) The right to a fair and impartial pool of jury venirepersons is a fundamental right of all accused of a crime. The failure of the State to provide a pool that is a fair cross-section of the community violates the Sixth and Fourteenth Amendments to the Constitution of the United States. The near automatic exclusion of senior citizens violates the most basic concepts of equal protection and cannot be condoned.

C. TRIAL COUNSEL'S INEFFECTIVE VOIR DIRE.

36) Counsel failed to object to the exclusion of senior citizens from the jury pool. Not only did counsel fail to object but actively participated in the age discrimination. There is no

evidence that counsel consulted with Mr. Cunningham about this, informed him that the actions were unconstitutional, or obtained his consent. Clearly counsel acting in an unconstitutional manner violates a defendant's rights to the effective assistance of counsel. *See Georgia v. McCollum*, 505 U.S. 42 (1992). Counsel also failed to properly conduct *voir dire* on the question of pre-trial publicity. The January 3rd shootings at the Eureka Street apartment received a pervasive amount of media exposure. Nearly every prospective juror was aware of this case. Of the thirty-six prospective jurors questioned, thirty-one (or eighty-six percent) were exposed to pre-trial publicity. Jurors were exposed to pretrial publicity through the media, and through discussions with co-workers, neighbors and relatives.

37) Not only was the community aware of the crimes, there was a public outcry that resulted from the shootings. It became a catalyst for community action. In particular, a billboard with Jayla Grant's photograph, which included her name, Leneshia Williams's name, and the names of four other children killed in a firebombing, was erected in Lima with the words "stop the violence." Counsel was fully aware of the billboard, as demonstrated by the fact that they questioned two jurors about it. One of the two jurors had seen the billboard.

38) This was prejudicial and inflammatory publicity placed in a location for all to see. Despite learning that at least one juror had seen the billboard, counsel failed to question the other thirty-four jurors to determine if they had seen the billboard and if it would prejudicially impact their ability to be fair and impartial jurors in Cunningham's case.

39) The Sixth Amendment to the United States Constitution guarantees a criminal defendant a trial by an impartial jury and the right to the effective assistance of counsel during the trial process. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970); *Morgan*, 504 U.S. at

728. The right to effective assistance of counsel extends to the *voir dire* process.² *Johnson v. Armontrout*, 961 F.2d 748, 754-56 (8th Cir. 1992).

40) If it is not possible to determine through *voir dire* if the jurors could afford the defendants the presumption of innocence during the proceedings the matter must be reversed. *United States v. Blount*, 479 F.2d 650, 651 (6th Cir. 1973); *United States v. Hill*, 738 F.2d 152, 153-55 (6th Cir. 1984). Likewise, Cunningham's counsel failed to ensure the fairness and impartiality of jurors.

41) By failing to determine whether jurors were exposed to the billboard and thus failing to ensure no juror would be biased against Cunningham trial counsel were ineffective. This error deprived Cunningham of his rights to a trial by a fair and impartial jury and due process, rendering counsel ineffective at both phases of Cunningham's capital trial. U.S. Const. amends. VI, XIV.

THE STATE APPELLATE PROCESS DEPRIVED MR. CUNNINGHAM OF A FULL AND FAIR OPPORTUNITY TO LITIGATE JURY SELECTION ISSUES.

42) Juror questionnaires completed in Jeronique Cunningham's capital trial raise numerous potential errors. Mr. Cunningham's appellate counsel received access to juror questionnaires only five days before the brief was due to the Ohio Supreme Court. This was clearly insufficient to review the questionnaires and research the facts and the law relevant to each of these issues. Appellate counsel were unable to review the questionnaires to determine the existence of *Batson* issues, age discrimination claims, biased jurors, fair cross-section or other exclusion issues, as well as issues of ineffective assistance of trial counsel during jury selection.

² The right to counsel attaches at the initiation of adversarial judicial proceedings by way of formal charge and continues during the trial. *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972). Prior to the initiation of proceedings, an individual has a Fifth Amendment right to counsel during any custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966).

The failure of the State to provide an effective appellate mechanism for review of Mr. Cunningham's case violates his right to due process of law and equal protection, *Evitts*, as well as his right to the effective assistance of appellate counsel. *Strickland*.

PROPOSITION OF LAW NO. II

THE DENIAL OF THE OPPORTUNITY TO LIFE QUALIFY THE JURY DEPRIVED MR. CUNNINGHAM OF A FAIR AND PROPER *VOIR DIRE* IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Introduction.

43) The trial court unduly restricted Jeronique Cunningham's *voir dire* of prospective jurors. The trial court precluded defense counsel from inquiring into prospective jurors' willingness and ability to consider mitigating factors. The restrictions during *voir dire* deprived Cunningham of his rights to an impartial jury, a reliable death sentence, due process, and equal protection. U.S. Const. amends. VI, VIII, XIV. *Morgan v. Illinois*, 504 U.S. 719 (1992). It is clearly established Constitutional law that a capital defendant must be able to explore questions both of absolute support of the death penalty, known as "ADP" or automatic death penalty jurors, and ability to consider mitigation evidence. *Morgan*. In this case the trial court severely and unconstitutionally restricted *voir dire* as to consideration of mitigating factors. The trial court permitted only the unenlightening question of whether the jurors would follow the law.

44) A defendant is guaranteed a trial by a jury that is impartial. *Turner v. Louisiana*, 379 U.S.466 (1965); *Duncan v. Louisiana*, 391 U.S. 145 (1968). *Voir dire* is the process by which an impartial jury is guaranteed to defendants and the state alike. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). See also *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Wainwright v. Witt*, 469 U.S. 412 (1985).

45) In *Morgan v. Illinois*, 504 U.S. at 735-736, the Court held:

"[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror.

Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empanelled and the death sentence is imposed, the State is disentitled to execute the sentence." The rationale behind this is that "a juror could, in good conscience, swear to uphold the law and yet be aware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception." (Footnote omitted.)

The right is so important that the failure to provide full and proper *voir dire* on the issue of mitigation evidence or automatic death penalty renders the proceedings a nullity. *Morgan*, 504 U.S. at 739.

46) Accordingly, Mr. Cunningham should have been afforded the opportunity to inquire as to prospective jurors' views as to the death penalty and mitigating evidence, so called "reverse-*Witherspoon*" qualification. The reason for this questioning is clear: jurors who are incapable of considering mitigating evidence cannot sit on capital juries. Their presence deprives the defendant of the constitutional right to present, and have due consideration given to, mitigating evidence. *Lockett v. Ohio*, 438 U.S. 586 (1978). *Morgan*, 504 U.S. at 729.

Facts.

47) The trial court questioned each prospective juror to assure that he/she could consider and impose the death penalty. The trial court followed up, asking each juror whether he/she would consider all four possible penalties. While most jurors agreed to consider all penalties, several prospective jurors' responses suggested an inability to consider mitigating factors and life sentencing options. When counsel attempted to delve further into this issue, the trial court precluded their questions. Several times counsel simply attempted to gauge a juror's willingness and ability to consider mitigating factors. The trial court precluded these efforts as well.

48) The *voir dire* of Juror 10 is instructive and demonstrative. Defense counsel asked whether there were any circumstances when he would vote for a sentence other than death. Juror 10 responded affirmatively, and continued:

PROSPECTIVE JUROR: Yes. I can't exactly tell you what they would be but, yes.

And I might say one of the things that I look for this court to instruct us on. For example, supposing -- I don't know how to say this but supposing an assistant to the gun, to the one who used the gun.

THE COURT: We aren't- we can't get into specifics of this case. We're just going in the general context-

THE COURT: The Court will instruct you as to the law.

PROSPECTIVE JUROR: That's-

THE COURT: You will follow the law.

PROSPECTIVE JUROR: And that's what I'm looking for when we -- if I'm on the jury and we (inaudible) at that point is the instructions in this area.

MR. DONOHUE: So, you consider the involvement of that individual in-

THE COURT: That's an improper question Mr. Donohue. We are not getting into specifics of this case. I will instruct you that that's not only to this one but all others. It's in general.

49) The trial court repeatedly cut counsel off from making any attempt to probe the venire members' attitudes towards mitigation and specific mitigation evidence. The trial court repeatedly expressed the belief that *voir dire* was limited solely to abstract issue of the death penalty and not the specifics of the case or of the venire members' views. As such the only question permitted was "will you follow the law?" Counsels' *voir dire* was directly cut off for

jurors 2, 7, 12, 14, 22, 38, 54, 76. For many others the trial court preempted questions by directly limiting the issue to whether the juror could follow the law in the abstract: Jurors 31, 32, 34, 37, 38, 49, 51, 79, 90, 92, 99, 105, and 108.

50) In contrast to its refusal to allow defense counsel to delve into, or even explain, mitigating factors, the trial court identified with specificity the aggravating circumstances in this case to Jurors 11, 12, 37, 38, 48, and 49. Jurors 11, 12, 14, 32, 37, 38, 51, and 54 all served on the jury that convicted Cunningham and sentenced him to death.

51) *Voir dire* is counsel's opportunity to ensure that a jury will be impartial and indifferent to the extent provided by the Sixth Amendment. *Morgan v. Illinois*, 504 U.S. 719 (1992). In order to secure a fair and impartial jury for the penalty phase of a capital trial, the defense must be provided the opportunity to conduct an adequate *voir dire*. *Morgan*, 504 U.S. 719. Although the content of *voir dire* does not have to conform to a particular framework, counsel must cover specific subjects in order to afford the defendant a fair trial. *Mu'Min v. Virginia*, 500 U.S. 415, 422-23 (1991). In capital cases this means an exploration of jurors' views on capital punishment and ability to consider and give effect to mitigating evidence.

52) The clear mandate of the Eighth Amendment is that capital sentencers must "be able to consider and give effect" to all mitigating evidence proffered by the defendant. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). Jurors who will refuse to consider mitigation or will automatically vote for the death penalty are not fair and impartial and are subject to a challenge for cause. *Morgan*, 504 U.S. at 729. Furthermore, a juror who refuses to consider particular evidence in mitigation is not a qualified sentencer. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

53) *Morgan* did not establish one set question that must be asked in order to determine whether jurors can be impartial. The trial court has “great latitude in deciding what questions should be asked on *voir dire*.” *State v. Twyford*, 94 Ohio St.3d 340, 345 (2002) (internal citations omitted). However, that discretion cannot be used to deprive the defendant of an “adequate *voir dire*,” a right included within the Sixth Amendment’s guarantee of an impartial jury. *Morgan*, 504 U.S. at 729 (internal citation omitted).

54) The Due Process Clause does not allow state court proceedings that provide an unfair advantage to the prosecution. Justice is due to both the accused and the accuser. *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) *rev’d in part Malloy v. Hogan*, 378 U.S. 1 (1964). This requires an equitable balance between the accused and the accuser. *See Wardius v. Oregon*, 412 U.S. 470, 475 (1973).

55) Beyond requiring fairness, the Due Process Clause also requires that state created procedures be administered in a meaningful manner. *Evitts v. Lucey*, 469 U.S. 387 (1985). In *Evitts* the Supreme Court held that when a state creates a system of appeals, that system must comport with Due Process. *Id.* Here, Ohio created a statutory *voir dire* procedure pursuant to O.R.C. § 2945.27. The Due Process Clause requires meaningful administration of that statute. *Evitts*, 469 U.S. 367.

56) Through its prohibition against state action that impinges upon fundamental rights, the Equal Protection Clause of the Fourteenth Amendment also requires that the prosecution receive no unfair advantage. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). This protection extends to the right to a fair trial, which is a fundamental right guaranteed to all criminal defendants. *See Estelle v. Williams*, 425 U.S. 501, 503 (1976) (citing *Drope v. Missouri*,

420 U.S. 162 (1975)). Encompassed within the guarantee of a fair trial is a “panel of impartial, ‘indifferent’ jurors.” *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

57) When state action interferes with a fundamental right, this Court must evaluate an Equal Protection challenge to that action under the strict scrutiny standard of review. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16 (1973). State action that “significantly interferes with the exercise of a fundamental right” must be “supported by sufficiently important state interests and [be] closely tailored to effectuate only those interests.” *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). To be “sufficiently important” a state interest must be “compelling.” *See Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) *rev’d in part Edelman v. Jordan*, 415 U.S. 651 (1974). Anything less violates the Equal Protection Clause. *See Zablocki*, 434 U.S. at 388-91.

Argument.

58) Determining whether a juror is qualified to serve in a capital case is not as simple an inquiry as the trial court perceived it to be. When a juror makes comments that evidence an automatic death penalty (ADP) stance or a lack of understanding of mitigation, it is not enough that the juror agrees to follow the law. “A court’s refusal to excuse a juror will not be upheld simply because the court ultimately elicits from the prospective juror a promise that he will be fair and impartial[.]” *Wolfe v. Brigano*, 232 F.3d 499, 502 (6th Cir. 2000) (internal citation and quotations omitted). Instead, the juror’s promise must be believable. *White v. Mitchell*, 431 F.3d 517, 537-543 (6th Cir. 2005). *See also Wolfe*, 232 F.3d at 502 (citing *Patton v. Yount*, 467 U.S. 1025, 1036 (1984)) (“did a juror swear that he could set aside any opinion that he might hold and decide the case on the evidence, and should the juror’s protestation be believed?”). *Morgan*.

59) Counsel must be able to question all jurors to ensure that they can, in fact follow the law. This includes ensuring that jurors are willing and able to consider mitigating factors. Absent such inquiry, the defendant cannot be assured his case will be tried to the fair and impartial jury guaranteed to him by the Sixth and Fourteenth Amendments of the United States Constitution.

60) As the *Morgan* Court noted; “a juror could, in good conscience, swear to uphold the law” and yet hold beliefs that would prevent him or her from doing as sworn. *Morgan*, 504 U.S. at 735. Counsel must delve into the individual juror’s beliefs to determine if his promise is merely hollow. However, Cunningham’s counsel could not ask jurors’ what they would consider to be mitigating. Counsel argued they had a right to go over potential mitigating factors and the jurors’ opinions. Counsel could not even ask jurors if they would consider *anything* to be mitigating in an aggravated murder case. Counsels’ every effort was cut off because the trial court believed that the only question that need be answered was whether the juror would follow the law. However, the *Morgan* Court clearly found this type of questioning to be insufficient. *Morgan*, 504 U.S. at 735.

61) This same error occurred in Cleveland Jackson’s trial. However, on appeal this Court recognized the *Morgan* violation and reversed the related death sentence. *State v. Jackson*, 107 Ohio St.3d 53, 64-65 (2005). This Court did not cite Cunningham’s case, but the disparate outcome demonstrates that this Court’s decision is contrary to, or an unreasonable application of, *Morgan*.

62) Despite the broad discretion given to the trial court, *voir dire* remains “subject to the essential demands of fairness.” *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001) (citing *Wolfe*, 233 F.3d at 504) (Wellford, J., concurring). In *Hughes*, counsel and the trial court’s failure to address the juror’s clear statement that she did not believe she could be fair required reversal. *Id.* at 459. There is no difference between Cunningham’s *voir dire* and the *voir dire* in *Hughes*. Defense counsel attempted to address the issues but the trial court cut counsel off and proceeded to pose only a general “will you follow the law” question. This question provided no insight into whether the jurors were willing and capable of considering Cunningham’s mitigation evidence. Unlike *Hughes*, counsel recognized an issue that required further attention; however, the trial court precluded any inquiry into whether the jurors could fairly consider mitigating evidence. The trial court’s solicitation of the jurors’ mere agreement to “follow the law” was insufficient. *See Miller v. Francis*, 269 F.3d 609, 618 (6th Cir. 2001) (internal citation omitted); *Morgan*, 504 U.S. 735.

63) Because the state “created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause” dictates a meaningful exercise of those statutory rights. *Morgan*, 504 U.S. at 730 (quoting *Ham v. South Carolina*, 409 U.S. 524, 527 (1973)). Without an adequate *voir dire* “to lay bare the foundation of [Cunningham’s] challenge for cause against” prospective jurors who would not consider mitigating factors, his right not to be tried by such jurors was rendered “nugatory and meaningless.” *Id.* at 733-34. Further, the trial court’s refusal to allow Cunningham to question jurors’ impaired his ability to intelligently exercise his statutory right to remove prospective jurors with peremptory challenges. *See Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). Without an adequate *voir dire*,

Cunningham could not sufficiently probe the prospective jurors' attitude about mitigating factors to the extent necessary to discover more subtle forms of juror bias. *See id.*

64) The trial court's restrictions on *voir dire* further violated Cunningham's right to due process because those restrictions substantially interfered with his statutory rights to make a challenge for cause and to use his peremptory challenges. Pursuant to O.R.C. § 2945.25, Cunningham had a statutory right to challenge for cause any biased juror. Additionally, under O.R.C. § 2945.21, Cunningham had a statutory right to exercise peremptory challenges. *See Ohio R. Crim. P. 24; State v. Greer*, 39 Ohio St. 3d 236 (1988). *See also J.E.B. v. Alabama*, 511 U.S. 127, 143 (1994) ("*Voir dire* provides a means of discerning . . . implied bias and a firmer basis [for exercising] peremptory challenges intelligently"). The failure of the state courts to properly apply state law deprived Mr. Cunningham of his right to due process of law. *Evitts*.

65) It is the trial court that must ensure this fairness because, in Ohio, the ultimate responsibility for seating fair and impartial jurors rests with the trial court. *See O.R.C. § 2945.27*. While the Ohio Revised Code envisions the participation of both the prosecution and the defense, the responsibility for seating a fair and impartial jury rests solely with the trial court. To ensure fairness in the criminal justice process, the trial court's administration of *voir dire* must be even-handed. *See Lakeside v. Oregon*, 435 U.S. 333, 341-42 (1978) ("It is the judge who has the ultimate responsibility for the conduct of a fair and lawful trial.>").

66) An even-handed *voir dire*, however, did not take place in this case. The court identified to several jurors the specific aggravating circumstances in Cunningham's case. However, the court precluded even the most general discussion of mitigating factors in which counsel sought to engage. The trial court advised jurors with specificity as to the aggravating

circumstances, but gave absolutely no guidance as to what was, or what could be, mitigation. This unequal application of the revised code denied Cunningham due process.

67) This same action has equal protection implications as well. Ohio Revised Code § 2945.27 is neutral on its face, directing the trial court to determine whether each juror is fair and impartial. Neutral legislation violates the Equal Protection Clause when that legislation is applied in an unequal and oppressive manner. *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886). The Constitution prohibits a law that is fair on its face, but administered with an unequal hand.” *Id.* at 373-74. The trial court below applied O.R.C. § 2945.27 in an unequal manner.

68) Like *Yick Wo* and *Harris*, the trial court’s administration of its responsibility under neutral legislation was unequal. The Ohio legislature designed O.R.C. § 2945.27 to ensure the fairness and impartiality of juries by directing the trial court to examine jurors as to their qualifications. In a capital case, an impartial and indifferent juror is a juror capable of considering both life and death sentencing options. *See Wainwright v. Witt*, 469 U.S. 412 (1985); *Morgan*; O.R.C. § 2945.27. If a juror refuses to consider or impose either option, that juror cannot be fair and impartial. *Morgan*, 504 U.S. at 729. Similarly, if a juror is unable or unwilling to consider mitigating evidence, he is not a fair and impartial juror. *Id.* His or her presence on the jury denies a capital defendant his fundamental right to a fair trial. *See Irvin*, 366 U.S. at 722.

69) The trial court is charged with providing fair trials to all that appear before it. This is why O.R.C. § 2945.27 requires that the trial court determine the fairness and impartiality of each juror. While ensuring fairness and impartiality to the prosecution, the trial court neglected to ensure fairness to Cunningham. In its role as the neutral arbiter, the trial court can have no legitimate interest in securing a jury incapable of imposing each available sentencing option. Nor can the court have a legitimate interest in securing jurors incapable or unwilling to consider

mitigating factors. Far from demonstrating a compelling interest, the trial court cannot even demonstrate a legitimate interest in seating a death-prone jury.

70) The trial court repeatedly, specifically, and directly told counsel that questioning about mitigation was not the issue before the court. Factually, counsel were prevented from properly conducting *voir dire* as required under the Constitution and *Morgan*. This Court specifically found this to be error in Cleveland Jackson's case demonstrating that relief is now mandated in this case. *Jackson*, 107 Ohio St.3d at 64-65.

71) Also, the limitation imposed by the trial court is factually and legally indistinguishable from the factual and legal predicates of *Morgan*. In *Morgan*, the trial court asked in *voir dire*:

(a) "Would you automatically vote against the death penalty no matter what the facts of the case were?"

and

(b) "Would you follow my instructions on the law even though you may not agree?"

and

(c) "Do you know of any reason why you cannot be fair and impartial?"

Id., 504 U.S. at 723-724.

72) The questioning permitted by the court was limited to bland and generic questions of whether the jurors could follow the law. In *Morgan*, the Court cautioned that dogmatic inquiries about a juror's ability to be fair and follow the law are inadequate to remedy jurors' bias, "*their protestations to the contrary notwithstanding.*" *Id.*, 504 U.S. at 735. The mandate of *Morgan* is clear: "A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception. The risk that such jurors may have been empanelled in this case and 'infected petitioner's capital sentencing [is] unacceptable

in light of the ease with which that risk could have been minimized.” *Morgan*, 504 U.S. at 735-736 (citation omitted).

73) The trial court, and the prosecutor, improperly limited the scope of *voir dire* and prevented Mr. Cunningham from exploring the biases and prejudices of the venire. *Morgan* is unequivocal in its directive that the denial of an adequate *voir dire* on the reverse *Witherspoon* issue creates an unacceptable risk that a biased juror was seated. *Morgan*, 504 U.S. at 733-734, 735-736, 739. *See also Jackson*, 107 Ohio St.3d at 62-65.

PROPOSITION OF LAW NO. III

MR. CUNNINGHAM'S CONFRONTATION RIGHTS WERE DENIED IN VIOLATION OF THE FOURTH, FIFTH, SIXTH EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. Introduction

74) Mr. Cunningham was convicted and sentenced to death for the homicides of Leneshia Williams and Jala Grant. Mr. Cunningham's theory of the crime, set out in his opening argument, and in closing argument, was that his involvement in the crime was not as one who shot any of the victims, or went to the apartment with the intent to kill, but rather to buy crack cocaine. In addition, Mr. Cunningham had a much different weapon than his co-defendant, Cleveland Jackson, one which was unmistakably a revolver, and one which *never discharged any bullets at all*. Moreover, Mr. Cunningham did not anticipate what would happen. The physical evidence supports Mr. Cunningham's theory, however the testimony of the witnesses are in conflict. If Mr. Cunningham had been able to confront all of the witnesses with their prior statements, at a minimum, Mr. Cunningham would not have been sentenced to death.

2. Physical Evidence That Mr. Cunningham Did Not Fire His Gun

75) Physical evidence from the crime scene established that all of the bullets and all of the bullet fragments, recovered at or near the crime scene came from the co-defendant's gun, a .380, which is a semi-automatic weapon with a clip that held the bullets, unlike Mr. Cunningham's revolver, which had a cylinder. In particular, Officer John Heile, a forensic scientist for the Bureau of Criminal Identification & Investigation ["BC&I"] testified that all the recovered fired cartridge cases were .380 automatic caliber, and all were fired from the same gun. Furthermore, Officer Heile submitted a list of the guns which could have fired those bullets, and concluded that *all* weapons listed as possibilities are semi-automatic handguns

[carried by co-defendant Cleveland Jackson] as opposed to revolvers [carried by Mr. Cunningham]. On cross-examination, Officer Heile distinguished between a "revolver" which has a cylinder and a "semi-automatic" weapon which has no cylinder but rather a "clip" that holds the bullets. He again testified that all the recovered casings came from the same weapon, a .380, and none came from a revolver. They were all made by Remington Peters, all were the same brand.

76) Officer Heile also testified that if you could put a .380 bullet into a .44 caliber [revolver], it would not fire.

77) One exhibit, State's Ex. 20, was also a .380 automatic caliber bullet, which came from the same type of gun [semi-automatic]. State's Ex. 22 is a fragmented lead core from a full metal jacketed bullet-just as the other identified bullets were. There was no other identification Officer Heile could determine as to State's Ex. 22.

78) Cynthia Beisser, M.D., is deputy coroner of Lucas County, Ohio, and a forensic pathologist. She performed the autopsies on the two victims. She testified that the size of the projectiles that penetrated the victims were all consistent with a .380 caliber weapon. They are not consistent with a larger caliber weapon.

3. Testimony of Witnesses at the Guilt Phase Which Is Inconsistent With the Physical Evidence

79) *Dwight Goodloe, Jr.* testified that Mr. Cunningham and co-defendant, Cleveland Jackson, knocked on the door and Tomeaka told Goodloe to let them into the apartment. Cleveland and Loyshane Liles go upstairs. Mr. Cunningham pulls a gun and tells Coron Liles and Goodloe to go into the kitchen.

80) Cleveland brings Loyshane into the kitchen. Goodloe says "in a couple seconds after that they had started shooting." Goodloe says that Jala Grant was shot first and then Loyshane was shot. Goodloe says after Loyshane is shot the rest of the people in the kitchen are standing against the wall. Goodloe says Cleveland shoots Loyshane Liles. There was no signal between Cleveland and Mr. Cunningham -- they just began shooting after Cleveland shot Loyshane. Goodloe says he saw Mr. Cunningham shooting a revolver. Goodloe says Cleveland had an automatic. Goodloe says he saw Mr. Cunningham shoot Coron Liles in the mouth. Goodloe says he did not see Mr. Cunningham shoot anyone else, but believes he was "still shooting" because he saw Mr. Cunningham's finger on the trigger and "smoke coming out of the gun." The prosecutor asks Goodloe if he could see Jeronique's face and the expression on Mr. Cunningham's face. Goodloe says yes and says that, "he didn't care, he didn't care if we lived or died." Goodloe says "we was all laying against the wall," Coron Liles feet were across Goodloe's body; and Goodloe's head next to Coron Liles's head.

81) The prosecutor asked Goodloe if he saw Mr. Cunningham shoot "and his head snap back" to which Goodloe answers yes. The prosecutor asked Goodloe if Mr. Cunningham continued to fire and Goodloe answers yes. On cross examination Goodloe described the weapon that Mr. Cunningham had and agreed that it had a long barrel. When asked if Mr. Cunningham requested jewelry, money, or any other items from persons in the kitchen, Goodloe said no. It was Loyshane Liles who told the people in the kitchen to place their valuables on the table and the people complied.

82) Goodloe testifies that Cleveland Jackson shot his uncle, Loyshane Liles. Goodloe described the weapon as black with a clip. When Loyshane Liles was shot Goodloe was lying

down and then "plugged his ears." Goodloe did not see Mr. Cunningham or Cleveland Jackson exchange weapons. Goodloe did not see Mr. Cunningham grab Cleveland Jackson's weapon.

83) *Tara Cunningham* testified that she saw co-defendant Jackson cleaning off a small caliber black semi-automatic weapon and clip at her house, and heard Cleveland Jackson say that he was going to hit a lick -- rob somebody. She believed the clip went into the gun.

84) *Coron Liles* stated in his testimony that he saw Mr. Cunningham start shooting, and saw him shoot the baby (Jala Grant). He also stated that Mr. Cunningham shot him and Tomeaka Grant, and that he saw sparks coming out of the gun.

85) On cross examination, Mr. Liles stated Mr. Cunningham's gun was chrome, a foot long, and it had a "spin thing," a cylinder, rather than a clip, and that it was a revolver. Co-defendant, Cleveland, had a black gun, and that gun was not a revolver. Mr. Cunningham and Cleveland did not trade guns.

86) *Loyshane Liles* testified that he was shot in the back, and was face down with his eyes closed after being shot. He said he heard two different guns going off, and heard the clicking of the gun like the bullets were out. He stated that Cleveland had an automatic weapon and Mr. Cunningham had a revolver.

87) On cross-examination, Loyshane admitted that Cleveland Jackson shot him. He stated that Cleveland, had a semi-automatic, and Mr. Cunningham had a large, 12 inch long revolver, and that he heard "click click click" after the gunshots.

88) *Armetta Robinson* testified as to her injuries. She does not remember January 3, 2002.

89) *Tomeaka Grant* testified next. She stated they started shooting, that: "Yes. And I saw both of them pulling the trigger and the gun was just clicking after the guns were out of

bullets.” She does not know who shot her, and does not remember where the shooting was coming from.

90) On cross examination, Tomeaka stated she did not know who shot Loyhane, even after defense counsel told her that she told him about a month ago that Cleveland Jackson shot Loyshane.

91) *James Grant* testified that Cleveland Jackson and Mr. Cunningham both started shooting. He heard a clicking like the gun was empty. He also stated that Mr. Cunningham shot him above his left eye, but that he did not see him shoot anyone else.

92) On cross-examination, Grant testified that Mr. Cunningham had a long-barreled revolver that was rusted, or like it was not good. Cleveland Jackson’s weapon was smaller, was not a revolver, but was an automatic that you put a clip into. He saw Loyshane [Liles] shot by Cleveland. They did not switch weapons or reload. He heard shots from Cleveland’s weapon, but when both were shooting at the same time, he was not sure who fired how many shots. Once the shooting started, he no longer looked at either of the two assailants.

93) On redirect, Grant testified that Mr. Cunningham was shooting at him.

94) As such, Mr. Cunningham needed to see any previous statements of occurrence witnesses to confront and minimize their testimony.

4. The Physical Evidence Was Inconsistent with the Testimony of Witnesses, and Therefore It Was Critical that Mr. Cunningham Be Given the Prior Statements of All the Witnesses

95) After the witnesses were directly examined by the State of Ohio, defense counsel pursuant to Criminal Rule 16 (B)(1)(g)³, moved for an *in camera* review of the witnesses’ prior

³ Criminal Rule 16(B)(1)(g) provides:

Upon completion of a witness’ direct examination at trial, the court on motion of the

statements. While the court did review the prior statements and make a determination regarding the presence of inconsistencies, the defense was not permitted to participate in that review. The court, after reviewing the statements for inconsistencies, determined that there were inconsistencies in the statements of Tarra Cunningham, Loyshane Liles and James Grant, and therefore disclosed those statements to defense counsel. However, the statements of Dwight Goodloe, Jr., Coron Liles, and Tomeaka Grant and the January 9, 2002 statement of James Grant were never disclosed or reviewed by trial counsel. The *in camera* review was completely one sided, with only the prosecutor and judge having knowledge of the content of the witness's previous assertions.

96) In Mr. Cunningham's case, defense counsel was not able to review with the court the prior statements of Dwight Goodloe, Jr., Coron Liles, Tomeaka Grant, or the January 9, 2002 statement of James Grant, witnesses whose testimony was crucial to the State's case. These witnesses who testified on behalf of the State were eyewitnesses to the crime whose statements were taken almost immediately after the crime occurred, arguably when memory of the crime was strongest. Defense counsels' review of these four statements was particularly important given the fact that Mr. Cunningham's defense relied on discrediting the State's case through the cross-examination of witnesses on inconsistencies. The statements of one or more of these four witnesses might have been inconsistent with their testimony at trial. Indeed, as discussed below, the statements of two of them (unavailable to trial counsel but disclosed after trial), Dwight

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

Goodloe, and the January 9, 2002 statement of James Grant, were materially inconsistent with their testimony at trial.

97) Participating in the court's review of the witness statements was important in presenting Mr. Cunningham's defense that he was not the shooter and that he did not commit the murders with prior calculation and design. The trial court's failure to permit counsel to participate in the review of witness statements interfered with defense counsel's ability to present a defense on behalf of Mr. Cunningham and expose any inconsistencies.

5. Supreme Court Authority Further Supports Mr. Cunningham's Claim.

98) The Sixth Amendment's guarantee of an accused's right to confront witnesses is a fundamental right imposed on the states via the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). This right is "essential to due process," *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Cross-examination is an integral component of effective confrontation of witnesses. *Davis v. Alaska*, 415 U.S. 308, 316 (1974). "In short, the Confrontation Clause only guarantees an opportunity for effective cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987) (internal punctuation omitted). Mr. Cunningham was denied his right to an opportunity for effective cross-examination when the trial court's denial of witness statement review left defense counsel unable to make an informed examination designed to expose witnesses' errors before the jury. This is especially critical here, because the State's case is made up exclusively of eyewitness testimony, and the physical evidence is inconsistent with the prosecutor's case.

99) Under the auspices of the Fourteenth Amendment, due process in this context means simply that the defense should have an opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371 (1971), *Morrissey v. Brewer*, 408 U.S. 471 (1972). The defense did not have an

opportunity to be heard pursuant to Ohio Criminal Rule 16(B)(1)(g), as to whether inconsistencies existed between the witnesses' testimony and their prior statements. The trial court's actions deprived Mr. Cunningham of his due process rights. *Cf. Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (“[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution and, in particular, in accord with the Due Process Clause”).

100) Mr. Cunningham asserts that the trial court's failure to turn over these four statements had a substantial and injurious effect on his defense. Although the Mr. Cunningham has never been able to see Coron Liles and Tomeaka Grant's statements, he was able, after the trial, to see Dwight Goodloe's statement., and the January 9, 2002 statement of James Grant.

101) However, Goodloe's initial statement on January 3, 2002 to investigating Lima Police officers, which occurred when his recollection of events would have been at its zenith, lacks many of the details to which he later testified. There is no reference to Mr. Cunningham shooting Coron Liles in the mouth; there is no reference to seeing Mr. Cunningham's finger on the trigger of a gun nor to “smoke” coming from Mr. Cunningham's gun; there is no reference to Goodloe observing the expression on Mr. Cunningham's face; there is no reference to Mr. Cunningham's head “snapping back” during the shooting. Further in Goodloe's statement to police, he commented that as the shooting started, he dove under the table to avoid being struck, an action that would have significantly militated against his ability to observe events in the manner he testified. Had defense counsel been provided with Goodloe's statement of January 3, 2002, they could have subjected Goodloe to withering cross-examination as to the adjustments of his portrayal of events from his original statement to his trial testimony.⁵

⁵ It is interesting to note that in his testimony at Cleveland Jackson's trial, Goodloe

102) The content of the statement of Goodloe was material to Mr. Cunningham's guilt. The statement demonstrates that Goodloe's recollection of events evolved over time. A jury would reasonably have been troubled by the adjustments to Goodloe's original story. The prosecutor capitalized on Goodloe's testimony to stir the juror's emotions against Mr. Cunningham in order to convict him. In addition, had defense counsel been provided with Goodloe's statement, counsel would have objected to the prosecutor's statements in his closing argument. Clearly, there is a substantial and injurious effect on the outcome of Mr. Cunningham's trial due to the trial court's refusal to turn over to defense counsel the statement of Dwight Goodloe.⁶

103) It was also critical and material that Mr. Cunningham obtain James Grant's January 9, 2002. James Grant was a critical state's witness. His testimony regarding the shootings at 503 E. Eureka Street in Lima, Ohio on January 3, 2002 was devastating to Mr. Cunningham. On direct examination he unequivocally testified that Mr. Cunningham shot him in cold blood. Mr. Grant testified that he was holding his daughter and he was "looking to the side where they were standing. And Jeronique pointed the gun at me and shot. And I didn't even know I was shot until I felt something running down my face." The prosecutor asked Mr. Grant "Is there any doubt in your mind that Jeronique was the one that pointed the gun at you?" to which Mr. Grant answered, "No." The prosecutor then asked, "Is this the one that shot you?" to

acknowledged that when the shooting began, he "closed my eyes for a little bit and I was crying. I looked up and I seen smoke and stuff."

⁶ Following the trial court's tendering Tara's prior statement (of January 7, 2002) to defense counsel, pursuant to his 16(B)(1)(g) motion, Tara admitted that only Cleveland Jackson stated he was going to hit a lick; and that she did not know of any response that Mr. Cunningham made to this statement. Also, she told Detective Kleman on January 7, 2002, several days after the event, that she did not take this comment of Cleveland seriously at the time. Tara also clarified that she only saw one weapon, a black, semi-automatic pistol and clip. This statement also indicates that the eyewitness testimony was suspect.

which Mr. Grant answered, "Yes." James Grant gave his first statement to police investigators on January 3, 2002. There is no reference in this statement to Mr. Cunningham shooting Mr. Grant. Mr. Grant did make reference to a second subject -- not Mr. Cunningham -- who "came into the kitchen and started shooting." In a second statement to police on January 9, 2002, Mr. Grant again failed to specifically implicate Mr. Cunningham as the person who shot him. Mr. Grant told police that Cleveland Jackson shot Loyshane Liles. However, it was noted that Mr. Grant "is uncertain as to who was shot after Shane was shot...." The prosecution would have been aware of these statements when Mr. Grant testified at Mr. Cunningham's trial.

104) James Grant's testimony against Mr. Cunningham was dramatic and highly prejudicial to Mr. Cunningham. The prosecutor asked Mr. Grant to go into specific detail as to the list of serious injuries he suffered, to display his wounds to the jury and to describe the debilitating effect of his injuries. The testimony of the victims of the shootings -- especially James Grant -- was extremely compelling to Mr. Cunningham's jurors. It was incumbent upon the prosecution to inform defense counsel of any discrepancies in Mr. Grant's recollection of events that would go to the question of Mr. Cunningham's involvement in the shooting of Grant. Had the prosecution done so, Mr. Grant's firm identification of Mr. Cunningham as the person who shot him would have been undermined.

105) Finally, Mr. Cunningham submits in the alternative, that trial counsel was ineffective for not objecting to the procedure the court used, and for not demanding strict compliance with Ohio Rule of Criminal Procedure 16 (B)(1)(g), which rule requires defense counsel's participation in determining whether the statements should have been turned over to the defense prior to cross-examination. There is a reasonable probability that trial counsel could have obtained these statements had he taken part in the review process, by making an argument

that -- once having seen the statements -- these statements were necessary for cross-examination. *See Strickland v. Washington*, 466 U.S. 668 (1984), *Williams v. Taylor*, 529 U.S. 362 (2000), *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

6. CONCLUSION

106) Therefore, this Court should vacate Mr. Cunningham's conviction and sentence of death and remand this case for a new trial.

PROPOSITION OF LAW NO. IV

THE STATE COMMITTED PROSECUTORIAL MISCONDUCT BY SUPPRESSING TWO EXCULPATORY STATEMENTS BY OCCURRENCE WITNESSES IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENENDMENTS TO THE UNITED STATES CONSTITUTION.

107) Trial prosecutors have an affirmative duty to timely provide to defense counsel all exculpatory evidence that is relevant to either the trial or sentence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963), *United States v. Bagley*, 473 U.S. 667 (1985). That constitutional duty applies not only to information in the prosecutor's file, but all information in the possession of other state agencies. *Kyles v. Whitley*, 514 U.S. 419 (1995).

108) The trial prosecutors in Mr. Cunningham's case failed to meet their constitutional obligations. The State violated its affirmative duty to provide defense counsel with the statements taken by investigating police of the eyewitnesses who testified against Mr. Cunningham. These two statements, from Dwight Goodloe and James Grant, contained reports from eye witnesses that would have allowed defense counsel to attack or impeach the accuracy of the testimony presented at trial and to impeach the testimony of these critical witnesses. The State's failure constituted a violation of the rule of *Brady v. Maryland* and its progeny.

DWIGHT GOODLOE

109) The first statement concerns Dwight Dwayne Goodloe, Jr. aka "D.J." Goodloe was a crucial state's eyewitness regarding the events in the kitchen at 503 Eureka Street on January 3, 2002. Goodloe testified that Jala Grant was shot first and then Loyshane Liles was shot. Goodloe said that after Loyshane was shot the rest of the people in the kitchen were standing against the wall. Goodloe said that Cleveland Jackson shot Loyshane. Goodloe said there was no signal between Cleveland and Mr. Cunningham they just began shooting after Cleveland shot Loyshane. Goodloe stated that he saw Mr. Cunningham shooting a revolver.

Goodloe states he saw Mr. Cunningham shoot Coron Liles in the mouth. Goodloe says he did not see Mr. Cunningham shoot anyone else, but believes he was “still shooting” because he saw Mr. Cunningham’s finger on the trigger and “smoke coming out of the gun.” The prosecutor then asked Goodloe if he could see Mr. Cunningham’s face and the expression on his face. Goodloe states yes and says that, “he didn’t care, he didn’t care if we lived or died.” Goodloe was lightly grazed on his side by a bullet. Goodloe says “we was all laying against the wall;” Coron Liles feet were across Goodloe’s body; and Goodloe’s head next to Coron Liles’s head. The prosecutor asked Goodloe if he saw Mr. Cunningham shoot “and his head snap back” to which Goodloe answered yes. The prosecutor asked Goodloe if Mr. Cunningham continued to fire and Goodloe answered yes.

110) However, Goodloe’s initial statement on January 3, 2002 to investigating Lima Police officers, which occurred when his recollection of events would have been at its zenith, lacks many of the details to which he later testified.⁷ There is no reference to Mr. Cunningham shooting Jala Grant;⁸ there is no reference to the absence of communication between Jackson and Mr. Cunningham; there is no reference to Mr. Cunningham shooting Coron Liles in the mouth; there is no reference to seeing Mr. Cunningham’s finger on the trigger of a gun nor to “smoke” coming from his gun; there is no reference to Goodloe observing the expression on Mr. Cunningham’s face; there is no reference to Mr. Cunningham’s head “snapping back” during the shooting. Further in Goodloe’s statement to police, he commented that as the shooting started, he dove under the table to avoid being struck, an action that would have significantly militated

⁷ Goodloe suffered a superficial wound to his ribs, which left a little mark.”

⁸ Throughout Mr. Cunningham’s trial, the horrific image of the murdered child Jala was vividly and repeatedly invoked through the testimony of prosecution witnesses and prosecution argument. Given the power of that image, it is unlikely that Goodloe would have forgotten it at the time of his initial statement.

against his ability to observe events in the manner he testified to. Had defense counsel been provided with Goodloe's statement of January 3, 2002, they could have subjected Goodloe to withering cross-examination as to the adjustments of his portrayal of events from his original statement to his trial testimony.⁹

111) The content of the statement of Goodloe was material to Mr. Cunningham's guilt. The statement demonstrates that Goodloe's recollection of events evolved over time. A jury would reasonably have been troubled by the adjustments to Goodloe's original story. *Kyles v. Whitley*, 514 U.S. at 443. The prosecutor capitalized on Goodloe's testimony to stir the juror's emotions against Mr. Cunningham in order to convict him. In addition, had defense counsel been provided with Goodloe's statement, counsel would have objected to the prosecutor's statements in closing argument. There is a reasonable likelihood that the outcome of the trial proceeding would have been different if the trial prosecutors had supplied defense counsel with this information.

JAMES GRANT

112) James Grant was a critical state's witness. His testimony regarding the shootings at 503 E. Eureka Street in Lima, Ohio on January 3, 2002 was devastating to Mr. Cunningham. On direct examination he unequivocally testified that Mr. Cunningham shot him in cold blood. Mr. Grant testified that he was holding his daughter and he was "looking to the side where they were standing. And Jeronique pointed the gun at me and shot. And I didn't even know I was shot until I felt something running down my face." The prosecutor asked Mr. Grant "Is there any doubt in your mind that Mr. Cunningham was the one that pointed the gun at you?" to which Mr.

⁹ It is interesting to note that in his testimony at Cleveland Jackson's trial, Goodloe acknowledged that when the shooting began, he "closed my eyes for a little bit and I was crying. I looked up and I seen smoke and stuff."

Grant answered "No." The prosecutor then asked, "Is this the one that shot you?" to which Mr. Grant answered, "Yes." James Grant gave his first statement to police investigators on January 3, 2002. There is no reference in this statement to Mr. Cunningham shooting Mr. Grant. Mr. Grant did make reference to a second subject -- not Mr. Cunningham -- who "came into the kitchen and started shooting." In a second statement to police on January 9, 2002, Mr. Grant again failed to specifically implicate Mr. Cunningham as the person who shot him. Mr. Grant told police that Cleveland Jackson shot Loyshane Liles. However, it was noted that Mr. Grant "is uncertain as to who was shot after Shane was shot...." The prosecution would have been aware of these statements when Mr. Grant testified at Mr. Cunningham's trial.

113) James Grant's testimony against Mr. Cunningham was dramatic and highly prejudicial to him. The prosecutor asked Mr. Grant to go into specific detail as to the list of serious injuries he suffered, to display his wounds to the jury and to describe the debilitating effect of his injuries. The testimony of the victims of the shootings -- especially James Grant -- was extremely compelling to Mr. Cunningham's jurors. It was incumbent upon the prosecution to inform defense counsel of any discrepancies in Mr. Grant's recollection of events that would go to the question of Mr. Cunningham's involvement in the shooting of Grant. Had the prosecution done so, Mr. Grant's firm identification of Mr. Cunningham as the person who shot him would have been undermined.

114) For example, on direct examination at Cleveland Jackson's trial, Mr. Grant was far more equivocal in his identification of Mr. Cunningham as the shooter who perpetrated his injuries. The prosecutor -- who also prosecuted Mr. Cunningham -- asked Mr. Grant, "Do you know who shot you." Mr. Grant testified in reply, "I'm not -- you know I didn't watch the bullets, but I believe Jeronique shot me first." Mr. Grant's opening comment is telling. It is

arguable that he was about to testify that he was not sure who shot him. ("I'm not..."). However, the prosecutor did not question Grant about this change in his resolve that Mr. Cunningham was his shooter. Further, on cross-examination at Cleveland Jackson's trial, Mr. Grant was asked directly if Mr. Cunningham shot him. Mr. Grant replied "I'm pretty sure he did." This testimony is also at odds with the firm identification Mr. Grant testified to at Mr. Cunningham's trial.

115) James Grant was the prosecution's witness over an extended period of time. The prosecution would have been thoroughly aware of any and all inconsistencies in Mr. Grant's recollection of events during the shootings, including his less than positive identification of Mr. Cunningham as his assailant. James Grant's equivocation regarding Mr. Cunningham's role in the shooting is material to his guilt. The equivocation demonstrates that Grant's recollection of events was not as exact or forceful as portrayed at Mr. Cunningham's trial. A jury would reasonably have been troubled by the disparity in Mr. Grant's recollection of events. *Kyles v. Whitley*, 514 U.S. at 443.

116) It is well settled that the failure of the government to disclose favorable evidence to an accused in a criminal prosecution violates the Due Process Clause of the Fourteenth Amendment, where the evidence is material either to guilt or to the sentencing, regardless of the good or bad faith of the prosecutor. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). There is a reasonable likelihood that the outcome of the trial proceeding would have been different if the trial prosecutors had supplied defense counsel with this information. As a result, Mr. Cunningham's rights as guaranteed by the Fourteenth Amendment to the United States Constitution were violated and he was prejudiced. *See Banks v. Dretke*, 540 U.S. 668 (2004);

Brady v. Maryland, 373 U.S. 83, 87 (1963), *United States v. Bagley*, 473 U.S. 667 (1985), *Kyles v. Whitley*, 514 U.S. 419 (1995), and their progeny.

117) Therefore, this Court should vacate Mr. Cunningham's conviction and sentence of death and remand this case for a new trial.

PROPOSITION OF LAW NO. V

TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO INVESTIGATE, OBTAIN AND USE BALLISTIC EVIDENCE DEMONSTRATING THAT JERONIQUE CUNNINGHAM WAS NOT THE ACTUAL KILLER IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

DEFENSE COUNSEL FAILED TO REASONABLY INVESTIGATE THE BALLISTICS EVIDENCE.

118) The issue in this case, both at trial and especially at sentencing, was whether Mr. Cunningham shot and killed anyone on January 3, 2002. The physical evidence is clear:

Mr. Cunningham was carrying a revolver which did not eject shell casings;

Cleveland Jackson carried a .380 semi-automatic pistol that ejected shell casings;

All of the shell casings found at the scene were .380 shells; and,

All of the bullets recovered from the victims and the scene, including those who died, were .380 bullets.

119) The prosecution presented witnesses and argument in an attempt to establish that Mr. Cunningham was the actual killer. Either in combination or separately their testimony and the pictures of the dead and wounded were graphic and highly inflammatory. It was incumbent on defense counsel to present a defense, if available, to prove that Jeronique Cunningham did not shoot the victims. Counsel attempted to present such a defense, without success, due to their failure to reasonably investigate the ballistics evidence that formed the core of the prosecution's case.

120) Both Mr. Cunningham and Cleveland Jackson emphatically informed investigating police that the revolver Cunningham carried that night was inoperable. At trial, defense counsel sought to deny Cunningham's role in the shooting deaths and shooting injuries by presenting argument that Cunningham carried a large caliber handgun, a .44 magnum, which

Mr. Cunningham had not fired. However, no handguns had been found by the police nor put into evidence by the prosecution. Consequently, the ability to make a comparison of weapons was negated. The only logical choice left to counsel was to analyze the ballistics evidence relied upon by the prosecution and to make accurate extrapolations based on empirical analysis from available procedures. This, defense counsel did not do.

121) In the State's case, Assistant Coroner Cynthia Beisser testified, regarding ballistics evidence that came from the autopsies she performed. Dr. Beisser first testified regarding her recovery of a bullet or bullet fragment from Ms. Williams. Dr. Beisser used a ruler to measure the wound to Ms. Williams's head.

122) The prosecutor asked Dr. Beisser regarding the picture that showed the wound being measured, "Is there any way you can tell the caliber of the projectile that was fired based on what you see here?" To which she replied, "No." Dr. Beisser went on to testify, "So unless I actually recover the bullet or know something of the size of the weapon I can't really make any statements as to the exact size of the bullet."

123) On cross-examination, defense counsel repeatedly asked Dr. Beisser if the size of the bullet wound to Jala Grant's head was consistent with "that of a .380 caliber pistol?" Dr. Beisser answered affirmatively. On redirect examination, the prosecutor asked the coroner if the wounds of the victims could have come from different caliber weapons to which she answered yes. The prosecutor asked the coroner if "a .380 and a .38 caliber bullet were the same size or practically the same size" to which she answered yes. On re-cross examination she testified that a .38 and .380 caliber cartridge are "in essence equal."

124) Ohio Bureau of Investigation and Identification Agent John Heile testified that all the cartridge casings retrieved from the crime scene were from .380 caliber cartridges. The

bullets retrieved from the crime included five full metal jacket bullets that were determined to be bullets from a .380 caliber semi-automatic pistol. A lead bullet fragment was also obtained from the crime scene. Agent Heile testified that the fragment was from a full metal jacket cartridge but that he could not determine the caliber. On cross-examination Heile testified that "Some .38 special revolvers you can place a .380 automatic cartridge in that." He also testified that the .380 cartridges used in the charged crimes would fit in a .38 special.

125) Counsel's failure to investigate, obtain, and utilize a qualified ballistics expert cannot be characterized as a reasonable exercise of professional judgment. Indeed, a simple procedure should have and would have been conducted and videotaped by a minimally competent ballistics expert.¹ This expert would have clarified for the jury that none of the possible revolvers at issue (i.e. .38; .357; .44 magnum) will fire a .380 caliber cartridge. Had this simple procedure been conducted, the jury would have been fully apprised that the revolver carried by Cunningham could not have fired the .380 cartridges and bullets taken from the crime scene. It would also have allowed defense counsel to harvest bullets to compare to the .380 bullets recovered from the crime scene. Such a comparison would have illustrated the disparity in size and weight of the two projectiles. With a reasonable investigation, defense counsel should have and would have been able prove to the jury that Cunningham could not have shot the victims on January 3, 2002. As a result, Jeronique Cunningham was prejudiced by his counsel's unreasonable failure to investigate, prepare and present competent evidence on this critical issue and to obtain a competent expert.

¹ In the absence of an expert, defense counsel could have done this simple but completely accurate procedure themselves.

126) It is clear that the real ballistics issue was never addressed: whether the revolver carried by Mr. Cunningham was physically capable of firing a .380 caliber bullet. The misimpression and confusion created by the prosecutors and ineffective defense counsel was that .380 caliber bullets are physically similar to other caliber bullets leaving the jury to mistakenly believe that Mr. Cunningham's inoperable revolver, regardless of caliber, was capable of firing a .380 caliber bullet. This is absolutely, scientifically, and "ballistically" false, and effective and competent counsel would have obtained a competent ballistic expert to correct this error.

127) Instead of presenting a proper ballistic expert, defense counsel put on a gun shop owner, Daniel Reiff, to rebut the prosecution's case. Reiff simply affirmed the mistakes of the prosecution's case: that a .380 caliber cartridge and a ".38, .357, .380 and .9 are all approximately the same diameter"; that these cartridges are "indistinguishable by looking at them;" and that .38 caliber cartridges are fired from a revolver. This permitted the prosecutor in closing argument to argue that the bullets that killed and injured the victims came from a ".38 or a .380" and that the coroner testified that the wounds were "consistent with a .38" and a ".357".

128) The upshot of all this was that the jurors convicted Mr. Cunningham and sentenced him to death as the principal offender in the shootings of those victims who died. When Cunningham's jurors were interviewed after his trial, their understanding was that the cartridges used in the shootings were .380 caliber cartridges. Further, the jurors' understanding of Reiff's testimony was that Mr. Cunningham's weapon was a revolver that could fire a .380 caliber cartridge. The jurors' belief that a .38 revolver -- the type of weapon attributed solely to Mr. Cunningham -- could fire .380 caliber ammunition was bolstered by the testimony of Beisser, and Reiff.

129) Had defense counsel reasonably investigated, prepared and presented analysis of the prosecution's ballistics evidence, they could have rebutted the testimony of Beisser and Heile and would have supported the defense theory that Mr. Cunningham did not shoot the victims in this case. Counsel's failure to investigate, obtain, and utilize a qualified ballistics expert cannot be characterized as a reasonable exercise of professional judgment. Indeed, a simple procedure should have and would have been conducted and videotaped by a minimally competent ballistics expert to clarify for the jury that none of the possible revolvers at issue (i.e. .38; .357; .44 magnum) will fire a .380 caliber cartridge.

130) Counsel's failure to investigate, obtain, and utilize a qualified ballistics expert cannot be characterized as a reasonable exercise of professional judgment. As a result, Mr. Cunningham was prejudiced by his counsel's unreasonable failure to investigate, prepare and present competent evidence on this critical issue and to obtain a competent expert. Consequently, counsel's performance "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668 (1984); *Ake v. Oklahoma*, 470 U.S. 68 (1985). Had trial counsel requested, obtained, and utilized a ballistics expert, there is a reasonable probability that Mr. Cunningham would have been convicted of a lesser offense, or at a minimum, not sentenced to death. Mr. Cunningham's rights as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution were violated and he was prejudiced.

PROPOSITION OF LAW NO. VI

THE STATE'S IMPROPER CLOSING ARGUMENTS AT BOTH THE GUILT AND SENTENCING PHASES OF MR. CUNNINGHAM'S CAPITAL TRIAL, CONSTITUTED PROSECUTORIAL MISCONDUCT IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

INTRODUCTION

131) A prosecutor is obligated to protect the integrity of the justice system in pursuing justice in a fair manner. A prosecutor “may prosecute with earnest and vigor – indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones.” *Berger v. United States*, 295 U.S. 78, 88 (1935). A defendant is entitled to relief if the misconduct complained of rendered the trial fundamentally unfair. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643-45 (1974); *see also Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

132) The prosecutor made improper remarks at both the guilt and the sentencing phases. They were neither minor nor something that could be easily overlooked by the jury. At the minimum, these remarks certainly had a cumulative effect of causing the Mr. Cunningham to be sentenced to death.

133) The prosecutor's improper remarks and misconduct in Mr. Cunningham's case were not “slight or confined to a single instance, but ... (were) pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential.” *Berger v. United States*, 295 U.S. 78, 89 (1935). This Court, when reviewing the improper misconduct, must assess the conduct in the context of the entire case. *State v. Keenan*, 66 Ohio St. 3d 402, 410, 613 N.E.2d 203, 209 (1993), *State v. Slagle*, 65 Ohio St. 3d 597, 607, 605 N.E.2d 916, 926 (1992). In doing so, this Court should consider the cumulative effect of improper comments because “[e]rrors that are separately harmless may, when considered

together, violate a person's right to a fair trial." *State v. Freeman*, 138 Ohio App.3d 408, 420, 741 N.E.2d 566, 574 (2000). *See also State v. Madrigal*, 87 Ohio St. 3d 378, 397, 721 N.E.2d 50, 70 (2000). While some of the improper statements of the prosecutor individually may not warrant reversal, the cumulative effect of the prosecutorial misconduct demonstrates that Mr. Cunningham was denied a fair trial and reliable sentencing proceeding.

IMPROPER CLOSING ARGUMENTS AT THE GUILT PHASE

134) The prosecutor in Mr. Cunningham's case made several improper comments during the closing arguments of the trial phase. While it is true that the prosecution is entitled to some degree of latitude during closing argument, the prosecutor's arguments in this case went beyond that latitude ordinarily afforded during closing arguments. *United States v. Carter*, 236 F.3d 777, 784 (6th Cir. 2001); *State v. Keenan*, 66 Ohio St. 3d 402, 410, 613 N.E.2d 203, 209 (1993).

Speculation about evidence.

135) During defense counsel's closing argument, defense noted some of the weaknesses of the State's case including the fact that the only bullets that were recovered from the scene by law enforcement were consistent with being fired from the weapon that the witnesses testified belonged to Cleveland Jackson. These statements by defense counsel were a legitimate attempt to cast doubt on the credibility of the State's case. *United States v. Carter*, 236 F.3d 777, 789 (6th Cir. 2001). In response to the defense's closing arguments, the prosecutor speculated about the whereabouts of the bullets that may have been fired from Mr. Cunningham's gun. "Let's not get caught up in a smokescreen about the bullets. Those bullets could be lost-lost in blood, they could disintegrate when they hit a wall because they're not jacketed." The prosecutor also informed the jury that the failure of the State to produce the

bullets was of no consequence. “Mr. Grzybowski wants to talk about a rusted or an old gun. We all know there’s a lot of people in the graveyard that were killed with rusty and old guns and unloaded guns.” It was improper for the prosecutor to speculate about the status of the bullets and about how the age of a gun affects its use. There was absolutely no evidence introduced at trial by the State to the jury that bullets could disintegrate. Nor was there evidence presented by the State’s witnesses that demonstrated the State’s assertions regarding old and rusty guns. These statements were clearly beyond the bounds of an invited response to argument. *Id.* at 788-789.

136) Juries are likely to place great confidence in the statements of prosecutor. *Id.* at 785. It was improper for the prosecutor to use his influence to discuss “evidence” that was never even submitted. By providing to the jury potential “scientific” reasons that the bullets were not found at the scene of the crime, the prosecutor misled the jury regarding the inference it should draw from the evidence’s absence. Such comments can convey the impression “that evidence not presented to the jury, but known to the prosecutor supports the charges against the defendant and can thus jeopardize the defendant’s right to be tried solely on the basis of the evidence presented to the jury...” “*United States v. Young*, 470 U.S. 1, 18 (1985).

137) Moreover, the prosecutor’s personal speculation was based on pure conjecture that was unsupported by the evidence. “It is a prosecutor’s duty in closing arguments to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury.” *State v. Smith*, 14 Ohio St. 3d 13, 14, 470 N.E.2d 883, 88 (1984). Prosecutors are not permitted to “allude to matters not supported by admissible evidence,” *State v. Lott*, 51 Ohio St. 3d 160, 166, 555 N.E.2d 293, 300 (1990), because it is “improper for the state to attempt to prove its case by suggestion rather than evidence.” *State v. Liberatore*, 69 Ohio St. 2d 583, 588, 433 N.E.2d 561,

565 (1982). Arguments must be confined to the record evidence and reasonable and fairly drawn inferences from the record.:

Assertions of fact not proved amount to unsworn testimony of the advocate, not subject to cross-examination. *American Bar Association Standards for Criminal Justice - The Prosecution Function. Standards 5.8 and 5.9[.]*

Smith, 554 So. 2d at 681-682.

138) The prosecutor's comments invaded the jury's province and improperly influenced the jury's deliberations. The prosecutor's comments did not direct the fact finder's attention to relevant evidence or arguments, and certainly did not help produce a fair trial and a reliable verdict. No verdict achieved by such means can be deemed reliable, rational or fair.

Inflammatory comments and comment on Mr. Cunningham's right to a fair trial.

139) During the prosecutor's closing argument, when commenting about victim Jala Grant he stated, "She never asked to be there and she was never given a chance. She was never given justice like he's receiving." This statement by the prosecutor was clearly an unfair comment on the defendant's right to a jury trial. The danger of such a statement is that it invited the jury to punish the defendant for exercising his right to a jury trial. See *State v. Willard*, 144 Ohio App.3d 767, 775, 761 N.E.2d 688, 694 (2001). Moreover, this comment improperly insinuated to the jury that the only way for the victim to receive justice was through Mr. Cunningham's conviction.

140) In addition, the prosecutor commented that, "This is absolutely the most cold-blooded calculated inhumane murder that anyone could ever imagine. Absolutely the most cold-blooded inhumane murder anyone could imagine." This comment by the prosecutor was simply designed to inflame the jury and appeal to the emotions of the jury. The comments invited the jury to convict Mr. Cunningham based not upon facts in evidence, but upon the jury's horror of

the crime. The prosecutor's arguments created an unacceptable risk that the jurors would convict Mr. Cunningham because of the heinousness of the crime and not because the State met its burden of proof.

IMPROPER CLOSING ARGUMENTS AT THE PENALTY PHASE

141) In addition, the prosecutor's repeated improper statement during closing arguments of the mitigation phase amounted to misconduct and violated Mr. Cunningham's right to due process. *Kincade v. Sparkman*, 175 F.3d 444, 445-46 (6th Cir. 1999).

Comment on unsworn testimony.

142) The prosecutor made improper comments regarding the fact that Mr. Cunningham made an un-sworn statement. Although the State is allowed to remind the jury that the defendant's statement was un-sworn, it must stop there. *State v. DePew*, 38 Ohio St. 3d 275, 285, 528 N.E.2d 542, 554 (1988). Here, the prosecutor did more than state what was permissible under *DePew*. The prosecutor informed the jury that Cunningham's failure to testify under oath prevented the state from cross-examining him:

So, with that the question becomes does the fact that the defendant made a statement that was not under oath in contrast to all other witnesses and that he was not subject to cross examination does that lessen his moral culpability?

Ohio courts have held that it is error for the State to inform the jury that the un-sworn nature of the statement prevented cross-examination. *State v. Broom*, 40 Ohio St. 3d 277, 533 N.E.2d 682 (1988).

Mischaracterized mitigation evidence

143) Throughout the closing argument of the mitigation phase, the prosecutor advised the jurors to weigh the aggravating circumstance in the case against evidence other than the mitigation evidence presented by defense. The prosecutor argued:

And mitigating factors are factors that lessen moral culpability of the defendant or diminish the appropriateness of a death sentence. That's what the court's going to tell you mitigating factor is.

So, with that the question becomes does the fact that the defendant made a statement that was not under oath in contrast to all other witnesses and that he was not subject to cross examination does that lessen his moral culpability? Does it diminish the appropriateness of the death sentence? The answer is no.

Does the fact that he's malingering and has as you heard the testimony, has malingered throughout evaluation his whole life? Does that somehow lessen his moral culpability or diminish the appropriateness of the death sentence? No.

Does the fact that he's not mentally ill, does that lessen his moral culpability or diminish the appropriateness of the death sentence? And again the answer is no.

Does the fact that he understands the wrongfulness of his acts, does that lessen his moral culpability or diminish the appropriateness of the death sentence, absolutely not.

How about the fact that he hasn't benefited from treatment? How about that does that lessen his moral culpability or diminish the appropriateness of the death sentence? I would suggest to you it does not.

Now you're supposed to go back in the room and weigh these things.

144) "The prosecutor used potential areas of mitigation not raised by the defense to inject improper aggravating factors and to appeal to the emotions of the jury." *State v. Fears*, 86 Ohio St. 3d 329, 361, 715 N.E.2d 136, 163 (1999) (Moyer, C.J., concurring in part & dissenting in part). Contrary to the State's argument, the jury was not supposed to weigh the factors the State argued during closing arguments against the aggravating circumstance in the case. Instead, the jury was supposed to weigh the mitigation evidence presented against the aggravating circumstances in the case.

145) The improper statements during sentencing closing arguments by the prosecutor deprived Mr. Cunningham of the individualized sentencing guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution. *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (plurality opinion). The jury was obligated to weigh the aggravating circumstances against the mitigating circumstances, not Mr. Cunningham's failure to present evidence of some mitigating factors. Moreover, the jury cannot turn mitigation evidence into aggravating circumstances. This type of prosecutorial misconduct is extremely prejudicial because it encourages the jury to ignore the statutory framework adopted by the Ohio legislature for determining the sentence in a capital case. See *Stringer v. Black*, 503 U.S. 222, 232 (1992) (invalid weighing process violates Eighth Amendment). The jury should weigh "aggravating" factors vs. "mitigating" circumstances. Such arbitrary infliction of capital punishment as the State asked for is unconstitutional *per se*. *Gregg v. Georgia*, 428 U.S. 153 (1976).

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

147) The prosecutor's use of non-statutory aggravating circumstances and pleas to the jury to consider factors other than Mr. Cunningham's mitigation evidence deprived Mr. Cunningham of his right to individualized sentencing as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

148) Mr. Cunningham submits that the above remarks violated his due process rights guaranteed by the Fourteenth Amendment, and rights against cruel and unusual punishment, as guaranteed by the Eighth Amendment. *See, e.g., Berger v. United States*, 295 U.S. 78 (1935); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Darden v. Wainwright*, 477 U.S. 168 (1986).

149) Alternatively, trial counsel was ineffective for not making contemporaneous objections to these improper remarks. *Strickland v. Washington*, 466 U.S. 668 (1984).

CONCLUSION

150) Therefore, this court should vacate the Mr. Cunningham's conviction and sentence of death, and remand for a new trial. Alternatively this case should be remanded for a new sentencing hearing.

PROPOSITION OF LAW NO. VII

TRIAL COUNSEL WAS INEFFECTIVE AT SENTENCING FOR FAILING TO INVESTIGATE AND PRESENT IMPORTANT MITIGATING EVIDENCE, FOR CAUSING THE SUBMITTED MITIGATION EVIDENCE TO BE OVERLOOKED AND UNDERSTATED, AND FOR PRESENTING AN INADEQUATE CLOSING ARGUMENT, THEREBY DEPRIVING MR. CUNNINGHAM OF HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

1. INTRODUCTION

151) Trial counsel's strategy to defeat the death penalty was to show that Mr. Cunningham had a horrible childhood and adult life, and that he still had redeeming qualities, such as that he cared for his siblings as a child and cared for his mother in a nursing home, to justify a sentence less than death. Mr. Cunningham does not challenge this strategy, but asserts that it was carried out in an ineffective manner.

152) In representing Mr. Cunningham in the penalty phase, trial counsel overlooked overwhelming mitigation evidence in the form of Mr. Cunningham's hellish childhood, and his unceasing caring for his younger brothers and sisters in spite of his nightmarish beatings from his schizophrenic, alcoholic mother. Counsel also failed to investigate and present evidence that as an adult, Mr. Cunningham nevertheless cared for and exhibited devotion to his mother when she was confined to a nursing home. Tragically, counsel also failed to present compelling evidence that Mr. Cunningham had but limited involvement in the events. Trial counsel overlooked a wealth of readily available evidence that could have been presented to the jury, and woefully understated the evidence that he did present, evidence which, if presented to the jury, would have resulted in a sentence less than death.

153) Also, trial counsel could have presented a cultural expert to explain to the jury the effects on Mr. Cunningham of his conditions as a child, and to tie together the evidence

including his positive character evidence. In addition, counsel could have presented evidence from Mr. Cunningham's initial statements to the police, and corroborated by a lie detector test, that Mr. Cunningham's gun never fired. As such, he never shot anyone.

154) In fact, trial counsel did the opposite of their strategy: they presented testimony from Mr. Cunningham's mother that was inconsistent with their position and the facts. They called Mr. Cunningham's mother as a witness, but she indicated that she merely disciplined Mr. Cunningham like a "normal" parent.

155) In addition, trial counsel should have presented as a mitigating factor at the penalty phase evidence that Mr. Cunningham was not the principal offender of the murder. Specifically, Mr. Cunningham's statement to the police indicated that his weapon was inoperable and that he did not fire a single shot in the Eureka Street apartment, which statement was in fact corroborated by the physical evidence retrieved from the crime scene: every bullet, fragment and casing found at the scene was of a .380 caliber, from a weapon with a clip. Just such a weapon was in co-defendant Jackson's hand, while a revolver was in Mr. Cunningham's hands.

156) Finally, counsel made a woefully inadequate closing argument that failed to mention the mitigating facts of Mr. Cunningham's childhood, the positive aspects of his character, or the evidence tending to show his lesser involvement in the events. Trial counsel's performance was deficient at the penalty phase, and had he submitted all the appropriate and available mitigating evidence, there is a reasonable probability that Mr. Cunningham would not have been sentenced to death. Mr. Cunningham will list what trial counsel actually presented, and then show what could have been presented to indicate that there is a reasonable probability that with the new evidence, Mr. Cunningham would not have been sentenced to death.

2. EVIDENCE THAT TRIAL COUNSEL PRESENTED TO THE JURY IN THE PENALTY PHASE

157) Trial counsel presented the testimony of Mr. Cunningham's sister, Tara Cunningham, his mother, Betty Cunningham, and a psychologist, Daniel L. Davis, Ph.D.

158) Tara Cunningham testified very briefly, noting that her mother was beaten by her boyfriend, Mr. Cunningham was beaten by their mother, that Mr. Cunningham he cared for his siblings when their mother left the children home alone, and that the children had been placed in foster homes three times.

159) Betty Cunningham also testified briefly, stating that Mr. Cunningham "got along well" with her boyfriend, Cleveland Jackson, Jr., that although her boyfriend beat her up frequently, he did not abuse Mr. Cunningham. He only disciplined him "like a normal parent would." She further testified that she ultimately stabbed Mr. Jackson to death when he attacked her. She testified that her mother cared for the children when she was on drugs, and sometimes the Allen County Children's services helped.

160) Importantly, his mother denied that she abused Mr. Cunningham. She indicated that she merely whipped his butt to discipline him. She denied ever whipping him with a stick or any other instrument. She just used her hand. She denied ever being diagnosed with a mental illness. She denied ever making a suicide attempt after she had children. Ms. Cunningham then asked the jury to spare her son's life.

161) Dr. Davis testified that Mr. Cunningham's father's behavior appeared to be mentally ill, demonstrating symptoms of paranoid schizophrenia. Dr. Davis obtained Mr. Cunningham's mother's records, showing she had a lengthy history of mental health and substance abuse treatment, and involvement with the Allen County Children's Services ("Children's Services").

162) Dr. Davis said Mr. Cunningham had multiple placements and lacked consistency in his life. He noted that Children's Services had intermittent involvement with Mr. Cunningham triggered by reports of absence from school and reports of bruises on Mr. Cunningham from time to time. Finally, in response to trial counsel's queries, Dr. Davis speculated on the effects of inconsistencies and substance abuse on behavioral issues. Dr. Davis concluded Mr. Cunningham was depressed, having a mental disorder, but not a mental illness. On cross examination, Dr. Davis stated that Mr. Cunningham had a psychopathic or antisocial personality, wanted to appear sicker than he was, and did not respond to treatment attempts in childhood.

3. EVIDENCE THAT TRIAL COUNSEL COULD HAVE, BUT DID NOT PRESENT TO THE JURY IN THE PENALTY PHASE

A. Evidence from Records of Allen County Children's Services and Records of Mr. Cunningham's Mother's Mental Illness, Killing, Suicide Attempts and Substance Abuse

163) Defense counsel did not present testimony from employees or records from the Allen County Children's Services that pertained to Mr. Cunningham. The Cunningham family had a long history of involvement with this agency, beginning when Mr. Cunningham was 5 years old, in 1977, when Mr. Cunningham's mother, Betty Cunningham, asked for her children to be put in foster homes.

Abandonment

164) The Allen County Children's Services records are replete with documentation of Betty repeatedly abandoning her children, for example:

In July, 1977 Mr. Cunningham, the oldest of the four children, went at night to his grandmother's Adoor asking if he could stay because he was afraid. He did not know where his mother was or when she would be back."

Betty "moved to Indiana in September of '77", abandoning her children." The Children's Services *closed her case. Id.*

In October, 1979, the school principal went to Betty's home because the children had missed two and a half weeks of school "at Washington McKinley School, and now were in Edison School district, and they had not been enrolled" in the new school. He found the children were home alone. Subsequently, Children's Services went to the home, finding the children alone. The record states as follows:

Contact was finally made with Betty, and was informed of the problems such as truancy and unsupervision of the children. Betty was very upset ... She threatened to blow the worker away if another HC [house call] was made.

Case closed.

In December, 1980, the case was re-opened.

In March, 1981, it was learned that Betty was "drinking frequently and leaving the children alone with a 3 month old baby."

May 18, 1981, the children were left alone, there was no food, and the police were called.

May 12, 1982, Betty leaves the children alone, is found drunk.

March, 1983, Betty was drinking heavily and left [Mr. Cunningham] and his brother home alone.

In April, 1983, Betty was leaving the children home alone more frequently and drinking more.

In May, 1983, situation worsens; Betty drinks more, leaves the children alone more.

In December, 1983, children were left alone.

December 18, 1983, Betty reported her children as missing.

Betty's beatings, whippings of Mr. Cunningham

165) Betty beat Mr. Cunningham repeatedly with belts, extension cords, switches, broom handles, leaving such marks that his teachers and principal took notice and called Children's Services.

166) The Allen County Children's Services records contain innumerable instances of Betty beating, whipping, and threatening Mr. Cunningham with beatings. For example:

December 9, 1980, Mr. Cunningham [8 years old] was beaten by Betty, leaving open cuts to his head, bruises to his arms and marks on his body. He was also beaten several days before.

School nurse observes bruises on Mr. Cunningham. Was coming to school with bruises again; notes indicate Mr. Cunningham has to care for his 3 month old sibling or face physical abuse.

March, 1981, school observes Mr. Cunningham was beaten causing bruises to his body.

March 26, Mr. Cunningham reports that if he tells anyone of Betty's beatings, she will beat him again. He has bruises on his arms, smells foul, has on dirty clothes, and examination reveals old bruises on his legs and buttocks. Betty hit him with a broom. Mr. Cunningham is afraid of his mother.

March 27, 1981, Mr. Cunningham was beaten with a belt, leaving bruises on his left and right arms.

On January 4, 1982, police took photos of the "obvious abuse" on Mr. Cunningham's body. He was then 9 year old.

January-February, 1983, "Betty is drinking frequently again, and leaving the children alone. Betty is also disciplining the children too harshly especially Jaronique. Jaronique is also expected to watch the children, clean and keep the home clean, and cook..."

In March, 1983, Betty beat Mr. Cunningham with an extension cord, and threatened more beatings if Mr. Cunningham did not watch the children while she was gone.

In May, 1983, Mr. Cunningham was beaten by Betty and both new bruises and

old bruises were observed on parts of his body.

Also in May, 1983, records noted that Mr. Cunningham was beaten a lot, that he was required to clean the house, cook, watch the children, and if he did not, Betty told then 10-year old Mr. Cunningham she would beat him to death or kill him. Case transferred to new case worker.

August, 1983, Mr. Cunningham "has been taking care of the children due to the fact Betty has been drinking, and [he] has been physically abused by Betty, and he is afraid of being shot by his mother."

Appellant's sister, Tara, reported that Mr. Cunningham "gets it all the time."

Mr. Cunningham's Mother's Suicide Attempts Which Mr. Cunningham Witnessed

167) Betty tried to commit suicide several times when Mr. Cunningham was young. In March, 1981, she tried to jump out of a window. In 1982, Mr. Cunningham found her and reported this to someone in authority at his school. The Children's Service records document one such suicide attempt on August 4, 1982, which was witnessed by Mr. Cunningham, then 9 years of age. Following are excerpts from the caseworker's notes concerning that suicide attempt and the striking conditions under which Mr. Cunningham lived:

Ptl. Kleman advised CW that Betty had slit her wrists quite deeply with a razor blade....

The children reiterated for CW several times the story of "Kevin" beating their mother and how she's going to kill herself or him just like last time and how she cut herself and sat down and they all watched it bleed while she drank beer. (They said she drank lots of beer since the check came).

The children were very dirty and had a little blood dried on them. The clothing they wore was equally dirty as was their hair... The children showed CW several areas on each of them which appeared to be bite marks, these they said were from the roaches biting them on the floor [where they slept, having no beds or bedding]. A major argument broke out at one point about which child had smashed the most roaches the previous night and Tara said it only counted if you mashed them before they bite...

In the "bedroom" at the left was an enormous pile of garbage in the center of the room consisting of bottles and cans, papers, dirt what appeared to be dried up food, and more dirty clothes....[T]his room belonged to [Tara] and her next two

younger siblings. There were no beds nor bedding of any form in this room.

...

Ptl. Kleman showed CW the "dining room" which was an extension of the main room. On the table was a very large pool of blood, there was also blood dripped on the floor and the chairs. In one corner of the room...there was a large amount of broken glass -- many pieces being large and jagged... There was garbage and boxes in the opposite corner of the room... CW next attempted to enter the kitchen. The floor was filthy and again there was blood dripped all over, there was an open box of garbage in the center of the floor with junk and food hanging out of it and all around it. Ptl. Kleman indicated that when he arrived the baby had been sitting beside this box eating from it.

...

The children continued on to say that they don't eat every day because there is not enough money to buy that much food and mom's beer.

Mr. Cunningham's mother killed her boyfriend in front of Mr. Cunningham and threatened his caseworkers with the fact of her having killed.

168) Cleveland Jackson, Sr., was the father of two of Betty's children. Betty stabbed and killed him in front of Mr. Cunningham. Mr. Cunningham's mother used her having killed in issuing threats to the children's caseworkers. For example, on April 25, 1983, when caseworker Cathy Downton was making a home visit and found some of the children alone the following occurred:

Betty was upset that CW had caught her in the act... She informed her girlfriend, Winky, referring to CW, stating she had a dream about CW and stated, "I beat that mother fucker to death." She then began beating her fist into her hand, acting as though she was beating CW."

Cathy stopped being Mr. Cunningham's caseworker and the case was transferred to two new caseworkers with the caveat, "It is strongly advised that on this case two workers be together at all times and still be careful."

169) In an earlier instance, it appeared that her threats might have succeeded when Betty told a caseworker "not to come and check on her children or she would blow us up. She said they were her kids and she'd do as she pleased... At this time case closed."

Allen County Children's Services Records Documenting Mr. Cunningham, as a Child, Caring

for His Siblings

170) Contained in the records from the Allen County Children's Services file are caseworkers' memorializations of Mr. Cunningham caring for his siblings. For example, in a social history from 1982, the records state that "Due to Jaronique's [sic] mother's instability and drinking, he had a lot of the responsibility for providing care for his siblings." In a summary from February 1982 when Mr. Cunningham [age 9] was living with his grandmother, it is noted that "Jeronique is concerned about his brothers and sisters and wants to return home to take care of them. Jeronique goes over to the home daily to insure they have food and are OK." In January of 1983 it is documented that "Jaronique is also expected to watch the children, clean and keep the home clean, and cook on several occasions, when Betty is drinking."

171) In addition, the notes indicate Mr. Cunningham has to care for his 3 month old sibling, and in August, 1983, Mr. Cunningham "has been taking care of the children due to the fact Betty has been drinking, and [he] has been physically abused by Betty, and he is afraid of being shot by his mother."

Mr. Cunningham's Mother's Medical Records Documenting Decades of Hospitalizations and Treatment for Severe Mental Illness, Schizophrenia

172) Extensive medical records -- filling two banker's boxes -- for Betty Cunningham, Mr. Cunningham's mother, document her extensive psychiatric history and treatment for severe mental illness, including chronic schizophrenia, as well as her equally extensive history of drinking and abusing drugs, including cocaine, despite attempts at treatment.

173) One report, on November 30, 1988, signed by Mark Leifer, M.D., summarizes some of the prior psychiatric admissions spanning nearly 20 years:

Patient has had numerous psychiatric admissions. Summary of her SRMC [St. Rita's Medical Center, Lima, Ohio] admissions include the following: November 1987 Cocaine abuse, alcoholism and depression. October, 1987 no diagnoses. February, 1985

depression due to adjustment disorder. August 1982 brief reactive psychosis, alcohol addiction, schizophrenia....October 1970 adjustment of adult life. April, 1969 chronic undifferentiated schizophrenia. May 1968 adjustment reaction.

The patient was discharged on Thorazine in August, 1988 but according to Dr. Demosthene's note she has not been reliable in taking it.

...

Patient...with well documented history of significant psychiatric diseases and multiple substance abuse.

174) Another medical record notes that she was "probated" to the Toledo State Hospital when she was 15 years of age. And the psychiatric hospitalizations continued, records indicate, up to 1996, including the following:

2/26/85 to 2/28/85 Acute exacerbation of schizophrenia

10/14/87-10/15/87 Depression, suicidal.

11/6/87-11/10/87 Cocaine abuse, acute, chronic, continuous; Alcoholism, possible thought disorder.

7/3/88-8/2/88 Schizophrenia, chronic, undifferentiated, continued and excessive drinking; substance abuse, multiple.

175) Betty Cunningham's medical records indicate that her other psychiatric hospitalizations were:

11/15/88-12/12/88

1/13/89-1/16/89

10/27/89-10/31/98

11/4/89-11/5/89

1990 9 days

1991 7 days

1992 8 days

1994 14 days

1995 7 days (3 admissions)

1996 1 day *Id.* at 1138-40

B. Evidence that as an Adult, Mr. Cunningham Cared for His Mother When She Was Confined to a Nursing Home

176) Sharon Cage is a nurse's aide at Lima Manor Nursing Home. Ms. Cage has provided long term care to Betty Cunningham at Lima Manor where Betty has been living since prior to the age of 50. Had counsel reasonably investigated Mr. Cunningham's background, character and history, they would have located Ms. Cage and presented her testimony at the penalty phase of Mr. Cunningham's case. According to Ms. Cage, "Jeronique Cunningham visited with his mother Betty *almost everyday*. He would sit and eat with Betty. He would often spend the night in Betty's room in order to comfort her." In her affidavit, Ms. Cage also discusses the positive impact that Mr. Cunningham's visits had on Betty.

C. Evidence from a Competent Expert, Such As a Cultural Expert, to Present to the Jury the Effects on Mr. Cunningham of His Deprivations and the Culture in which He Lived as a Child

177) Counsel failed to seek the assistance from a cultural expert and provide such evidence in mitigation of the death penalty. This failure resulted in the jurors being unaware of the effects on Mr. Cunningham of his childhood deprivations in light of the culture in which he lived as a child.

178) Had counsel provided such an expert, the jury could have learned of the cultural impact of Mr. Cunningham's family, neighborhood, and his unique experiences within that world, and could have been provided a powerful insight into the Mr. Cunningham's plight. In addition, a cultural expert could have put into context the wealth of other mitigating evidence including his mother's mental illness, alcohol and drug abuse, the effects of his

witnessing the killing of his step-father and the suicide attempts of his mother, and Mr. Cunningham's still caring for his younger siblings in the face of his own suffering and abuse.

D. Evidence that Mr. Cunningham Passed a Lie Detector Test -- Indicating That He Did Not Shoot Anyone -- Whereas His Co-Defendant Failed the Test

179) Trial counsel could have presented evidence that Mr. Cunningham's initial statements to the police concerning his lesser involvement in the events were corroborated by a lie detector test. Mr. Cunningham and co-defendant Cleveland Jackson both had several interviews with, or gave statements to, the Detectives at the Lima City Police Department. During Mr. Cunningham's interviews he maintained that the revolver he had in his possession at 503 E. Eureka St. on January 3, 2002, when the crimes occurred, was inoperable. In an interview on January 7, Detective Kleman administered the Voice Stress Analyzer test (VSA) to Mr. Cunningham. Prior to, and during, this examination, Detective Kleman made several statements to Mr. Cunningham about the reliability of the VSA, including this examination is a "detection of deception technique," "It's a very simple examination to take, however it is a very accurate examination," "I'm telling you it is accurate. I've done these tests, have cleared people, but I tell you one thing, when I'm done I will know whether or not you did it with two main questions. Whether or not you fired that .380 or whether or not you shot the baby."²

180) The VSA was structured such that the results from two of the questions would indicate Mr. Cunningham's culpability. The first question was whether Mr. Cunningham shot anyone at 503 E. Eureka St. on January 3, 2002. Mr. Cunningham answered this question in the negative. The other question that would indicate Mr. Cunningham's culpability was whether he

² This question also demonstrates the State's knowledge that the murder weapon was the .380 pistol, not the revolver. See Proposition of Law No. IV.

had shot the baby at 503 E. Eureka St. on January 3, 2002. Mr. Cunningham also answered this question in the negative.

181) After the test was completed, Detective Kleman scored Mr. Cunningham based on the VSA results. When asked, Detective Kleman told Mr. Cunningham, "You look better than I thought."

182) Mr. Cunningham's co-defendant, Cleveland Jackson, was also administered a VSA by Detective Kleman. Jackson was asked the same questions as Mr. Cunningham. Jackson also answered the questions about whether he shot anyone at 503 E. Eureka St. on January 3, 2002, and whether he shot the baby at 503 E. Eureka St. on January 3, 2002, in the negative. However, in sharp contrast to Mr. Cunningham's results, Detective Kleman told Jackson that "The problem is, your brother took a lie detector test and passed it," and "I gave him the same test I gave you. He passed, you didn't."

E. Evidence That Mr. Cunningham's Pre-Trial Statement That His Gun Did Not Fire Is Consistent With the Physical Evidence Indicating that He Was Not The Principal Offender of the Murder

183) Mr. Cunningham had given a statement to the police that indicated that his weapon was inoperable and that he did not fire a single shot in the Eureka Street apartment. This statement is consistent with all of the physical evidence retrieved from the crime scene, evidence which corroborates Mr. Cunningham's statements. Specifically, every bullet, fragment, and casing found at the crime scene was of a .380 caliber. A weapon with a clip fires this type of ammunition. Witness testimony placed the weapon with a clip in co-defendant Jackson's hands, and -- by contrast -- a revolver in the Mr. Cunningham's possession.

4. TRIAL COUNSEL'S PERFORMANCE FELL BELOW A REASONABLE STANDARD, AND MR. CUNNINGHAM WAS PREJUDICED BY THIS INEFFECTIVENESS

184) Had trial counsel presented a detailed history of Mr. Cunningham's deprived and abusive childhood, presented records and witness testimony concerning Mr. Cunningham's caring for his younger siblings as a child and as an adult, caring for his mother in a nursing home, sought a cultural expert to explain the effects on Mr. Cunningham of his childhood experiences, and provided the jury evidence that Mr. Cunningham had a lesser role in the events in that he did not shoot anyone, there is a reasonable probability that the jury would not have voted in favor of a death sentence.

A. Failure to Provide Records or Testimony of Employees from the Allen County Children's Services Concerning Mr. Cunningham's Abusive Childhood and Records of His Mother's Mental Illness and Drug Abuse

185) Evidence through the testimony of employees, or at the very least the records, describing the Allen County Children's Services role in Mr. Cunningham's life was important information that should have been presented to the jury. It was also important for the jury to hear more than the few sentences provided by Dr. Davis and Mr. Cunningham's sister about the chilling beatings that Mr. Cunningham suffered as a young child. The Children's Services records give undisputed witness to his inescapable suffering at the hands of his cruel if not demented mother.

186) Moreover, the jury required, and wanted, to hear testimony from someone other than Mr. Cunningham's mother to discuss Mr. Cunningham's upbringing. The facts contained in the Children's Services records would have provided objective information that was not prepared for a criminal trial, but was recorded when the beatings, killing, suicide attempts, neglect, abandonment and expectations for a child living in those conditions to care for multiple younger children took place.

187) An employee from Children's Services who worked with the Cunningham family over the years could have provided an unbiased account of the instability and chaotic life of this family when Mr. Cunningham was just a young child. This is precisely what jurors were looking to hear, but did not hear about in this case.

188) Jurors from Mr. Cunningham's trial were interviewed by investigator Gary Ericson who was working on co-defendant Cleveland Jackson's case. Regarding those interviews, Mr. Ericson reports that some of the jurors told him that they were disappointed that defense counsel failed to present relevant and competent testimony at the sentencing phase for them to consider when arriving at a punishment. For example, Juror Nichole Mikesell told the investigator that "She, and other jurors, wanted corroboration from other witnesses at the sentencing hearing regarding something of a positive aspect regarding Jeronique." Evidence throughout the Children's Services records would have provided the jurors with just this kind of corroboration about Mr. Cunningham, including his abusive childhood.

189) The jurors reported to Mr. Ericson that they wanted evidence to be presented at the mitigation phase that they could consider in determining Mr. Cunningham's sentence. In Mr. Ericson's interview with Juror Cheryl Osting she told him that "All 12 jurors wanted the defense to give them anything which they could use in mitigation but the defense did not deliver anything. She remembered that the jurors deliberated for 3 hours trying to find a mitigating factor but could not find anything and that the attorneys did not give a good defense at the mitigation hearing." Juror Staci Freeman also indicated that this was the hardest thing she has ever done and the defense did not do a good job and needed to present testimony from other professional people. Juror Jeanne Adams said that "the defense did not present any defense at the sentencing hearing. She said that there really was not any mitigation to work with."

190) The jury wanted to hear testimony, such as that contained in the records of the Allen County Children's Services that was compelling mitigation of the kind likely to have influenced the jury's decision in favor of Mr. Cunningham's life. This included records, if not the testimony of caseworkers documenting again and again that Mr. Cunningham was an abused, terrified young boy who still cared for his young siblings, including a new-born infant, in spite of not only his abuse, but also his witnessing his mentally ill, schizophrenic, drug abusing mother kill her long-time boyfriend, attempt on several occasions to kill herself, and threaten his caseworkers with physical violence.

191) Due to counsel's failure to reasonably and competently investigate, prepare and present relevant and available witnesses for mitigation, the jury was not provided with mitigating evidence of recognized weight for a sentence less than death. *Strickland v. Washington*, 466 U.S. 668 (1984). Nor was this a strategy decision, since the Children's Services records and employee corroboration as well as the medical records of the many psychiatric hospitalizations of Mr. Cunningham's mother for schizophrenia, drug and alcohol abuse would have been consistent with trial counsel's strategy, evidenced by his feeble attempt to provide the jury with this sympathetic information. Mr. Cunningham was prejudiced by the absence of this evidence from his mitigation hearing and the adversarial process was undermined. Counsel's ineffectiveness rendered the outcome of this capital trial unreliable. The Eighth Amendment requires the trier of fact to consider the circumstances of the crime and the defendant's background or character during the mitigation phase of a capital trial. *Boyd v. California*, 494 U.S. 370, 377 (1990); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Counsel's duty to investigate the client's background for mitigating factors is an indispensable component of the constitutional requirement of effective representation and assistance from his lawyer. *See Williams v. Taylor*,

529 U.S. 362 (2000); *Glenn v. Tate*, 71 F.2d 1204 (6th Cir. 1995); *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Rompilla v. Beard*, 545 U.S. 374 (2005). See also ABA Guidelines.

B. Evidence that as an Adult, Mr. Cunningham Cared for His Mother When She Was Confined to a Nursing Home

192) As to Mr. Cunningham's caring for his mother in the nursing home, Mrs. Cunningham's care-taker, Ms. Cage was the type of witness that Mr. Cunningham's jury wanted to hear from at the sentencing phase of the trial. Jurors interviewed by investigator Ericson reported that jurors told him that they were disappointed that defense counsel failed to present relevant and competent testimony to corroborate, thus making it believable to them, that Mr. Cunningham in fact cared for his mother in the nursing home. For example, in the report of the interview with Juror Roberta Wobler, Mr. Ericson reports that she wanted to hear testimony from "a nurse from his mother's nursing home ... (to) testify and corroborate testimony from Jeronique's mother about anything of a positive nature." Similarly, Juror Nichole Mikesell told the investigator that "She, and other jurors, wanted corroboration from other witnesses at the sentencing hearing regarding something of a positive aspect regarding Jeronique." Ms. Cage was exactly the type of person who the jurors wanted, and needed, to hear testify.

193) The jury wanted to hear testimony that supported positive aspects of Mr. Cunningham's character. The testimony of Ms. Cage would have provided this very kind of evidence to the jury from a highly credible, knowledgeable and readily available witness. This testimony would have been consistent with trial counsel's strategy.

194) Due to counsel's failure to reasonably and competently investigate, prepare and present relevant and available witnesses for mitigation, the jury was not provided with mitigating evidence of recognized weight for a sentence less than death. *Strickland v. Washington*, 466

U.S. 668 (1984). Mr. Cunningham was prejudiced by the absence of this evidence from his mitigation hearing and the adversarial process was undermined. Counsel's ineffectiveness rendered the outcome of this capital trial unreliable.

C. Trial Counsel's Failure to Request and Present a Cultural Expert in Mitigation to Explain the Effects of Mr. Cunningham's Horrific Childhood on Mr. Cunningham and His Characteristics

195) As to counsel's failure to present a cultural expert in mitigation, counsel did not provide objectively reasonable assistance and Mr. Cunningham was prejudiced as a result of this failure. *Strickland v. Washington*, 466 U.S. 668 (1984). Mr. Cunningham's rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated.

196) An ineffective assistance of counsel claim arises when trial counsel fails to present mitigating evidence and otherwise conduct a reasonable investigation into their client's background. *Williams v. Taylor*, 539 U.S. 362 (2000); *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995). Evidence concerning a defendant's familial background, personal history, and cultural experiences is not only relevant for mitigation purposes, but could significantly affect a jury's decision regarding the ultimate sentence defendant-appellant is to receive. The United States Supreme Court recognizes an indigent defendant's constitutional right under the Fourteenth Amendment's Due Process Clause to have a court-appointed expert assist his defense counsel in the mitigation phase of his capital trial. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

197) A client's culture consists *inter alia*, of the ideas, beliefs and customs that are communicated to him from birth through adulthood by persons within his culture. The client's personality, value system, his view of himself and others, and how he operates in the world are tied to the culture in which he exists.

198) For Mr. Cunningham, an African-American male, his particular culture consisted of much dysfunction. When he was very young his parents divorced. His father, Larry Cunningham, had psychological problems and ended up living for quite some time in a mental institution in Tulsa, Alabama. Mr. Cunningham's mother had significant drug and alcohol problems. Allen County Children's Services were involved with this family for a lengthy period of time. Mr. Cunningham's mother, Betty, would leave the children home alone, abuse them, attempt suicide in their presence, and just be an unfit mother. The children bounced between being in the custody of their mother, their grandmother and foster homes. Mr. Cunningham was oftentimes left to basically raise his siblings even though he was a child himself. Betty also would have relationships with men who were abusive to either her or her children. One of these abusive boyfriends, Cleveland Jackson, Sr., was the father of two of her children. Betty stabbed and killed him in front of all of her children. Although found to be self-defense, that wouldn't diminish the effect on the children of witnessing the act.

199) Mr. Cunningham did not have any positive parental influences when he was growing up. He was left to fend for himself. He was negatively influenced by bad people. Mr. Cunningham was raised in Lima, Ohio which, from the trial testimony, has drug influences present in the community in which he lived. That, coupled with Mr. Cunningham's mother's life-long mental illness and her having abused drugs and alcohol throughout Jeronique's life, were horribly negative influences.

200) The only expert who defense counsel sought to have appointed was a psychologist. This defense psychologist, Dr. Davis, is not a cultural expert. Dr. Davis does not have the appropriate expertise to testify about these aspects of Mr. Cunningham's life.

201) The jurors on Mr. Cunningham's capital trial tried to find any mitigating factor to use in weighing the aggravating circumstances against the mitigating factors, but could not. They deliberated for 3 hours trying to find a mitigating factor but could not find anything. Indeed, the jurors prayed for even one factor they could have used in mitigation but there were no mitigating factors to be found. Jurors were searching for anything of a mitigating factor, after being instructed by the judge, that if the jury found only one (1) mitigating factor that the jury could consider a life sentence as opposed to a death sentence. Testimony from a cultural expert would have provided mitigating evidence to the jury.

202) Juror Freeman told Mr. Ericson that "she knows of other people who have had bad childhoods but they do not end up killing anybody." Juror Wobler told Mr. Ericson that "In other words, Jeronique was exhibiting behavior throughout his life which culminated in the instant offense." A cultural expert could have explained to the jury how Mr. Cunningham turned out the way he did and how the dysfunction in Jeronique's life took him down the wrong path and led to this tragic incident. This expert would have examined the culture in which Mr. Cunningham was reared which is not something the jurors could relate to because it deals with much more than just residing in the same city or county, or being affluent or not. A cultural expert would have provided testimony which explained Mr. Cunningham's character, history and background and tied together the abundant mitigating evidence -- including positive, caring aspects of Mr. Cunningham's character as a child and as an adult -- that would have been given weight and effect by the jury, and would have been consistent with trial counsel's strategy.

203) Mr. Cunningham was prejudiced by counsel's failure to present testimony from a cultural expert in mitigation of the death sentence. *Strickland v. Washington*, 466 U.S. 668, 690 (1984); *Ake v. Oklahoma*, 470 U.S. 68 (1985). Relevant mitigating evidence was not presented to the jury, to the detriment of Mr. Cunningham.

D. Trial Counsel's Failure to Present Evidence from Favorable Lie Detector Test and Statements to Police of Mr. Cunningham's Lesser Involvement

204) Mr. Cunningham's co-defendant, Cleveland Jackson, was also administered a lie detector test called Voice Stress Analysis ["VSA"] by Detective Kleman. Jackson was asked the same questions as Mr. Cunningham. Jackson also answered the questions about whether he shot anyone at 503 E. Eureka St. on January 3, 2002, and whether he shot the baby at 503 E. Eureka St. on January 3, 2002, in the negative. However, in sharp contrast to Mr. Cunningham's results, Detective Kleman told Jackson that "The problem is, your brother took a lie detector test and passed it", and "I gave him the same test I gave you. He passed, you didn't."

205) This information was not presented to the jury, thus they had no idea that Mr. Cunningham and his co-defendant gave statements. They would not have had any knowledge about the VSA and its results as reported by Detective Kleman. Juror Cheryl Osting, Juror Douglas Upshaw and Juror Jeanne Adams told Mr. Ericson, the investigator for Jackson's case, that they did not know that Mr. Cunningham had made any statement to the police. Juror Nichole Mikesell told Mr. Ericson that after the trial she learned that Mr. Cunningham had made a statement to the police. She went on to say that had she viewed the video tapes of the statements, "she might have sided more with the defendant."

206) A large part of Mr. Cunningham's history and character would have been provided to the jury through the video tapes of the statements he made during the interviews with the Lima Police Department. Notably, the jury would have learned that Mr. Cunningham said his

gun did not shoot and therefore he did not shoot anyone at 503 E. Eureka St. on January 3, 2002. This was corroborated by the results of the VSA as scored and reported by Detective Kleman. Further, the jury could have learned that co-defendant Jackson was not telling the truth when he said he did not shoot anyone at 503 E. Eureka St. on January 3, 2002, again corroborated by his VSA as scored and reported by Detective Kleman.

207) The video tapes of the Lima Police Department interviews with Mr. Cunningham and Jackson were the kind of material that would have been crucial for the jury to hear. This information was the “sort calculated to raise reasonable doubt as to whether this young man ought to be put to death.” *Glenn v. Tate*, 71 F.3d at 1207. Since the jury did not know about the statements and the results, the sentence imposed upon Mr. Cunningham was unreliable and not based on a fully-informed decision. Counsel’s failure to present and argue in mitigation that Mr. Cunningham had a lesser role in the offense was unreasonable and surely prejudiced Mr. Cunningham before a jury looking for any kind of mitigation that they could consider to avoid sentencing him to death. This evidence would have been consistent with trial counsel’s strategy.

208) Also trial counsel was ineffective for failing to introduce Mr. Cunningham’s statement to the police that indicated that his weapon was inoperable and that he did not fire a single shot in the Eureka Street apartment. While these statements to the police were ruled inadmissible under the Ohio rules of evidence in the guilt phase, the rules of evidence are relaxed during the mitigation phase of a capital trial. *See* O.R.C. § 2929.04(c). While a defendant’s self-serving statements might generally carry little weight with a jury, that would not be true here, since all of the physical evidence retrieved from the crime scene corroborates Mr. Cunningham’s statements. Every bullet, fragment, and casing found at the crime scene was of a .380 caliber. A weapon with a clip fires this type of ammunition. Witness testimony placed the weapon with a

clip in co-defendant Jackson's hands, and a revolver in Mr. Cunningham's possession. Without a single bullet, fragment or casing that was demonstrated to be ammunition for a revolver, jurors may well have harbored doubts as to whether Mr. Cunningham fired any shots at the Eureka Street apartment.

E. Trial Counsel's Ineffective Closing Argument at the Penalty Phase

209) In addition, trial counsel did not even make an adequate plea for Mr. Cunningham's life in closing argument. Defense counsel made their closing plea for Cunningham's life in forty-nine lines of transcript, barely over two pages, of which counsel spoke only four truncated sentences about mitigation, reproduced here in their entirety:

The mitigating factors that we've presented to you include a mental disorder not rising to the level of an illness. There's a difference. Multiple home placements and inconsistencies in a man's life, substance abuse issues. And as I've said these are not excuses and I don't want you to consider them as excuses. I want you to consider them as factors in making your determination.

Only this and nothing more was said to the jury in this last chance to place before the jury Mr. Cunningham's life, history and character to be balanced against the aggravating factors, and as the basis for a final plea for mercy.

210) Trial counsel should have, but obviously did not, tell the jurors of the many fierce, unprovoked beatings unleashed upon Mr. Cunningham by his mother, of her essential abandonment of Mr. Cunningham while demanding on threat of more beatings and even death to Mr. Cunningham that he clean, cook, and care for his many younger siblings though he was as young as 7, 8 and 9 years of age. Counsel should have reminded the jury of Betty Cunningham's psychotic mental illness, schizophrenia, of her drug and alcohol abuse, her decades-long history of admissions to psychiatric hospitals, of her use of the family income to buy drugs and alcohol while Mr. Cunningham and his siblings went hungry, of her terrifying suicide attempts

performed in front of Mr. Cunningham, of her stabbing to death her boyfriend, also in front of Mr. Cunningham, and of her many threats of bodily harm to caseworker after caseworker resulting in their withdrawal from Mr. Cunningham's case and even apparently the closing of his case altogether. See above, section 3-A of this claim.

211) Counsel should have told the jury about ample, credible evidence that even after his nightmarish childhood, Mr. Cunningham took care of his cruel and abusive mother, visiting her daily in the nursing home to which she was confined. See above, section 3-B of this claim.

212) Counsel should have, relying on a competent expert, such as a cultural expert, reinforced such testimony and reminded the jury of the effects upon Mr. Cunningham's life flowing from the circumstances of his childhood. See above, section 3-C of this claim.

213) Counsel should have argued that evidence existed tending to show that Mr. Cunningham had a lesser role in the events, in that his gun likely did not fire at all, and that evidence showed that he did not shoot anyone. See above, section 3-D of this claim.

214) Counsel should have introduced in mitigation evidence of Mr. Cunningham's pre-trial statement to police that his gun was inoperable and that he did not fire a single shot in the Eureka Street apartment, and introduced all of the guilt-phase physical evidence that corroborated his pre-trial statement: namely that every bullet, fragment and casing found at the crime scene was of the type fired by his co-defendant's gun, a weapon with a clip, unlike the weapon in Mr. Cunningham's possession. See above, section 3-D of this claim.

215) Including the above stated evidence in Mr. Cunningham's closing argument would have been consistent with trial counsel's strategy. As it was, counsels' closing argument failed to apprise the jury of the relevant and humanizing mitigation presented through witness testimony. A powerful plea for Jeronique Cunningham's life could be made based on the

mitigation evidence that should have been presented. Counsel completely failed to make that plea.

216) This error deprived Cunningham of his rights to due process and against cruel and unusual punishment, rendering counsel ineffective and Cunningham's mitigation phase unfair. U.S. Const. Amends. VI, VIII, XIV.

5. CONCLUSION

217) The Sixth Circuit has explained that, "since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused." *Combs v. Coyle*, 205 F.3d 269, 289-90 (6th Cir. 2002), *quoting* ABA Standards for Criminal Justice Prosecution Function and Defense Function 120 (3d ed. 1993). As indicated above, trial counsel simply failed to comply with these minimum standards. Trial counsel's performance was deficient, and had trial counsel's performance not been deficient, there is a reasonable probability that Mr. Cunningham would not have been sentenced to death.

PROPOSITION OF LAW NO. VIII

THE JURY INSTRUCTIONS DEPRIVED MR. CUNNINGHAM OF HIS RIGHT TO DEFEND AGAINST THE STATE'S CHARGES, TO CONFRONT THE STATE'S WITNESSES, HIS RIGHT TO A RELIABLE SENTENCE, AS WELL AS HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Introduction.

218) The trial court instructed Cunningham's jury in a manner that eviscerated the effectiveness of defense counsel's cross-examination of the State's witnesses. The court's instructions told the jury that inconsistencies among and between a witness's testimony did not impact on his or her credibility. Resultantly, the court's instructions hampered Cunningham's rights to defend against the charges, to confrontation, a reliable sentence, due process, and equal protection. U.S. Const. amends. V, VI, VIII, XIV.

Facts.

219) During the trial phase of Cunningham's capital trial, the court instructed the jury regarding inconsistencies in witness testimony. In pertinent part, the court stated:

Also, discrepancies in the witness' testimony, or between his or her testimony and that of others, if there are any, does not necessarily mean that you should disbelieve that witness, as people commonly forget facts or recollect them erroneously after the passage of time. In considering a discrepancy in a witness testimony, you should consider whether such discrepancy concerns an important fact or a trivial fact.

The trial court gave the identical instruction in its preliminary instructions to the jury.

Law.

220) The Sixth Amendment's guarantee of an accused's right to confront witnesses is a fundamental right imposed on the states via the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965). This right is "essential to due process." *Chambers v. Mississippi*, 410 U.S.

284, 294 (1973). The confrontation right includes both the right to face the state's witnesses and the right to cross-examine them. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987).

221) The right to cross-examination promises the defendant the opportunity to demonstrate bias as well as that testimony is "exaggerated or unbelievable." *Id.* (internal citations omitted). Cross-examination is invaluable in "exposing falsehood and bringing out the truth in the trial of a criminal case." *Pointer*, 380 U.S. at 404 (citing 5 Wigmore, Evidence § 1367 (3d ed. 1940)). Oftentimes, a criminal defendant's sole defense presentation is the cross-examination of the State's witnesses. Thus, any infringement on that right can impact the defendant's ability to present a defense. The Due Process Clause guarantees every defendant "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984); *see also Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Defendants must be given more than cross-examination in name, it too must be meaningful. *See Davis v. Alaska*, 415 U.S. 308 (1974); *Olden v. Kentucky*, 488 U.S. 227 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

Argument.

222) Jeronique Cunningham presented three witnesses to defend against the State's charges. The crux of his defense plainly was discrediting the State's case through the cross-examination of witnesses. The trial court's instruction was fatal to Cunningham's defense.

223) In essence, the trial court instructed Cunningham's jury that discrepancies in witness testimony were insignificant. Instead, such inconsistencies were common. This was a decision to be made by the jury as the trier of fact. *See Rock v. Arkansas*, 483 U.S. 44, 54 (1987); *Westinghouse Elec. Corp. v. Dolly Madison Leasing & Furniture Corp.*, 42 Ohio St.2d 122, 132 (1975). However, if a juror felt an inconsistency or contradiction negatively affected a

witness's credibility or believability, this was directly contradicted by the trial court's instruction. This unduly influenced the jury and prejudicially affected Cunningham's constitutional rights.

224) This instruction is inconsistent with decades of understanding of trial practice. The United States Supreme Court recognizes the importance cross-examination plays in the defense against criminal charges. For example, in *Rock*, the Court noted that "[t]he more traditional means of assessing accuracy of testimony also remain applicable...cross-examination even in the face of a confident defendant, is an effective tool for revealing inconsistencies." *Id.*, at 61. Not only is cross-examination a vital component of due process, establishing *inconsistencies* is an elemental component of testing the accuracy of witness testimony. *Id.*

225) The importance of cross-examination and establishing inconsistencies in witness testimony is the benchmark of effective advocacy. A witness's credibility "is always at issue." *Westinghouse*, 42 Ohio St.2d at 131. Demonstrating inconsistent or contradictory statements is the primary method for attacking a witness's credibility. *Id.* Similarly, credibility is weakened where contradicted by record evidence or inconsistencies. *State v. Calhoun*, 86 Ohio St.3d 279, 285 (1999). *See also Disciplinary Counsel v. Furth*, 93 Ohio St.3d 173, 184 (2001) (found against respondent after he gave inconsistent testimony); *State v. Mason*, 82 Ohio St.3d 144, 161 (1998) (no prosecutor misconduct where remarked on inconsistencies between defendant's pre-trial statement and trial testimony); *State v. Gillard*, 78 Ohio St.3d 548, 562 (1997) (Stratton, J., dissenting) (recognizing an attorney unimpeded by a conflict of interest could have impeached identifications by exploiting inconsistencies in testimony); *State v. Hill*, 75 Ohio St.3d 195, 204 (1996) (permissible to encourage jury to doubt defendant's credibility because of inconsistent statements); *University of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980) (court may give

testimony no weight when it is internally inconsistent or impeached with prior inconsistent statements); *Cincinnati Bar Association v. Allen*, 84 Ohio St. 3d 1203, 1203 (1998) (Stratton, J., concurring) (finding serious credibility issues where three witnesses' testimony had inconsistencies and contradictions).

226) The courts recognize the reality of witness testimony - discrepancies matter. Indeed, the wholesale rejection of internally, or externally, inconsistent postconviction affidavits, without an evidentiary hearing is a hallmark of Ohio's post-conviction process. *Calhoun*, 86 Ohio St.3d at 285. No one should deny the value of cross-examination, *Pointer*, 380 U.S. at 404, the primary method of which is showing inconsistencies or contradictions. *Westinghouse*, 42 Ohio St.3d at 131.

227) Ohio's model jury instructions tell jurors to test a witness's credibility via the accuracy of his or her memory. O.J.I. sec. 5.30(3). Evidence Rules 607 and 613 provide for impeachment via prior inconsistent statements, even in rather unusual circumstances. Moreover, inconsistencies in witness statements entitle defendants to otherwise undiscoverable reports and grand jury testimony. Ohio R. Crim. P. 16. The Ohio Jury Instructions, the Ohio Rules of Evidence, and the Ohio Rules of Criminal Procedure further demonstrate the principle that inconsistencies and contradictions are not necessarily normal. Inconsistencies and contradictions are extremely relevant to the assessment of a witness's believability and credibility, a legal principle that was directly contradicted by the trial court's instruction.

228) Despite clear recognition from both the United States Supreme Court that inconsistencies weigh heavily in the evaluation of witness testimony, the trial court instructed Cunningham's jury in a manner calculated to neutralize the impact of any inconsistencies among

and between the State's witnesses. This did significant damage to Cunningham's defense, which was primarily presented through the cross-examination of State's witnesses.

229) Defense counsel sought to establish that Cunningham did not fire a shot, that Cunningham did not participate in the robbery at Loyshane Liles's home, and that Cunningham did not have a plan to rob and kill the people in Liles's home. Witness testimony was inconsistent on these points. Tarra Cunningham was the only witness to testify to a plan to rob Liles. Tarra also testified that she observed Cunningham and Cleveland Jackson, Jr. wiping down a gun and bullets earlier that day. The prosecution used this information to argue that Cunningham and Jackson committed the murders with prior calculation and design. On cross-examination, defense counsel asked Tarra if she recalled telling the police that she saw Jackson wiping down the gun and bullets alone. If Jackson alone wiped down the gun and bullets, this would help to refute prior calculation and design on Cunningham's part. The trial court's instruction minimized the importance of this discrepancy.

230) The State also argued that prior calculation and design was present because Cunningham and Jackson did not speak to each other while in the Liles' home. Several witnesses testified that they did not see Cunningham and Jackson speak while in the kitchen. However, James Grant testified that Jackson said something to Cunningham before the shooting began in the kitchen. Once again, the trial court diminished the value of this inconsistency.

231) Other inconsistencies arose among and between the State's witnesses. Both Dwight Goodloe, Jr. and Coron Liles testified that Cunningham did not direct the people in the kitchen to turn over their jewelry and money. Instead, it was Loyshane Liles who told them to give Cunningham and Jackson whatever they had. However, both Tomeaka Grant and James Grant testified that Cunningham directed them to give him their jewelry and money. This

information was relevant to whether Cunningham participated in a robbery. Again, the trial court's instruction severely minimized the impact of these significant inconsistencies.

232) Several witnesses testified that they saw Cunningham fire his weapon. However, this testimony was inconsistent with the physical evidence from the crime scene. Every bullet, fragment, and casing found at the scene was of a .380 caliber. A weapon with a clip fires this type of ammunition. Witness testimony plainly places the weapon with the clip in Jackson's hands and a revolver in Cunningham's possession. However, this discrepancy was minimized by the trial court's instruction.

233) The trial court crippled Cunningham's defense against these crimes. The inconsistencies in witness testimony could have provided a strong challenge to the arguments that Cunningham was the shooter, that he participated in a robbery, and that Cunningham committed these murders with prior calculation and design. While Cunningham was able to make these points on cross, his efforts were rendered futile by the trial court's instruction. It was the jury's task to determine the "credit and weight" of witness testimony. *Rock v. Arkansas*, 483 U.S. 44, 54 (1987) (internal citation omitted). *See also Chambers*, 410 U.S. at 295 (jury judges whether testimony is worthy of belief); *State v. Scott*, 26 Ohio St. 3d 92, 102 (1986) ("the question of credibility of conflicting testimony and the weight to be accorded certain evidence are matters primarily left to the trier of fact. *State v. DeHass*, 10 Ohio St. 2d 230 (1967).") Rather than leaving the issue solely to the jury, the trial court unduly influenced the jury in its assigned task via the flawed instruction.

234) Not only is the court's instruction fatally flawed, it is also illogical. The court's instruction minimized discrepancies in the witnesses' testimony. In essence, the court told the jury that inconsistencies were normal, thus eviscerating the impact of significant disparities in

witnesses' testimony. However, the court's instructions fail to recognize that an untruthful witness can tell a very consistent lie. Just as a witness's inconsistency might not demonstrate a lack of veracity, a witness's consistent story does not necessarily prove that he or she is being truthful. The trial court's instruction ignored the latter reality.

235) The jury should have determined the significance of any inconsistencies or contradictions without the trial court's undue influence. Instead, the trial court's instruction created an un-level playing field for the State and the defense. The State was protected from any weaknesses in its case found in witness' testimony. The jury was told that it is "normal" to have inaccuracies in one's memory. The jury was not told similarly, that a witness can tell the same lie consistently. The balance was not kept true between the State and the defense in violation of the Equal Protection Clause of the United States Constitution. *See Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934); *see also Wardius v. Oregon*, 412 U.S. 470, 475 (1973).

Mitigation phase.

236) The trial court's instruction had a carry-over effect to the sentencing phase of Cunningham's capital. *See State v. Thompson*, 33 Ohio St.3d 1, 15 (1970). The nature and circumstances of the offense as well as Cunningham's degree of participation in the offenses were relevant to the jury's sentencing determination. *See O.R.C. § 2929.04(B), (B)(6)*. The inconsistencies among and between the State's witnesses provided counsel with the opportunity to argue that Cunningham did not shoot the victims, that he did not plan to kill anyone, and that he was not as culpable as his codefendant because of his lesser degree of participation in the offenses. *See id.* Again, however, the trial court's instruction eviscerated the significance of these inconsistencies thus hampering the usefulness of these fact in mitigation.

Reasonable Doubt

237) The reasonable doubt charge, taken as a whole, did not adequately convey to jurors the stringent “beyond a reasonable doubt” standard. The “willing to rely and act” language of § 2901.05 did not guide the jury because it is too lenient. The statutory definition of reasonable doubt is further flawed because the “firmly convinced” language represents only a clear and convincing standard. As a result, the jury convicted and sentenced Jeronique Cunningham on a standard below that required by the Due Process Clause of the Fourteenth Amendment. This was a fundamental, structural error which requires reversal of Mr. Cunningham’s convictions and sentences.

238) The United States Supreme Court in *In re Winship*, 397 U.S. 358 (1970), addressed the fundamental nature of the reasonable doubt concept. To maintain confidence in our system of laws, the Court continued, proof beyond a reasonable doubt must be held to be proof of guilt “with utmost certainty.” *Id. See Cage v. Louisiana*, 498 U.S. 39, 41 (1990).

239) Likewise, the O.R.C. § 2901.05 definition of reasonable doubt allows jurors to find guilt based on proof below that required by the Due Process Clause. While this Court has held that the statutory reasonable doubt definition is not an unconstitutional dilution of the State’s burden of proof, *State v. Nabozny*, 54 Ohio St.2d 195, 202-203, *vacated as to death penalty*, 439 U.S. 811 (1978), the United States Supreme Court, the majority of federal circuit courts and lower Ohio courts have condemned the language in the statute that defines reasonable doubt as “proof of such character that an ordinary person would be willing to rely and act upon in the most important of his own affairs.”

240) In *Holland v. United States*, 348 U.S. 121, 140 (1954), the United States Supreme Court indicated strong disapproval of the “willing to act” language when defining proof beyond a reasonable doubt. The majority of the federal circuit courts have disapproved the “willing to act” phrase and adopted a preference for defining proof beyond a reasonable doubt in terms of a prudent person who would hesitate to act when confronted with such evidence. See, e.g., *Monk v. Zelez*, 901 F.2d 885 (10th Cir. 1990); *United States v. Colon*, 835 F.2d 27 (2nd Cir. 1987); *United States v. Pinkney*, 551 F.2d 1241 (D.C. Cir. 1976); *United States v. Conley*, 523 F.2d 650 (8th Cir. 1975).

241) The “firmly convinced” language in the first sentence of Ohio Rev. Code Ann. § 2901.05(D) does not define the reasonable doubt standard; it defines the clear and convincing standard. In *Cross v. Ledford*, 161 Ohio St. 469, syl. (1954), this Court defined clear and convincing evidence as that “which will provide in the mind of the trier of facts a firm belief or conviction to the facts sought to be established.” (Emphasis added.) That definition is quite similar to Ohio Rev. Code Ann. § 2901.05(D), where reasonable doubt is presented only if jurors “cannot say they are firmly convinced of the truth of the charge.” (emphasis added). Resultantly, jurors are given a definition of reasonable doubt in the first sentence of Ohio Rev. Code Ann. § 2901.05(D) which fails to comport with the Due Process Clause.

242) Taken as a whole, Ohio Rev. Code Ann. § 2901.05(D) defines reasonable doubt by an insufficient standard. Accordingly, the instructions in Mr. Cunningham’s case allowed his jury to find guilt and death penalty verdicts based on a degree of proof below that required by the Due Process Clause.” *Cage*, 498 U.S. at 41.

Conclusion.

243) Cunningham's right to cross-examination was rendered a futile act. The "diminution" of Cunningham's right to confrontation and cross-examination "calls into question the ultimate integrity of the fact-finding process." *Chambers*, 410 U.S. at 295. The trial court's instruction infringed on Cunningham's confrontation rights, his right to present a meaningful defense, his right to a reliable death sentence, as well as his rights to due process and equal protection.

PROPOSITION OF LAW NO. IX

THE TOTAL BREAKDOWN IN OHIO'S CAPITAL SENTENCING PROCESS DEPRIVED MR. CUNNINGHAM OF HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Trial court opinion.

244) On June 25, 2002, the trial court issued its sentencing opinion pursuant to O.R.C. § 2929.03 (F). After identifying the aggravating circumstance and discussing what it perceived to be the mitigating factors, the trial court sentenced Jeronique Cunningham to death. However, the trial court's opinion reveals that it failed to review all mitigating evidence presented by Cunningham. Moreover, the trial court's weighing of the aggravating circumstances against the mitigating factors was inadequate; the court accorded no weight to mitigating factors repeatedly recognized by the courts. Further, the court did not consider the penalty for each aggravated murder count separately.

245) The trial court's opinion is inadequate and does not comply with the requirements of O.R.C. § 2929.03(F). These errors denied Cunningham the individualized sentencing guaranteed by the Eighth and Fourteenth Amendments to the United State Constitution. *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Zant v. Stephens*, 462 U.S. 862, 879 (1983). *See also Clemmons v. Mississippi*, 494 U.S. 738 (1990).

Trial court opinion requirements.

246) O.R.C. § 2929.03 (F) provides the requirements for a trial court opinion:

The court or the panel of three judges, when it imposes a 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.

This statute requires the trial court to articulate its reasoning for sentencing a capital defendant to death. *State v. Maurer*, 15 Ohio St. 3d 239, 237 78 (1984). The failure of a trial court to comply with this requirement deprives a reviewing court of the “trial court’s perceptions as to the weight accorded all relevant circumstances.” *Id.*

247) In the present case, the trial court failed to conform its opinion to the requirements of O.R.C. § 2929.03(F). In addition, the trial court improperly conducted its weighing process. These errors deprived Cunningham of the independent review he is entitled to under state and federal law. Thus, his death sentence cannot stand.

248) At page four of the trial court’s opinion, the court indicates that Dwight Goodloe, Jr. testified that Cunningham shot him. Review of Goodloe’s testimony demonstrates that he gave no such testimony. This was a fundamental flaw in the court’s opinion.

249) The trial court failed to comprehend, and thus consider, the mitigation evidence presented by Cunningham. The court gave little weight to the fact that Cunningham came from a broken home, which resulted in both his mother and Cunningham being abused. The trial court gave no weight to Cunningham’s foster home placements, which interrupted his education and hurt his ability to form good relationships. The trial court also gave no weight to Cunningham’s mental illness because it was not the same as his parents,’ or to his use of drugs and alcohol at the age of sixteen.

250) Even a brief review of Cunningham’s mitigation transcript demonstrates that some of the most compelling mitigation evidence presented fails to be incorporated in the trial

court's opinion. Cunningham lived in far more than a broken home. He lived in a violent a chaotic environment that served to regularly attack his young mind.

251) Cunningham's mother was a drug abuser who frequently abandoned her children. She regularly abused Cunningham, which resulted in the school reporting the problem to Children's Services. At the age of seven or eight, Cunningham witnessed his mother murder his stepfather. Subsequently, Cunningham and his siblings witnessed his mother's attempted suicide.

252) Conditions in the home were violent and deplorable. One report indicates that garbage and dirty clothing were strewn about. A case worker witnessed one of the children eating garbage mixed with glass.

253) Cunningham began drinking at nine years of age. He was diagnosed as an alcoholic at the age of sixteen and placed in a substance abuse program. As a result of this horrific childhood, Cunningham was diagnosed with depression and post-traumatic stress disorder as early as age thirteen.

254) Not one of these facts is included within the trial court's sentencing opinion. Cunningham's childhood is ripe with compelling mitigation. The trial court had an obligation to consider all the mitigating evidence presented, but failed to consider some of the most compelling reasons for imposition of a life sentence in this case. *Lockett; Eddings*.

255) The trial court's review of Cunningham's mitigation was inadequate. It ignored compelling mitigation and gave little to no weight to those factors it did consider. The court's review was inconsistent with the mandates of *Lockett; Eddings*.

256) Cunningham was convicted of two counts of aggravated murder. Attached to both counts at sentencing was one aggravating circumstance. Specifically, the circumstance was Cunningham's involvement in the purposeful killing, or attempt to kill, two or more persons.

Ohio law required the trial court to weigh only the aggravating circumstance related to each count in assessing the penalty for that count. *State v. Cooley*, 46 Ohio St. 3d 20, para. 3, syl. (1989).

257) Each murder was a separate offense subject to a separate penalty. The trial court was required to determine whether the death penalty was appropriate for each of the counts for which Cunningham was convicted. Thus, the trial court was required to perform the weighing process twice. While the death penalty may be appropriate for one count, it may be inappropriate for another count. In fact, this Court noted in *Cooley* that prejudice could occur in a case in which aggravation outweighs mitigation on one count, but not the other. *Id.* at 38.

258) From the trial court's opinion, it is unclear how the trial court reached its conclusion to sentence Cunningham to death. The trial court could have collectively weighed the aggravating circumstance from each, for a total of two, against the mitigation evidence. This too would have been improper. This would have denied Cunningham the "consideration of *** the circumstances of the particular offense *** that is a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* (citing, *Woodson v. North Carolina*, 428 U.S. 280 (1976).

259) Because it is unclear how the trial court performed its review, this Court cannot determine what the result of re-weighing by the court would be. Moreover, this Court has concluded that sometimes deficiencies in a case are too severe to correct by simply reevaluating the evidence. *Green*, 90 Ohio St.3d at 364. The failure of the trial court to independently determine the appropriateness of the death sentence for each count is a deficiency that this Court cannot correct through a reevaluation of the evidence.

Conclusion.

260) Capital punishment is only constitutional if the law of the State limits those cases that are eligible for the death penalty by guiding the sentencer's discretion with specifically enumerated factors that may be considered in favor of death. *Gregg v. Georgia*, 428 U.S. 153 (1976). If the sentencer is not acting under this "guided discretion," then the imposition of the death penalty is considered both arbitrary and void. *Furman v. Georgia*, 408 U.S. 238 (1972). When a sentencer eschews the State's statutory framework its discretion is unguided and the resulting death penalty is rendered in violation of the constitution. *Lockett; Eddings*.

261) The sentencing opinion filed by the trial court in the instant case clearly shows that the trial court abandoned the statutory framework for capital punishment, and instead imposed its sentence with unguided discretion based upon arbitrary and capricious factors in violation of the Eighth and Fourteenth Amendments to the United States Constitution. *Gregg*, 428 U.S. 153. The cumulative effect of these errors reflects serious violations of the deliberative process.

Preventing the sentencers from considering residual doubt contravenes *Lockett and Eddings*.

Introduction.

262) In *State v. McGuire*, 80 Ohio St. 3d 390, 403-04 (1997), this Court held that residual doubts of guilt are irrelevant to the issue of whether a person convicted of a capital crime should be sentenced to death or a lesser punishment. This decision flatly precludes the capital sentencer in Ohio from entertaining residual doubts of guilt with regard to the capital defendant's moral culpability; notwithstanding proof beyond a reasonable doubt of his or her legal culpability.

Facts.

263) Defense counsel filed a motion on April 22, 2002 requesting that residual doubt of guilt be included as a mitigating factor during the mitigation phase of Cunningham's trial. The trial court overruled counsels' request.

264) During the mitigation phase, counsel still attempted to argue residual doubt as a mitigating factor. During defense counsels' opening statement the following transpired:

DEFENSE COUNSEL: We believe that from all the evidence that you have heard in the last ten (10) days and the evidence that you will hear today that no one could say with complete certainty that Jeronique Cunningham took a life or if he just --

PROSECUTOR: Objection.

THE COURT: Opening statement, overruled.

DEFENSE COUNSEL: Or if he participated in a tragedy, which resulted in the loss of life on January 3rd of this year. If there's any doubt in your mind as to Jeronique Cunningham's involvement on January 3rd of 2000 --

PROSECUTOR: Objection, your honor.

An unrecorded sidebar discussion followed the State's objection. When defense counsel returned to their opening statement, there was no further mention of residual doubt. Given the trial court's ruling on the defense's earlier motion, it is apparent that the trial court sustained the prosecution's objection.

265) Had counsel been permitted to argue residual doubt, a powerful argument could have been made on Cunningham's behalf. Every bullet, fragment, and casing found at the scene was .380 caliber. A weapon with a clip fires this type of ammunition. Witness testimony placed the weapon with the clip in Jackson's hands and a revolver in Cunningham's possession. Without a single bullet, fragment, or casing that was demonstrated to be ammunition for a revolver, jurors may well have harbored doubts as to whether Cunningham fired any shots at the

Eureka Street apartment. Additionally, the rules of evidence are relaxed during the mitigation phase of a capital trial. *State v. Landrum*, 53 Ohio St.3d 107 (1990) (“in response, we recognized that the rules of evidence do not strictly apply to sentencing proceedings.”) *See also State v. Williams*, 23 Ohio St.3d 16, 23 (1986). *See also*, O.R.C. § 2929.04(c). While the trial court ruled Cunningham’s statements to the police inadmissible at trial, defense counsel could have presented those statements during the mitigation phase. Cunningham’s statements indicate that his weapon was inoperable and that he did not fire a single shot in the Eureka Street apartment. While a defendant’s self-serving statements might generally carry little weight with a jury, that would not be true under these circumstances. The physical evidence retrieved from the crime scene corroborates Cunningham’s statements. This would have rendered them more credible to the jury.

Argument.

266) In *McGuire* this Court rejected residual doubt as a mitigating factor, because it reasoned that residual doubt of guilt was “illogical” following a verdict of guilt beyond a reasonable doubt. 80 Ohio St.3d at 403. This reasoning overlooks, however, the essential distinction between residual doubt as mitigation and the State’s burden of proof at trial. At trial, the issue for the trier of fact is whether the accused is legally culpable on each essential element beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). A proper standard of proof beyond a reasonable doubt must direct the trier of fact to decide the legal, and not moral, culpability of the accused. *See Victor v. Nebraska*, 511 U.S. 1, 21 (1994) (Kennedy J., concurring).

267) Unlike the trial phase, in which the issue is legal culpability beyond a reasonable doubt, the issue for the trier of fact at the penalty phase is the moral culpability of the already

convicted defendant. *See Gregg v. Georgia*, 428 U.S. 153, 184 (1976) (capital punishment is “expression of society’s moral outrage”) (footnote omitted); *Enmund v. Florida*, 458 U.S. 782, 800 (1982) (intent of capital defendant relevant to “moral guilt”); *Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter J., concurring) (Eighth Amendment requires “reasoned moral judgment” in capital cases); *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring) (capital sentencing proceeding inquires into defendant’s moral culpability). Thus, this Court incorrectly applied Supreme Court precedent to call residual doubts “illogical” and to bar its presentation and argument. *See* 80 Ohio St.3d at 405. (Pfeifer J., concurring). Reasonable doubts exist in the context of the quantum of proof for legal, and not moral, culpability. *See Victor*, 511 U.S. at 21 (Kennedy J., concurring). Residual doubts exist in the context of a convicted person’s moral culpability. Further, the use of the beyond a reasonable doubt standard for sentencing under O.R.C. § 2929.03(D)(1) does not diminish this distinction between legal and moral culpability. Instead, the Revised Code merely provides guidance to weigh those factors that are used to assess the moral culpability of the defendant. Death is different in kind from lesser punishments because of its extreme finality. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Due to the unique nature of death as a punishment, “there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” *Id.* Accordingly, the Supreme Court held in *Woodson*, and since then, that there is a reliability component to capital jurisprudence under the Eighth and Fourteenth Amendments. *See id.*; *Simmons v. South Carolina*, 512 U.S. at 172 (Souter J., concurring) (citations omitted); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (instruction on lesser offense required in capital case when supported by evidence because of risk of mistake in imposition of

death penalty); *Parker v. Dugger*, 498 U.S. 308, 321 (1991) (meaningful appellate review is crucial to review of capital sentences).

268) *McGuire's* prohibition of residual doubt in mitigation violates this reliability component of capital jurisprudence. The objective of the reliability component is to eliminate the risk of a nonreversible, fatal mistake in the imposition of the death penalty. See *Woodson*, 428 U.S. at 305.

269) There are three distinct interests in a reliable capital sentencing outcome. First, and most apparent, is the defendant's interest in reliable sentencing. Mistakes happen in our criminal justice system. Indeed, Justice Pfeifer's concurrence in *McGuire*, joined by the Chief Justice, aptly noted the plight of Randall Dale Adams:

Adams, who had recently moved to Dallas from Grove City, Ohio, had met sixteen-year-old David Harris on the morning of the day before the murder. They spent the day together, driving around Dallas. They disputed what occurred in the evening. Adams claimed that Harris dropped him off near his motel at around 9:30 that evening. Harris testified that he and Adams went to a late show at a drive-in theater, and that after that, when the pair was pulled over shortly after midnight by police for driving without headlights. Harris slumped unseen in the front seat while Adams shot one of the officers in cold blood. The jury believed Harris, and the judge sentenced Adams to death.

By chance, Adams's case caught the attention of filmmaker Errol Morris. Morris' film about the case, "The Thin Blue Line" (1988), generated publicity in the case and featured self-incriminating footage of Harris, filmed while he was serving time on death row for another murder. On March 21, 1989, Adams was finally released.

80 Ohio St. 3d at 405 (Pfeifer, J., concurring).

270) Another Ohioan wrongly sentenced to death was Dale Johnston:

"Johnston was sentenced to death for the murder of his stepdaughter and her fiancée. His conviction was overturned in 1988 by the Ohio Supreme Court because the prosecution withheld

exculpatory evidence from the defense, and because one witness had been hypnotized. The state later dropped charges against Johnston.”

Richard C. Dieter, *Innocence And The Death Penalty: The Increasing Danger Of Executing The Innocent*, A Death Penalty Information Center Report at 12-13 (July 1997) [hereinafter, Dieter].

271) No one has a greater interest in reliable capital sentencing than people like Adams, Johnston, and Cunningham. A finding of proof beyond a reasonable doubt is cold comfort to a person who is mistakenly executed. *McGuire* infringed on Cunningham’s interest in a reliable capital sentencing proceeding and constitutional error resulted. *See Woodson*, 428 U.S. at 305; *Simmons*, 512 U.S. at 172 (Souter, J., concurring).

272) Aside from the defendant’s interest in reliability, society also has an interest in having its ultimate punishment inflicted with assurances of reliability. *See generally, Gregg*, 428 U.S. 153; *Woodson*, 428 U.S. 280. Although far less personal to society than to the defendant, the risk of avoiding a mistake in capital sentencing creates a strong societal interest in the reliability of death cases. Residual doubt is a necessary “backstop” to avoid mistakes. If the wrong result is reached at trial, but the evidence is nevertheless legally sufficient under the stringent test in *Jackson v. Virginia*, 443 U.S. 307 (1979), the defendant must produce evidence outside the record to exonerate himself or herself. Mitigation as residual doubt, however, may correct this problem. If residual doubt results in a life sentence, then the defendant lives to fight for his innocence from prison. The American Law Institute noted this benefit of residual doubt when the ALI included residual doubt in its Model Penal Code:

After the U.S. Supreme Court overturned existing death penalty statutes in 1972, many states wrote statutes which closely paralleled the recommendations of the American Law Institute’s (ALI) Model Penal Code. Indeed, in *Gregg v. Georgia*, which gave approval to some states, new statutes, the Court specifically referred to the Model Penal Code as a source for constructing an

acceptable statute. In this code, there was an attempt to minimize mistaken executions by allowing the trial court to withhold a death sentence if the evidence left some doubt about the defendant's guilt. These drafters realized the lingering possibility of innocence despite a conviction "beyond a reasonable doubt." The Model Penal Code contained the following provision:

§ 210.6 Sentence of Death for Murder; Further Proceedings to Determine Sentence.

- (1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree [i.e., a non-death sentence] if it is satisfied that:

* * * *

(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

The ALI explained the need for such a provision in its Comment to this subsection:

[S]ubsection (1)(f)...is an accommodation to the irrevocability of the capital sanction. Where doubt of guilt remains, the opportunity to reverse a conviction on the basis of new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal.

Dieter at 7 (emphasis in original and footnotes omitted).

273) The prospect of a mistake in capital sentencing is very real: "For every 7 executions -- 486 since 1976 -- 1 other prisoner on death row has been found innocent." Joseph P. Shapiro, *The Wrong Men On Death Row*, U.S. News & World Report, Nov. 9, 1998 at 22. *See also* Dieter at iii (69 people released from death row between 1973 and July 1997 "after evidence of their innocence emerged"). Because residual doubt in mitigation lessens the risk of a mistake, it must be a mitigating factor available to the jury. The failure to permit its consideration undermines society's interest in reliable capital sentencing.

274) The trier of fact, who passes judgment on a fellow human being, holds the third and final interest in reliable capital sentencing. There can be little doubt that the weighing decision at the penalty phase is a “truly awesome responsibility.” *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985). The preclusion of residual doubt in *McGuire* makes this very personal and very difficult decision unreliable to the men and women who comprise Ohio’s juries.

275) As the Court noted in *Caldwell*:

A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion.

Id. at 333 (citations omitted). *See also Harris v. Alabama*, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting) (jurors “answer only to their own consciences”). Jurors must answer to their own consciences to make a difficult and uncomfortable decision. It is the trier who must live with the decision to condemn a fellow human being. As the result of *McGuire*, Cunningham’s jury must bear the burden of imposing a sentence of death without the benefit of considering residual doubt. This is indeed too high a burden for this Court to impose on the people who have to carry out Ohio’s capital system. A juror should not be forced, as a matter of law, to regret a decision of this magnitude. Allowing judges and jurors to parse residual doubts on the issue of moral culpability can alleviate the very real personal strain of capital sentencing.

276) The *McGuire* decision is an unreasonable application of, or contrary to *Franklin*. The *Franklin* Court expressed doubt whether residual doubt was constitutionally required. 487 U.S. at 172-75. The Court assumed no constitutional error in *Franklin*, however, because “[t]he trial court placed no limit whatsoever on [Franklin’s] opportunity to press the ‘residual doubts’

question with the sentencing jury.” *Id.* at 174. This position was affirmed in *Oregon v. Guzek*, 126 S.Ct. 1226 (2006). Thus, the issue presented here, whether the sentencer may be precluded from entertaining any residual doubts, was absent in *Franklin*.

277) Unlike *Franklin*, in this case the trial court precluded all arguments about residual doubt. Cunningham asserts that because of this crucial difference, *Franklin v. Lynaugh* is distinguished. Constitutional error resulted in his case under the Eighth and Fourteenth Amendments.

278) In *Lockett*, the Court held that the sentencer must not be precluded from considering evidence of the defendant’s character and record or the circumstances of his or her offense. 438 U.S. at 604. From the rule in *Lockett* follows a corollary rule stated in *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986):

There is no disputing that this Court’s decision in *Eddings* requires that in capital cases “the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Eddings, supra*, 455 U.S., at 110, 102 S. Ct., at 874 (quoting *Lockett, supra*, 438 U.S., at 604, 98 S. Ct., at 2964 (plurality opinion of BURGER, C.J.)) (emphasis in original). Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering “any relevant mitigating evidence.” 455 U.S., at 114, 102 S. Ct., at 877. These rules are now well established, and the State does not question them.

(emphasis added).

279) In *Skipper*, the Court recognized not only the rule in *Lockett*, but also the “corollary rule” that requires the consideration of any relevant mitigation. *Id.* This is evident as the Court expressly referred to “rules” in the plural form. *Id.* Accordingly, the capital sentencer’s consideration of relevant mitigation is not limited to just the three factors in *Lockett*. *See id.*

280) In *Skipper*, the Court held that a capital defendant's adjustment to life in prison was a constitutionally required mitigating factor. *Id.* at 4-5. To a certain extent, *Skipper* mitigation relies on the defendant's past behavior while incarcerated, and therefore, it relies in part on the defendant's character or record. Nevertheless, the Court made clear in *Skipper* that this type of mitigation also involves the defendant's "probable future conduct" while incarcerated. *Id.* at 4. Thus, the Court opined that the predictive element of *Skipper* mitigation is constitutionally relevant, even assuming that it was not evidence of the defendant's character:

The State's proposed distinction between use of evidence of past good conduct to prove good character and use of the same evidence to establish future good conduct in prison seems to be drawn from the decision of the South Carolina Supreme Court This distinction is elusive. As we have explained above, a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination. Accordingly, the precise meaning and practical significance of the decision in *Koon II* and of the State's argument is difficult to assess. Assuming however, that the rule would in any case have the effect of precluding the defendant from introducing otherwise admissible evidence for the explicit purpose of convincing the jury that he should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment, the rule would not pass muster under *Eddings*.

Id. at 6-7.

281) Based on *Skipper v. South Carolina*, 476 U.S. at 4-7, the sentencer must consider any relevant mitigation, and relevance is not limited only to the three factors in *Lockett*. Under *Skipper*, mitigation may be relevant when it involves a prediction about the defendant, so long as it serves the explicit purpose of convincing the [trier of fact] that the [defendant] should be spared the death penalty. 476 U.S. at 7.

282) O.R.C. § 2929.04(B) directs the sentencer to consider and weigh the nature and circumstances of the offense in mitigation. The nature and circumstances of any offense are simply the relevant evidence adduced at the trial phase. Compare O.R.C. § 2929.03 (D)(3) (“Upon consideration of the relevant evidence raised at trial....”). Trial phase evidence may well raise residual doubts as to moral culpability even when it is legally sufficient to sustain a verdict of guilty beyond a reasonable doubt.

283) The facts of an offense may create residual doubt as to either identity or to a discrete element of either the offense or the aggravating circumstance. Here, physical evidence linking an automatic weapon, a .380, to the actual shootings of the victim provide residual doubt as to Cunningham’s participation, notwithstanding proof of identity.

284) This type of case, one with codefendants, may create residual doubt. It is hardly far-fetched to think of a scenario in which the principal offender falsely implicates his codefendant in order to plead to a lesser offense. The false testimony of the codefendant might well be compelling enough to secure an unjust capital conviction. In such a case, the facts of the offense should be mitigating as residual doubt. Similarly, where the crimes occur in a chaotic few seconds, the victims’ testimony as to who fired shots may be less than reliable. In such a case, the consideration of residual doubt may well prevent an unjust execution.

285) It is well established that a capital defendant has a due process right to rebut any information on which his or her sentencer may rely to impose death. *Simmons v. South Carolina*, 512 U.S. 154, 169 (1994) (capital defendant denied due process; unable to rebut evidence of future dangerousness); *Skipper v. South Carolina*, 476 U.S. 1, 5, n. 1 (1986) (capital defendant denied due process right of rebuttal; unable to rebut evidence of future dangerousness); *Id.* at 9-11 (Powell, J., concurring); *Gardner v. Florida*, 430 U.S. 349, 362

(1977) (capital defendant denied due process; unable to address presentence information report). Cunningham asserts that this right must necessarily extend to arguments or evidence of legal culpability that are offered by the State for the issue of moral culpability and punishment. *McGuire* precludes a capital defendant like Cunningham from rebutting the State's arguments and evidence in favor of death with evidence of residual doubt.

286) The State must prove guilt of aggravated murder and guilt of the aggravating circumstances at the trial phase. At the penalty phase, the aggravating circumstances are weighed, however, no proof of them is required and no proof of aggravated murder is required at the penalty phase. No proof is necessary because a guilty verdict at trial renders the existence of the crime and aggravating circumstance moot for the purpose of sentencing.

287) Although the existence of the aggravating circumstance is moot for sentencing, the Revised Code permits the State to re-litigate the aggravating circumstance by introducing evidence of the "nature and circumstances of the aggravating circumstance." O.R.C. § 2929.03(D)(1). Further, the State is able to re-litigate the aggravating circumstance at the penalty phase by commenting on the trial phase facts that encompass the aggravating circumstance. *See State v. Gumm*, 73 Ohio St. 3d 413 (1995). Despite the mootness of the existence of the aggravating circumstance, the State has free reign to re-litigate it by introducing trial phase evidence, and by arguing trial phase facts. *See id.*

288) Because of *McGuire*, a capital defendant is unable to rebut these re-litigation efforts by the State. The only logical means for a defendant to rebut evidence and argument by the State about the legal existence of the aggravating circumstance is to argue its nonexistence. That is, the defendant's only adequate rebuttal is to offer residual doubt that the offense and the aggravating circumstance were not actually proved. Moreover, when the State argues that the

trial phase facts call for a sentence of death, the defendant should be entitled in mitigation to rebut those facts.

289) Here, the State relied on all trial phase evidence for sentencing. The State also argued for death by emphasizing an element of aggravated murder proved at trial: Cunningham's purpose to kill.

290) The State was permitted to re-litigate Cunningham's legal culpability by arguing trial phase issues and facts and by reintroducing trial phase evidence. As the result of *McGuire*, Cunningham had no opportunity to rebut the State's re-litigation of the trial phase with his own evidence or arguments of residual doubt.

291) Due process requires a level playing field. If the State may re-litigate trial phase issues, then the defendant must be able to rebut the State's re-litigation efforts with evidence of the same kind: Evidence of residual doubt of guilt. Due to *McGuire*, Cunningham was denied his due process right to rebut the State's evidence and arguments for the death penalty. See *Simmons*, 512 U.S. at 169; *Skipper*, 476 U.S. at 5, n.1; *Gardner*, 477 U.S. at 362. Accordingly, his death sentence must be vacated.

292) The *McGuire* decision unduly restricts non-statutory mitigation, it violates the reliability component of the Eighth Amendment, and it overlooks the reality that the circumstances of an offense may raise doubts as to the defendant's moral culpability. Moreover, it overlooks the basic unfairness in capital litigation which allows the prosecutor to re-litigate trial issues without giving the defense an opportunity to rebut such re-litigation with evidence and argument in kind.

The death sentence violates the right to a jury determination on every element of the offense.

293) It is axiomatic that the State must prove every element of the offense beyond a reasonable doubt in order to obtain a conviction. *Winship*. See also *Richardson v. United States*, 526 U.S. 813 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002). It is also axiomatic that an accomplice cannot be sentenced to death unless the State proves that the accomplice intended for the killing to occur. *Enmund v. Florida*, 458 U.S. 782 (1982). A critical element is whether Mr. Cunningham possessed the requisite personal responsibility for the crime to justify death eligibility, compare *Enmund* with *Tison v. Arizona*, 481 U.S. 137 (1987), and possessed the requisite specific intent. See also *Beck v. Alabama*, 447 U.S. 625 (1980). Absent the jury finding on these matters the case should not have even progressed to a capital sentencing phase. *Apprendi*; *Ring*. See also *Schad v. Arizona*, 501 U.S. 624 (1991)

294) The jury never determined Mr. Cunningham's role in the offense, his mental state, or his relative culpability. The failure to obtain a unanimous jury verdict on these elements deprived Mr. Cunningham of his Constitutional right to hold the State to its burden of proof at trial. *Winship*. See also *Glover v. United States*, 531 U.S. 198 (2001).

295) In *Ring*, the Supreme Court overruled *Walton v. Arizona*, 497 U. S. 639 (1990), "to the extent that . . . [*Walton*] allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Id.*, 536 U.S. at 609. Quite simply, *Ring* subjected capital sentencing to the Sixth and Fourteenth Amendment rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "that the Sixth Amendment does not permit a defendant to be 'expose[d] ... to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" *Ring*, 536 U.S. at 588-89, quoting *Apprendi*, 530 U.S. at 483. "Capital defendants, no less than non-capital defendants," the Court

in *Ring* declared, “are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” *Id.*

296) That rule squarely and indisputably outlaws the Ohio sentencing procedure used to impose Cunningham’s death sentence. No other conclusion can plausibly be reached. *Ring*’s recognition that the “right to trial by jury guaranteed by the Sixth Amendment . . . encompass[es] the factfinding . . . necessary to put . . . [a capital defendant] to death”. *Ring*, 536 U.S. at 609.

297) Mr. Cunningham’s death sentence, exactly like Timothy Ring’s in *Ring v. Arizona*, was imposed without a “jury determination of any fact on which the legislature condition[ed] an increase in their maximum punishment” from imprisonment to death (*Ring*, 536 U.S. at 588-89). Therefore, Petitioner was “expose[d] . . . to a penalty *exceeding*” life imprisonment (*Ring*, 536 U.S. at 588-89) -- he was subjected to an increase in . . . [his] maximum punishment” (*id.*) -- only upon the legislatively specified condition that certain factual findings were made going beyond “the facts reflected in the jury verdict alone” (*id.*). And those findings, “necessary for imposition of the death penalty” (*id.* 536 U.S. at 591-92), were never made.

298) The jury’s verdict at the guilt phase of petitioner’s trial reflected no more than a finding of guilt of murder, but not under what theory. No jurors made further findings of fact at the penalty stage so as to satisfy the requirements of *Ring*, *Apprendi*, and the Sixth, Eighth, and Fourteenth Amendments.

299) In short, there is no rational way to square the process that produced Mr. Cunningham’s death sentence with *Ring* and *Apprendi*. For this reason, the death sentence imposed on Mr. Cunningham violates the Sixth and Fourteenth Amendments to the Constitution of the United States and must be vacated.

300) The trial court also made no specific finding as to the level of Mr. Cunningham's involvement or his individual culpability as required by *Ring*, *Enmund*, and *Tison*. The death sentence is contrary to or an unreasonable application of *Ring*.

PROPOSITION OF LAW NO. X

MR. CUNNINGHAM'S SENTENCE OF DEATH IS INAPPROPRIATE, ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

301) The guiding principal underlying Eighth Amendment jurisprudence is that sentences of death may not be imposed in an arbitrary and capricious manner. *Furman v. Georgia*, 408 U.S. 239 (1972). The death sentence imposed on Cunningham could not be more arbitrary or capricious. The jury verdict and the trial court sentence were imposed without this critical fact. Permitting the death sentence to stand is a fundamentally unfair. The Fifth, Sixth, Eighth, and Fourteenth Amendments require that there must be a meaningful basis upon which to distinguish between those few cases in which the death penalty is justified and the many cases in which it is not. *Gregg v. Georgia*, 428 U.S. 153, 188-89 (1976); *Furman v. Georgia*, 408 U.S. at 313 (White, J., concurring). *See also Getsy v. Mitchell*, 456 F.3d 575 (6th Cir. 2006). This principle applies to intra-case as well as inter-case proportionality.

302) The Eighth and Fourteenth Amendments mandate that sentences be proportional and not disparate. *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, O'Connor, Souter, JJ. concurring). A requirement that is most stringently imposed in capital cases. *Id.* ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Gregg*, 428 U.S. at 187.) The proportionality of death sentences are subject to review by the federal courts. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980). *See also Coker v. Georgia*, 433 U.S. 584 (1977) (death sentence for non-fatal rape disproportionate); *Enmund v. Florida*, 458 U.S. 782 (1982) (death sentence for defendant who did not kill nor intend death to occur disproportionate); *Tison v. Arizona*, 481 U.S. 137 (1987) (death sentence for defendant who did not kill but, acted with reckless disregard for human life was not

disproportionate); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (death sentence for 15 year old unconstitutional); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (death sentence for 16 and 17 year olds constitutional); *Atkins v. Virginia*, 536 U.S. 304 (2002) (execution of mentally retarded individuals is unconstitutional). *See also Roper v. Simmons*, 543 U.S. 551 (2004) (*certiorari* granted to review constitutionality of executing sixteen and seventeen year olds).

303) A state may not leave the decision of whether a defendant lives or dies to the unfettered discretion of the jury because such a scheme inevitably results in death sentences that are “wantonly and ... freakishly imposed” and “are cruel and unusual in the same way that being struck by lightning is cruel and unusual.” *Furman v. Georgia*, 408 U.S. at 309-310. (Stewart, J., concurring). Therefore, some form of meaningful review is required to prevent potentially arbitrary imposition of the death penalty.

304) The trial court determination that Cunningham’s death sentence was proportionate violates clearly established federal law. *Coker v. Georgia*, 433 U.S. 584 (1977); *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987); *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991).

305) Jeronique Cunningham was born into a family situation that can only be described as horrifying. Substance abuse as well as mental illness plagued the adults who were supposed to care for and teach him. Rather than teaching him to be a good and law-abiding citizen, Jeronique’s childhood was filled with abuse and neglect.

306) Jeronique’s father was severely mentally ill. He heard voices, cared little about hygiene, and was violent. He was diagnosed as a paranoid schizophrenic. He was hospitalized as a result of this illness and remained hospitalized at the time of Jeronique’s trial. He was completely absent from Jeronique’s life.

307) With his father absent from the home, Jeronique looked to the men involved with his mother for a role model. However, he did not find one. Instead, he was met with abuse. His stepfather, Cleveland Jackson Sr., beat Jeronique with a belt. He abused Jeronique and his mother, Betty Cunningham.

308) Ultimately the violence erupted into a bloodbath. Jackson came to the family home. He threatened Jeronique until he coerced the young boy into letting him inside the family home. A violent struggle ensued between Jackson and Jeronique's mother. The children watched as Betty Cunningham stabbed and killed Jackson. This occurred in 1980 when Jeronique would have been seven or eight years old. The impact of this horror at such a tender age cannot be ignored.

309) Jeronique's sister testified that the children did not really have a mother after the murder. Mrs. Cunningham became violent and abusive. She was regularly abusing drugs and alcohol. Dr. Davis described Mrs. Cunningham as having a long history of mental health and substance abuse issues. She was hospitalized several times. As a result of her drinking and drug use, the children were regularly left alone. Jeronique, just a small child himself, was responsible for their care.

310) However, even before the murder, Jeronique's mother was not there for Jeronique and his siblings. Jeronique's first contact with Children's Services occurred in 1977. His mother contacted the agency, but Children's Services closed the case after Mrs. Cunningham moved to Indiana, leaving Jeronique and his siblings behind.

311) Repeated referrals to Children's Services followed. In 1979, Children's Services contacted Mrs. Cunningham after Jeronique missed twelve days of school. Children's Services closed that case after Jeronique's mother threatened to "blow away" the caseworker if she

returned. Later that year, the school reported bruises and a cut to Jeronique's forehead, apparently inflicted by a switch. At that time Children's Services determined that, beyond the abuse, Mrs. Cunningham was abandoning the children regularly, leaving them alone unsupervised, including a three-month-old baby.

312) Abuse and neglect reports continued after the murder. School officials found bruises on Jeronique in March of 1981. Children's Services removed Jeronique from his home for one month. At the time of removal, workers reported that Jeronique was dirty and smelled. Three months after Jeronique returned home, his mother overdosed.

313) In 1982, Jeronique suffered bruises after his mother beat him with an extension cord. A suicide attempt by Mrs. Cunningham followed later that year. When medical assistance arrived at the home, Mrs. Cunningham was drinking a beer with blood pouring down her arm. She refused medical treatment. The house was filthy with trash, garbage, and dirty clothes strewn on the floor. The youngest child was eating garbage mixed with glass.

314) Another abuse report occurred in 1983. As a result of the neglect and abuse, Jeronique was in and out of foster homes. He never had a stable environment.

315) In a child's first five or six years of life, he learns how to behave from his parents. Jeronique learned only violence, brutality, and substance abuse. People came in and out of his life. He had no good role model, he formed no positive relationships, and he moved from school to school regularly interrupting his education.

316) The serious repercussions of his chaotic and brutal life were apparent at a very young age. Jeronique began drinking alcohol at the age of nine. He was diagnosed as an alcoholic and placed in a substance abuse program when he was sixteen. He also was abusing cocaine and marijuana at this time. Dr. Daniel Davis opined that Jeronique suffered from

depression as early as the age of thirteen as well as childhood post-traumatic stress disorder. The effects of the brutality and neglect Jeronique experienced should not be minimized.

317) There is not one piece of physical evidence to demonstrate that Jeronique fired the shots that killed Jala Grant and Leneshia Williams, or any other shot in Loyshane Liles's kitchen. Rather, every bullet, fragment, and jacket recovered by law enforcement was .380, ammunition that is fired by a weapon with a clip. Victim-witnesses clearly placed a revolver in Cunningham's hands and the weapon with the clip in the hands of Cleveland Jackson Jr. While witnesses indicated they saw Jeronique's gun fire, in the few seconds of chaos that occurred in that kitchen, those witnesses could be mistaken. There is absolutely no corroborating physical evidence to suggest that a revolver was fired in Liles's kitchen. Jeronique's role is less culpable than that of co-defendant Cleveland Jackson Jr.

318) Jeronique made an unsworn statement during the mitigation phase of his trial. In his statement Jeronique expressed remorse. He took full responsibility for his actions and apologized.

319) Despite the horrible facts of this case, some very powerful mitigation is present. Jeronique was brutalized and neglected as child. He witnessed a violent and bloody murder at a tender age. The repercussions of this horrific life are apparent through the early onset of substance abuse, the diagnosis of alcoholism at only sixteen years of age, as well as his childhood depression and post-traumatic stress disorder. Jeronique's childhood mitigates in favor of a life sentence in this case. *See State v. Raglin*, 83 Ohio St.3d 253, 272 (1998) (appellant's troubled childhood given meaningful weight in mitigation); *see also State v. Slagle*, 65 Ohio St.3d 597, 620 (1992) (Wright J., dissenting) ([T]his is not a case of "mere alcoholism" for the reason that Slagle was a child when he became an alcoholic.).

320) Jeronique expressed remorse and accepted responsibility for his actions. *See State v. Stallings*, 89 Ohio St.3d 280, 300 (2000) (appellant's remorse given weight as "other factor" in mitigation). Moreover, Jeronique was not the principal offender in these offenses. *See State v. Green*, 90 Ohio St. 3d 352, 363 (2000) ("Normally, [that the defendant is not the principal offender] would be a powerful mitigating factor.").

321) Each of these factors mitigates in favor of a life sentence. This death sentence is inappropriate. Jeronique Cunningham's death sentence must be vacated. *Gregg v. Georgia*, 428 U.S. 153, 188-89 (1976); *Furman v. Georgia*, 408 U.S. at 313 (White, J., concurring). *See also Getsy v. Mitchell*, 456 F.3d 575 (6th Cir. 2006).

PROPOSITION OF LAW NO. XI

PERVASIVE PRETRIAL PUBLICITY DEPRIVED MR. CUNNINGHAM OF HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Introduction.

322) The media publicity surrounding the Eureka Street shootings was massive. Nearly every prospective juror was exposed to the case. The publicity was so extensive that this Court must presume prejudice to Jeronique Cunningham. As a result, the trial court's denial of Cunningham's change of venue motion deprived Cunningham of his rights to an impartial jury and to due process. U.S. Const. amends. VI, XIV.

Facts.

323) The citizens of Lima, Ohio could not escape the unrelenting coverage given to the Eureka Street shootings. Coverage of the crimes reached as far as Chicago and Houston. Newspaper articles detailed the horrors of the shooting and the brutality of this crime. Many emphasized James Grant's pleas that his young daughter's life be spared.

324) The media watched and reported as several victims "were left clinging to life." Particular emphasis was given to Armetta Robinson. Details of her coma and her struggles to recover were printed for all to read. Extensive print was given to sharing the heart-wrenching details of the brief lives of Leneshia Williams and Jala Grant.

325) Every article discussed Jeronique Cunningham. More significant, however, was the information relayed by the articles. Articles told the community that Cunningham served ten years for shooting a man in the mouth. Newspapers reported that Cunningham had been on parole only one month before this crime. Further, most reports indicated that Cunningham faced charges as a repeat violent offender and for having weapons under disability, charges that were not presented to the jury.

326) Other inappropriate information came to surface via the media. The State, it was reported, had a "mountain of evidence" against Cunningham, including several statements he gave to the police. These statements were not presented at trial. The newspaper also informed the public that Cunningham received \$8,500 for defense experts. Again, this was information that jurors should not have received.

327) The media saturated the citizens of Allen County with publicity. The nature of these crimes and their impact on the community was obvious. Cunningham and his co-defendant proceeded to their pre-trial hearings in bulletproof vests. The trial court moved the hearing forward fifteen minutes and acquired extra officers because of security concerns. In an act police believed was connected to these crimes, someone shot at Cunningham's sister's home.

328) The response to these crimes also demonstrated their impact on the community. These crimes, as well as an earlier firebombing, prompted the erection of a billboard featuring a picture of Jala Grant and including her name and Leneshia Williams's name along with the phrase "stop the violence." Family members and surviving victims attended hearings in t-shirts with pictures of both girls and "stop the violence" on the front, with the back of the shirt listing the survivors. The crime and deaths were the impetus behind a Martin Luther King celebration call for a "week of calm." Emotions clearly ran high. The voluminous media coverage served only to fuel these feelings.

329) As a result of this extensive publicity, defense counsel moved for a change of venue via a motion filed March 8, 2002. Counsel argued that the community had "been saturated with stories concerning this case and, eventually, the Defendant, his criminal record, and his indictment for this crime. Counsel represented that they could "adduce evidence that would detail matters relevant to the full and fair adjudication of this Motion" at an evidentiary hearing,

which the trial court did not grant. Counsel also proffered that they had accumulated “a fair amount of newspaper clippings.”

330) The adverse effects of pretrial publicity are made apparent by voir dire examination on the issue of publicity. The trial court allowed individual voir dire on the issues of publicity and capital punishment. Counsel spoke to each juror separately on these two issues. Almost every prospective juror was aware of this case. Of the thirty-six prospective jurors questioned, thirty-one (or eighty-six percent) were exposed to pre-trial publicity. Jurors were exposed to pretrial publicity through the media and through discussions with co-workers, neighbors and relatives. Jurors two and thirty-two expressed the reality of the saturation of media coverage during their voir dire - of course they had heard of the case, everyone had. Counsel only asked two jurors if they saw the billboard. One of the two jurors had seen it.

331) Because of the voluminous media coverage, many prospective jurors knew the facts of the case. The prospective jurors knew about this case as the result of the extensive pretrial publicity. Pretrial publicity made the facts of this case common knowledge. The facts of this case made Cunningham seem legally culpable to everyone and morally culpable to most.

Argument.

332) In *Irvin v. Dowd*, the Supreme Court of the United States held that the defendant's right to an impartial jury was denied by a presumption of prejudice arising from extensive pretrial publicity. 366 U.S. at 725-28. The Court found a presumption of prejudice despite the sincerity of the jurors who stated that they could be “fair and impartial” to the defendant. *Id.* at 728. In *Irvin*, the viewpoint of the community was revealed by the media's pretrial coverage. *Id.* at 725. The media painted Irvin as a person of especially bad character, due to his prior criminal record and status as parole violator. *Id.* Further accounts noted that Irvin confessed and offered to

plead guilty to avoid the death penalty. *Id.* at 725-26. The Court found that the “force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County.” *Id.* at 726. *See also Sheppard v. Maxwell*, 384 U.S. 333, 352-53 (1966) (presumed prejudice from pretrial publicity on totality of circumstances); *Rideau v. Louisiana*, 373 U.S. 723, 725-27 (1963) (defendant denied due process without change of venue after confession was televised).

333) Like *Irvin*, prejudice from the weight of adverse publicity must be presumed in this case. As in *Irvin*, the community was bombarded with media stories about this crime. The gruesome details were repeated regularly in the five months before trial, as were the surviving victims’ serious injuries and struggle for recovery. Cunningham immediately was named as the perpetrator. Moreover, he was identified as a repeat offender who was paroled recently for a crime committed in a similar manner. Cunningham’s guilt was presumed and there was a strong community outcry for the victims in this case.

334) Unlike *Irvin*, the jurors empanelled in this case did not express strong opinions about Cunningham’s guilt at voir dire. However, the pervasive and adverse publicity alone negates the need for Cunningham to show prejudice. *See Sheppard*, 384 U.S. at 352-53. A presumption of prejudice is well-established by the volume and content of the media’s coverage of this case. This case is simply like no other in terms of its affect on Allen County. On these facts, prejudice is presumed.

Conclusion.

335) Cunningham could not get a fair and impartial jury in Allen County as the result of overwhelming pretrial publicity. The media accounts of his case ensured that his guilt was presumed in Allen County.

336) Cunningham's convictions must be reversed. He must be retried after a change of venue. It is irrelevant that he would most likely be convicted anywhere outside of Allen County. The right to a fair and impartial jury is fundamental. The denial of that right is a structural error that is never harmless. *See Arizona v. Fulminante*, 499 U.S. 279, 290 (1991).

The failure of trial counsel to inquire into pretrial publicity deprived Mr. Cunningham of his Sixth Amendment right to the effective assistance of counsel.

337) Lima, Ohio was saturated with media publicity surrounding the shootings and deaths at the Eureka Street apartment on January 3, 2002. As a result of this extensive publicity, defense counsel filed a motion for a change of venue. Counsel represented in their motion that they could "adduce evidence that would detail matters relevant to the full and fair adjudication of this Motion" at an evidentiary hearing.¹ Counsel also proffered that they had accumulated "a fair amount of newspaper clippings" relating to these crimes. The trial docket and record reflect that counsel never proffered these newspaper clippings to support their request for a change of venue.

338) Counsels' actions were inexcusable given fifty years of precedent. In *Irvin v. Dowd*, 366 U.S. 717 (1961), the Supreme Court of the United States held that the defendant's right to an impartial jury was denied by a presumption of prejudice arising from extensive pretrial publicity. *Id.* at 725-28. The Court found a presumption of prejudice despite the sincerity of the jurors who stated that they could be "fair and impartial" to the defendant. *Id.* at 728. In *Irvin*, the viewpoint of the community was revealed by the media's pretrial coverage. *Id.* at 725. The Court found that the "force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County." *Id.* at 726. *See also Sheppard v. Maxwell*, 384 U.S. 333, 352-53 (1966) (presumed prejudice from pretrial publicity

¹ There is no indication in the record that an evidentiary hearing on pretrial publicity was ever held.

on totality of circumstances); *Rideau v. Louisiana*, 373 U.S. 723, 725-27 (1963) (defendant denied due process without change of venue after confession was televised).

339) Like *Irvin's* community, Lima, Ohio was saturated with media coverage of these crimes, Cunningham's prior violent offense, and his recent parole. While counsel demonstrated full awareness of the extent of media coverage, they failed to incorporate it into Cunningham's record to support his request for a change of venue. Counsels' failure deprived Cunningham of his rights to the effective assistance of counsel and to a fair and impartial jury and due process. U.S. Const. amends. VI, XIV.

PROPOSITION OF LAW NO. XII

THE ADMISSION OF IRRELEVANT, REPETITIVE, AND INFLAMMATORY PHOTOGRAPHS DEPRIVED MR. CUNNINGHAM OF HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Introduction.

340) At trial, the State submitted numerous crime scene and autopsy photographs. The trial court should not have admitted the crime scene or autopsy photographs. (Exs. 34-45, 47-50, 53, 56-58, 60). They had no probative value as there were no questions as to the causes of death, nature of the wounds, or any other issue in regard to the homicide. The only issue was who actually held the gun that fired the shots that killed. Moreover, the photographs were cumulative of testimony and non-gruesome evidence. The photographs created an unacceptable risk of prejudice to Jeronique Cunningham. Their admission into evidence at trial, and at the penalty phase, violated Cunningham's right to a fair trial. U.S. Const. Amend. XIV.

Facts.

341) At a pre-trial hearing, the trial court made preliminary rulings on the photographic evidence the State intended to introduce at trial. The trial court correctly announced it would follow the standard the Ohio Supreme Court set forth in *State v. Maurer*, 15 Ohio St.3d 239 (1984), that it would admit relevant photographic evidence so long as the danger of material prejudice to the defendant is outweighed by their probative value and if the photographs were not repetitive or cumulative.

342) Defense counsel objected to the following photographs: 34-38, 40-43, 50, 53, 56-58, and 60 at the pre-trial hearing. At the close of the State's case, the defense objected to Exhibits 30-37, 40-43, 56. Both the State and the Court relied on the fact that the State winnowed down its photographs from 240. Indeed, the State argued that it could have brought in "a lot

more of those.” The trial court overruled defense objections. Thereafter, the jury returned guilty verdicts on all counts and specifications.

343) During the mitigation phase, the State moved to admit Exhibits 37-40, 42, 45, 46, 49. The defense again objected to Exhibits 38-40. The trial court overruled counsel’s objection. Following the jury’s consideration of the photographs, it returned a death verdict.

Argument.

344) The prosecution indicated that photographs introduced were relevant and necessary to its case in chief. However, the photographs were irrelevant, unnecessary, cumulative, repetitive, and created a danger of prejudice to Cunningham. Their admission at both phases violated Cunningham’s right to due process under the Fourteenth Amendment.

345) The jury had to weigh one aggravating circumstance for Leneshia Williams and Jala Grant at the penalty phase: that their killings were part of a course of conduct involving the purposeful killing of two or more people. O.R.C. § 2929.04(A)(5). The prosecution may rely on any trial phase evidence that is relevant to the nature and circumstances of the aggravating circumstances. Here, the prosecution could rely on any photographic evidence that was relevant to the course of conduct aggravating circumstance.

346) During the penalty phase, the jury was allowed to consider many exhibits, including Exhibits 37-40, 42, 45, and 49. Few of these photographs even came close to being relevant to the nature and circumstances of the aggravating circumstances. Exhibits 37-40 and 42 depict either a deceased or surviving victim. The number of victims is arguably relevant to the mass murder circumstance. However, such evidence was unnecessary given that the jury knew there were two murder victims and six attempted murder victims in this case. By virtue of multiple convictions of aggravated murder for separate victims, the prosecution established the

(A)(5) specifications. Even if such photographs were relevant, given their inflammatory nature, admitting five such photographs was unnecessarily prejudicial.

347) This is particularly true of the bloody photograph of Leneshia Williams, Exhibit 42. Exhibits 45 and 49 depict blood pooling and smears on the floor and walls. These photographs were graphic and inflammatory. Moreover, they created an inaccurate perception of the crimes and Leneshia Williams's injuries. Ms. Williams was left deceased, but bleeding in the corner of the kitchen for some roughly seven hours while police processed the scene. Detective Hammond testified that Ms. Williams laid in the kitchen bleeding for "a very long time" and that she emitted a large amount of blood. He could not state for certain if all of the jewelry covered in pools of blood at the scene were in pools of blood when he arrived. Had she been removed from the scene when the other victims were, the blood pooling would have been substantially different.

348) Had the trial court used the proper test to determine the admissibility of these photographs, the jury would not have seen them at sentencing. Rather than supporting the aggravating circumstances, these photographs emphasized the brutality of this crime. Not one of these photographs had sufficient probative value to outweigh the "danger of prejudice" to Cunningham at the penalty phase. *See Morales*, 32 Ohio St. 3d at 259.

349) The jury must have felt "horror and outrage" when they viewed the photographs at the trial phase. *See Thompson*, 33 Ohio St.3d 15. The sheer number of victims, Leneshia Williams's body in a pool of blood, Armetta Robinson left in a coma for over a month -- each was a highly prejudicial image. These exhibits were inflammatory and they appealed to the jurors' emotions. *See Thompson*, 33 Ohio St.3d at 15. They created an unacceptable risk that the jurors would convict Cunningham out of their feelings of anger and revulsion. Moreover, unlike

DePew in which the photographs were kept to an “absolute minimum of two for each victim,” 38 Ohio St.3d at 282, here the prosecution relied on fifteen crime scene photographs and eight autopsy/hospital photographs.

350) Unlike *Thompson*, this trial error is not harmless beyond a reasonable doubt. *See* 33 Ohio St.3d at 15. The prosecution’s case was problematic. This is particularly true given that the physical evidence pointed to a single shooter using a automatic weapon, while Cunningham is clearly identified as carrying a revolver. Here, the evidence was not so overwhelming as to make the prosecution’s use of the photographs harmless. *See Chapman*, 386 U.S. at 26.

351) The admission of the photographs at the penalty phase was also error. Moreover, as in *Thompson*, these photographs would cause the jurors to feel “horror and outrage.” 33 Ohio St.3d at 15. This graphic evidence was fundamentally unfair to the issue of punishment. The photographs must have inflamed the jury. The photographs would compel the jury to seek revenge with a gruesome penalty to match the gruesome crime that harmed so many. *See id.* at 15.

352) These photographs rendered the penalty phase fundamentally unfair because Cunningham had significant and compelling mitigation evidence. In mitigation of the death penalty, Cunningham presented evidence including a horrific childhood. While the aggravating circumstance in this case was serious, Cunningham presented evidence that mitigated in favor of a life sentence.

353) Cunningham’s jury was assuredly mindful of the photographs at the penalty phase. *See Thompson*, 33 Ohio St.3d at 15. Indeed, it must be presumed that the jury was influenced by the photographs because the trial court admitted those exhibits and instructed the jury to consider that evidence in assessing Cunningham’s sentence. *See State v. Raglin*, 83 Ohio

St. 3d 253, 264 (1998) (jury presumed to follow instructions). Furthermore, the prosecutor stood before the jury in closing argument and used the photographs as the evidence demonstrating that the death penalty was the only proper sentence. The penalty phase was fundamentally unfair given that the photographs were very prejudicial and largely irrelevant to the aggravating circumstances.

354) Exhibits 34-43, 47-50, 53, 57-58, and 60 were irrelevant, unnecessary, cumulative, repetitive, and they created a danger of prejudice to Cunningham. Their admission at both phases of the trial violated Cunningham's right to due process. U.S. Const. Amend. XIV. The prejudicial impact of the jury's exposure to repetitive inflammatory photographs deprived Mr. Cunningham of his right to a fair trial, due process, and a reliable determination of his guilt in a capital case as guaranteed by the Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

355) The trial's contamination by exposure to evidence not related to facts at issue further prejudiced Mr. Cunningham's right to a fair trial free from improper emotional impact. Moreover, the "carry-over" effect of the evidence violated the Eighth and Fourteenth Amendment as well as the guarantee "that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). The Sixth Circuit recently reaffirmed that violations of state evidentiary rules are subject to review in federal *habeas*. *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000). The Court granted *habeas* relief to an Ohio death row inmate on the basis of ineffective assistance of counsel. The ineffectiveness was based on the failure of trial counsel to object to irrelevant and inadmissible evidence. *Id.*, 205 F.3d at 278-286.

Ineffective Assistance of Counsel

356) The introduction of numerous irrelevant, repetitive, and cumulative photographs from the crime scene, hospital, and autopsies was improper. However, defense counsel failed to object to admission of many of these photographs during both the trial and mitigation phases. As such, Mr. Cunningham was deprived of his right to the assistance of competent counsel at his capital trial.

PROPOSITION OF LAW NO. XIII

OHIO'S DEATH PENALTY SCHEME VIOLATES ARTICLE VI AND THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

357) The right to life is a constitutionally protected fundamental right. *Massachusetts v. O'Neal*, 327 N.E.2d 662, 668 (1975). Therefore, "in order for the state to allow the taking of life by legislative mandate, it must demonstrate that such action is the least restrictive means toward furtherance of ... a compelling governmental end." *O'Neal*, 327 N.E.2d at 668.

358) The societal interests commonly advanced to justify capital punishment are, as the United States Supreme Court noted in *Gregg v. Georgia*, 428 U.S. 153 (1976), "deterrence of capital crimes by prospective offenders," "incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future," and "retribution." *Id.* at 183, and fn. 28. The Court in *Gregg*, however, was not presented with and did not decide whether capital punishment is the least restrictive means for achieving the purported societal interests.

359) Despite the most exhaustive research by noted experts in the field, there is no convincing evidence that the death penalty is a deterrent superior to lesser punishment. "In fact, the most convincing studies point in the opposite direction." *Massachusetts v. O'Neal II*, 339 N.E.2d 676, 682 (1975) [hereinafter *O'Neal, II*]. Studies in Ohio, more particularly, have similarly failed to show any deterrent effect by imposition of the death penalty. This Court has not addressed the issue of lack of evidence supporting deterrence in its previous decisions upholding the death penalty.

360) The second purported justification for the death penalty, that of incapacitation of the offender, can be achieved by restraint, a less restrictive means than destruction of human life.

Retribution cannot serve as the compelling state interest justifying capital punishment because there is no evidence that a less onerous penalty would not equally satisfy the public's outrage and its desire for punishment. See *O'Neal II*, 339 N.E. 2d at 686-7. The State's possible reliance on retribution as a justification for the death penalty is further weakened by the imminent threat that the irreversible deprivation of life may befall an innocent or less culpable person.

361) The failure of the State to meet "its heavy burden of demonstrating that, in pursuing its legitimate objectives, it has chosen means which do not unnecessarily impinge on the fundamental constitutional right to life," *O'Neal II*, 339 N.E. 2d at 688, requires the rejection of death as a punishment as it is violative of due process.

362) The punishment also violates the Cruel and Unusual Punishment Clause because it is "more severe than is necessary to serve the legitimate interests of the State," *Furman v. Georgia*, 408 U.S. 238, at 359-60 (1972) (Marshall, J., concurring).

363) Studies have established that past experience with the death penalty in this state and others are fraught with discrimination violative of equal protection.

364) Such arbitrariness and discrimination persists under the Ohio statutory scheme which gives even greater discretion in sentencing to the trier of fact. While African-Americans number less than twenty percent (20%) of Ohio's population, half (50%) of those on Ohio's death row are African-American. "Death Penalty Report", State Public Defender's Report (as of June 30, 2003). In all, fifty-four percent (54%) of death row residents are minorities. *Id.* Further, while only three (3) Caucasians were on Ohio's death row for killing African-Americans (often along with Caucasian victims) in 2003, sixteen times that number, forty-eight (48) African-Americans sit on Ohio's death row for killing a white person. *Id.* Ohio's statistical disparity in sentencing, by race of defendant and race of victim, is tragically consistent with the national

findings of a 1990 General Accounting Office Study. The GAO reported “a strong race of victim influence was found at all stages of the criminal process,” and the evidence was stronger at the earlier stages involving prosecutorial discretion in charging and trying cases. Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities, U.S. General Accounting Office, Report to Senate and House Committees on the Judiciary (February 1990).

365) Ohio courts have not evaluated the implications of these racial disparities in imposition of the death penalty for several years. In short, Ohio law fails to assure against race discrimination playing a role in capital sentencing.

366) “Discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.” *Gregg*, 428 U.S. at 189. Yet, the prosecuting attorney has acquired “virtually unlimited control over charging, inconsistent with a system of criminal procedure fair to defendants and to the public.” Vorenberg, Decent Restraint of Prosecutorial Power, 42 Harv. L. Rev. 1521, 1525 (1981). *See also* Sonner, “Asking for the Death Penalty”, ABA Criminal Justice 32 (Fall 1986).

367) In Ohio no fair and consistent determination is made. The determination as to whether one is indicted with a death penalty specification is apparently largely a function of where a defendant is charged, not of the circumstances of the crime and the character of the individual. Cuyahoga County contains approximately fourteen percent (14%) of Ohio’s population and has handed down approximately forty-four percent (44%) of Ohio’s death penalty indictments. “Death Penalty Report,” State Public Defender’s Report (as of October 1990).

368) Furthermore, no independent review of the propriety of the charging decision is conducted. No judicial body considers the appropriateness of the charging decisions.

369) In effect, Ohio's system is designed so as to permit a prosecuting attorney to sidestep the procedural safeguards of Supreme Court decisions by allowing arbitrary charging decisions that unfairly impinge on defendants' rights before the trial safeguards commence. This denies equal protection and imposes cruel and unusual punishment if the product of intentional discrimination on the basis of an improper classification, or results in arbitrary, freakish imposition of death sentences. See *McCleskey v. Kemp*, 481 U.S. 279 (1987); *State v. Zuern*, 32 Ohio St. 3d 56 (1987).

A. O.R.C. §§ 2929.022, 2929.03, AND 2929.04 VIOLATE THE DEFENDANT'S RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND TO A TRIAL BEFORE AN IMPARTIAL JURY, AS GUARANTEED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, §§ 9, 10, AND 16 OF THE OHIO CONSTITUTION.

370) Ohio's capital statutory scheme provides for a sentencing recommendation by the same jury which determines the facts at trial if the accused is found guilty. This procedure violates the defendant's rights to effective assistance of counsel and to a fair trial before an impartial jury as guaranteed by the State and Federal constitutions.

Denial of Effective Assistance of Counsel.

371) Ohio's bifurcated capital trial process with the same jury violates the defendant's right to effective assistance of counsel as guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution. *McMann v. Richardson*, 397 U.S. 759, 771 (1970), fn. 14; *Powell v. Alabama*, 287 U.S. 45, 47 (1932); Article I, §§ 10 and 16, Ohio Constitution; *State v. Hester*, 45 Ohio St. 2d 71, 341 N.E.2d 304 (1976).

372) First, under the operation of the current statute, if counsel argues to the jury a defense which loses at the guilt phase of the trial, in effect he is forced to simultaneously destroy the defendant's credibility prior to the start of the trial's sentencing phase. By invoking the

defendant's right to strenuously argue for his innocence in the first phase, if the defense loses in the first phase counsel will have significantly reduced the credibility desperately needed to successfully argue for a life sentence.

373) The legislature should have eliminated this constitutional dilemma by providing for two separate juries, the first for determining guilt and the second for determining punishment. It is respectfully suggested that at the second trial the prosecuting attorney would be allowed to reiterate the specific evidence of aggravating circumstances. This proposed order of trial would eliminate the impairment of the right to have a defense presented with the effective assistance of counsel. The State essentially has "prevented (counsel) from assisting the accused during a critical stage of the proceeding". *United States v. Cronin*, 466 U.S. 648, 659 (1984), fn. 25. This creates constitutional error without any showing of prejudice necessary. *Id.*

374) Extensive voir dire on the subject of the death penalty before the guilt phase places the accused in the untenable position of appearing to the jury to feel his case is so poor on the merits insomuch as he is already discussing the topic of punishment.

375) The Ohio Constitution does guarantee a capital-charged defendant a liberty interest in the right to an impartial jury during the guilt phase and one composed of a fair cross-section of the community under Article I, §§ 5, 10, and 16. Where a jury is not representative of the fair cross-section of the community as constitutionally required, it is clear that such a jury cannot be considered fair and impartial with respect to the issue of the innocence of defendants in capital cases. *Id.* at 172.

376) The State's claim that it has an interest in having a single jury for both phases of the trial and that this should surmount the defendant's right to a fair and impartial trial phase jury is also belied by the Attorney General's recent efforts in the Ohio legislature (through H.B. 585

and S.B. 258, introduced early 1996) to require that a second jury be selected for purposes of resentencing trials when a capital defendant's death sentence is overturned on appeal. The Attorney General's present claims that this two-jury practice would be workable and inexpensive fly in the face of the State's earlier urgings against just such a two-jury practice at the initial trial. The State cannot have it both ways, and the capital criminal justice system must not force defendants into trial before a less than impartial jury. No Ohio court has yet considered the impact that the State's contradictory positions have on the fairness of the present capital scheme.

377) This highly prejudicial situation, as imposed on defense counsel by Ohio's statutory scheme again renders his assistance to the accused ineffective. Under Ohio's statutory scheme, defense counsel must choose between either engaging in sufficient voir dire on the death penalty issue and risk the appearance to the jury of a surrender on the guilt issue, or forego voir dire on the death penalty issue and risk the impanelment of jurors whose undetected bias toward the death penalty would render them unfit to sit on the jury. *State v. McClellan*, 12 Ohio App. 2d 204, 232 N.E.2d 414 (1967). Both choices created by the statute are constitutionally unacceptable to a defendant facing death as a possible punishment.

378) Ineffective assistance of counsel is also caused by the application of O.R.C. § 2929.03(D)(1) because once an accused requests a mental examination, presumably with the hope that the results will be in mitigation of the offense, defense counsel has no control over the distribution of the results to the jury regardless of whether the results are in favor of or against the defendant's best interest.

379) Counsel must play a blind guessing game when requesting the examination and has no way to prevent the jury from reviewing the results if they are adverse to his client's interests or suffer from procedural irregularities. Without any right to review the examination

results prior to distribution to the jury, defense counsel is unable to fully and effectively serve the best interests of his clients. O.R.C. § 2929.03 must be struck down as an unconstitutional deprivation of the defendant's right to effective assistance of counsel as guaranteed by both the Constitutions of Ohio and of the United States.

Denial of an Impartial Jury

380) An accused has an absolute right to an impartial jury under the Sixth Amendment to the United States Constitution. *Sheppard v. Maxwell*, 384 U.S. 333 (1966). A sentencing hearing is part of the criminal prosecution, *Mempa v. Rhay*, 389 U.S. 128 (1967), and therefore, as a federal constitutional matter, a criminal defendant has the right to an impartial jury at his sentencing hearing.

381) Ohio's bifurcated trial procedure wherein a single jury hears and decides both the guilt and penalty phases of trial violates the defendant's rights to an impartial jury at the sentencing hearing. Once a jury has found an accused guilty of aggravated murder a very high probability exists that jury bias and animosity towards the accused will exist at the sentencing hearing, the existence of which should be a basis for challenge for cause during voir dire at the start of the trial.

382) Under Ohio's death penalty statutory scheme, an intolerable risk exists that a defendant's life may be put in the hands of a hostile venire, which in effect creates uncertainty in the reliability of the determination reached. Such a risk cannot be tolerated in a capital case, *Beck v. Alabama*, 447 U.S. 625, 638 (1980). Therefore, the statute must be struck down as an unconstitutional violation of the defendant's right to an impartial jury under the State and federal constitutions.

B. O.R.C. §§ 2929.03, 2929.04 AND 2929.022 VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND

ARTICLE I, §§ 9 AND 16 OF THE OHIO CONSTITUTION BY FAILING TO PROVIDE ADEQUATE GUIDELINES FOR DELIBERATION, AND LEAVING THE JURY WITHOUT PROPER GUIDELINES IN BALANCING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES.

383) The language contained in the Ohio death penalty statutory scheme; “that the aggravating circumstances ... outweigh the mitigating factors” violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9 and 16 of the Ohio Constitution by inviting arbitrary and capricious jury decisions. These constitutional guarantees require that the aggravating circumstances must more than merely “outweigh” the mitigating factors to result in imposition of the death penalty.

384) The use of the term “outweigh” preserves reliance on the lesser standard of proof by a preponderance of the evidence. The statute requires only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors. In that instance, any perceived marginal difference in weight between aggravating circumstances and mitigating factors would result in execution. Such a sentencing scheme is unconstitutional because it creates an unacceptable risk of arbitrary or capricious sentencing. As the Ohio provisions do not explicitly provide for merciful discretion on the part of the trier of fact and the death penalty is mandatory once the criteria are established, it is particularly important that the scales not be more heavily skewed toward death.

385) Additional problems exist because the mitigating circumstances are vague. The jury must be given “specific and detailed guidance” and be provided with “clear and objective standards” of their sentencing discretion to be adequately channeled, according to *Gregg* and *Godfrey v. Georgia*, 446 U.S. 420 (1980). Without such guidance, a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.

386) The mitigating circumstances stated in O.R.C. § 2929.04(B) are so vague in terminology that there is a “substantial risk that sentencing authorities will inflict the death penalty in an arbitrary and diversified manner.” *Delaware v. White*, 395 A.2d 1082, 1091 (1978).

387) Case law from Ohio continuously reaffirms that “[t]he process of weighing factors, as well as the weight, if any, to assign a given factor, is a matter for the discretion of the individual decision maker,” *State v. Fox*, 69 Ohio St. 3d 183, 193, 631 N.E.2d 124, 132 (1994), and *State v. Loza*, 71 Ohio St. 3d 61, 82, 641 N.E.2d 1082, 1105 (1987) (“the individual decision maker ... must be allowed to freely decide whether to give any weight to the mitigating evidence”).

388) Giving so much discretion to sentencing juries -- in respect to both aggravating and mitigating factors -- inevitably leads to arbitrary and capricious judgments. Aggravating factors must not be applied arbitrarily or inconsistently, yet that is unchecked in Ohio. The Ohio open discretion scheme further risks that constitutionally relevant mitigating factors which must be considered as mitigating and recognized as such [for instance youth or childhood abuse (*Eddings v. Oklahoma*, 455 U.S. 104 (1982)), mental disease or defect (*Penry v. Lynaugh*, 492 U.S. 302 (1989)), level of involvement in the crime (*Enmund v. Florida*, 458 U.S. 782 (1982)), or lack of criminal history (*Delo v. Lashley*, 507 U.S. 272 (1993))] will not be factored into the sentencer’s decision.

389) While the federal constitution may allow states to shape consideration of mitigation in order to obtain more rational and equitable imposition of the death sentence, *see Johnson v. Texas*, 509 U.S. 350 (1993), Ohio’s capital scheme fails to provide adequate guidelines to sentencers, and fails to assure against arbitrary, capricious, and discriminatory results.

390) Empirical evidence is developing in Ohio and around the country that, under commonly used penalty phase jury instructions, juries do not understand their responsibilities and apply inaccurate standards for decision. See Cho, Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death, 85 Journal of Criminal Law and Criminology 532, 549-557 (1994), and findings of Zeisel discussed in *Free v. Peters*, 12 F.3d 700 (7th Cir. 1993). A series of studies of jury instructions are now being conducted in several states, some under grants from the National Science Foundation. There is a substantial risk that the law is presently being misapprehended in ways fundamentally prejudicial to defendants. This confusion violates the federal and state constitutions.

C. O.R.C. §§ 2929.022, 2929.03 AND 2929.04 AND OHIO R. CRIM. P. 11(C)(3) PLACE AN UNCONSTITUTIONAL BURDEN ON THE DEFENDANT'S RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, § 10 OF THE OHIO CONSTITUTION AND HIS RIGHTS TO BE FREE FROM COMPULSORY SELF-INCRIMINATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §10 OF THE OHIO CONSTITUTION.

391) Under the Ohio death penalty statutory framework, an accused indicted under the statute has two initial choices; go to trial or plead guilty. This statute, however, needlessly and unconstitutionally encourages guilty pleas.

392) If there is a close issue of whether an attempted murder was committed, or a killing was purposeful, an accused may choose to demand a trial by jury. If an accused pursues this defense at the trial and loses, i.e., is found guilty of the offense and specifications, he is put in a precarious position. At the sentencing hearing he may suffer a loss of credibility due to the posture taken at the trial, and furthermore, he may face a hostile and biased jury, if the jury is also death-qualified. Against this backdrop the accused will have to submit mitigating facts to save his own life.

393) These choices are the result of an unconstitutional burden being placed on the defendant's Federal and Ohio Constitutional right to trial by jury and his right against compelled self-incrimination by the Ohio death penalty statute. In *United States v. Jackson*, 390 U.S. 570 (1968), the United States Supreme Court declared unconstitutional a statute which it held unnecessarily and needlessly encouraged guilty pleas.

394) Similarly, the Ohio death penalty statute operates in much the same manner, i.e., a guilty plea greatly increases the defendant's chance to demonstrate mitigating facts and thus save his own life.

395) Needless pressure is also placed on the accused to plead guilty as a result of Ohio R. Crim. P. 11(C)(3). O.R.C. § 2929.02 was amended in 1978 to provide that whoever "pleads guilty to, or pleads no contest and is found guilty of aggravated murder" shall be sentenced in accordance with the new law, as are those who are convicted after trial. This was apparently an attempt to answer the concerns expressed by Justice Blackmun, concurring in *Lockett*, at 618, regarding the "disparity between a defendant's prospects" as to sentence when pleading guilty or proceeding to trial. See Note, The Death Penalty and Guilty Pleas Ohio Rule 11(C)(3)--A Constitutional Dilemma, 5 Ohio North. L. Rev. 687 (1978). However, the disparity Justice Blackmun spoke of was occasioned by Ohio R. Crim. P. 11(C)(3), which is still in effect, and still needlessly encourages guilty pleas.

396) Under Ohio R. Crim. P. 11(C)(3), "if the (aggravated murder) 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 the specifications and impose sentence accordingly, in the interests of justice."

397) Although Ohio's present sentencing statute is not quite as harsh as the previous law (in that greater consideration is given to mitigating factors), after a trial the sentencing judge or judges are not given unbridled discretion to simply disregard the aggravating factors "in the interests of justice."

398) On its face, O.R.C. § 2929.04(D)(2) compels the jury and judges to consider aggravating circumstances and to balance them when imposing a sentence. They are required to impose the death sentence if the aggravating factors outweigh those presented in mitigation. Thus, if an accused has doubtful or no mitigating circumstances, he is strongly encouraged to plead guilty and to waive all of his constitutional rights at the trial with the hope of evading death through an injected discretionary capital sentencing decision.

399) The issue of whether this provision creates an impermissible burden on the defendant's exercise of his right to plead not guilty was not addressed by the Court majority in *Lockett* because the death sentence was reversed on other grounds. *Lockett* at 608, fn. 16. Justice Blackmun, however, would have reversed the sentence because "a defendant can plead not guilty only by enduring a semi-mandatory, rather than a purely discretionary, capital sentencing provision." *Id.* at 619. This Court has rejected the alleged constitutional violation. *See State v. Weind*, 50 Ohio St. 2d 224 (1977); *State v. Jackson*, 50 Ohio St. 2d 253 (1977), *vacated on other grounds*, 438 U.S. 911 (1978); and *State v. Nabozny*, 54 Ohio St. 2d 195 (1978).

400) In *State v. Zuern*, 32 Ohio St. 3d 56, 65 (1987), this Court returned to this precedent, and again failed to provide any guidance to lower courts which would limit the discretion under Ohio R. Crim. P. 11(C)(3), and correct this encouragement to plead guilty. Further, this Court's present practice of considering only other death-sentence imposed cases in its proportionality review means that instances of dismissals of the specifications will not be

reviewed or considered in the future. This maintains the totally unchecked discretion of the trial courts under Ohio R. Crim. P. 11(C)(3).

401) This Court's view in *Buell* and *Zuern* that the issue is not raised unless a "plea is offered or accepted" is improperly narrow, as a corollary impact of Rule 11(C)(3) is to create an unchecked arbitrariness in the State's death penalty statutory scheme. This practice has not yet been addressed by the federal courts, and has not been rectified by Ohio decisions. As the present statutes and rules create an unnecessary encouragement to waive Federal Constitutional rights, thus rendering the Ohio capital sentencing scheme unconstitutional.

D. O.R.C. § 2929.03 FAILS TO PROVIDE A MEANINGFUL BASIS FOR DISTINGUISHING BETWEEN LIFE AND DEATH SENTENCES, AS IT DOES NOT EXPLICITLY REQUIRE THE JURY, WHEN IT RECOMMENDS LIFE IMPRISONMENT, TO SPECIFY THE MITIGATING CIRCUMSTANCES FOUND, OR TO IDENTIFY ITS REASONS FOR SUCH SENTENCE. THIS DENIES THE ACCUSED HIS RIGHTS UNDER O.R.C. § 2929.03(A), THE OHIO CONSTITUTION AND THE FEDERAL CONSTITUTION.

402) Ohio's appellate review practices offend rights guaranteed under the Constitution to due process, to equal protection of the laws, and to be free from cruel and unusual punishment. This Court is constitutionally and statutorily required, pursuant to O.R.C. § 2929.05(A), and Article I, §§ 9 and 16 of the Ohio Constitution to determine whether a particular sentence of death is excessive or disproportionate to that imposed in similar cases.

403) Although the United States Supreme Court has declined to require proportionality review in all cases, *Pulley v. Harris*, 465 U.S. 37 (1984), it continues to recognize that proportionality review "serves as a check against the random or arbitrary imposition of the death penalty." *Gregg v. Georgia*, 428 U.S. 153 (1976). *See also Gesty v. Mitchell*, 456 F3d 575(6th Cir. 2006).

404) While Ohio's capital sentencing provisions require collection of certain data relating to capital cases to facilitate this review, i.e., the entire records of cases in which the

death penalty is imposed, O.R.C. § 2929.03(G); and information as to each capital indictment including name of defendant, court, date of capital indictment, disposition (by plea, dismissal, or trial) and sentence imposed, O.R.C. § 2929.021, there is a fundamental omission in the collection scheme.

405) This flaw arises from the failure to require of the jury, when recommending life imprisonment, identification of the mitigating factors found to exist, and why these outweigh the aggravating factors.

406) Information as to cases in which life imprisonment was imposed after a capital sentencing hearing is essential for the reviewing courts to carry out their responsibility of assuring that excessive, disproportionate sentences of death are not imposed. Baldus, Pulaski, Woodworth and Kyle, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 Stan. L. Rev. 1, 7 (1980), fn. 15; *Woodson v. North Carolina*, 428 U.S. 280 at 305-316 (1976) (Rehnquist, J., dissenting); *McCaskill v. Florida*, 344 So. 2d 1276, 1280 (1977). The majority of states follow the practice of comparing cases in which life sentences were imposed. Van Duizend, Comparative Proportionality Review in Death Sentence Cases. What Why?, State Court Journal, Vol. 8, No. 3 (1984), at fn. 26 (pub. draft).

407) Because the jury's recommendation of life is binding and no opinion is required to be prepared by the jurors setting forth the mitigating factors found and the reasons why one outweighed the other, there is no means in Ohio to accurately compare a case in which a binding jury's life recommendation was made to that in which a death sentence was imposed. While a finding of aggravation is necessarily made and specified by the jury in the guilt phase, this finding cannot substitute for the life recommendation of the jury because it cannot serve to

distinguish among death-eligible defendants or explain why some of them are sentenced to death while others are not. *Gesty v. Mitchell*, 456 F3d 575(6th Cir. 2006).

408) In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court stated that the Constitution mandated both “measured, consistent application (of the death penalty) and fairness to the accused,” and again that “capital punishment (must) be imposed fairly, and with reasonable consistency, or not at all.” (Emphasis added.) These aims of consistency and fairness cannot be achieved within the present Ohio capital sentencing scheme.

409) Without requiring the jury to identify and specify its reasons, arbitrary and capricious decisions are masked by jury secrecy and the general verdict of a binding life recommendations. *Furman; Gregg; Getsy*.

E. O.R.C. §§ 2929.021, 2929.03 AND 2929.05 FAIL TO ASSURE ADEQUATE APPELLATE ANALYSIS OF ARBITRARINESS, EXCESSIVENESS AND DISPROPORTIONALITY OF DEATH SENTENCES AND THIS COURT FAILS TO ENGAGE IN A LEVEL OF ANALYSIS THAT ENSURES AGAINST ARBITRARY DEATH SENTENCING.

O.R.C. §§ 2929.021, 2929.03 and 2929.05 are Inadequate to Ensure Non-Arbitrary and Non-Excessive Sentences.

410) O.R.C. §§ 2929.021, 2929.03 and 2929.05 require the reporting of some data to the courts of appeals and the Supreme Court of Ohio, although, as discussed above, there is the critical omission of a written life recommendation report from the jury. There is substantial doubt about the adequacy of the information received on guilty pleas to lesser offenses, or after charge reductions at trial under the statute. O.R.C. § 2929.021 requires the reporting of only minimal information on these cases and the defense respectfully contends that additional data is necessary to make an adequate comparison in these cases.

411) O.R.C. § 2929.021 is incomplete in the required tracking aspects because:

- (1) The statute does not explicitly require the employment of resources (personnel, data collection and retrieval systems) to adequately compile and summarize the requisite data for this comparative evaluation, and use it. *See Delaware v. White*, 395 A. 2d 1082, 1094-1095 (1978).
- (2) There is no statutory requirement that the courts identify the types of cases considered, the particular cases considered, or submit written findings comparing the cases.

412) "Adequate" or "meaningful" appellate review is a precondition to a finding that a state death penalty system is constitutional. *Zant v. Stephens*, 462 U.S. 862, 890 (1983); *Pulley v. Harris*, 465 U.S. 37 (1984). The standard for review is one of careful scrutiny. *Barclay v. Florida*, 463 U.S. 939, 960 (1983). Review must be based on a comparison of similar cases and ultimately must focus on the character of the individual and the circumstances of the crime. *Id.* Death sentences will be reversed where there is a significant risk of arbitrary sentencing. *Zant*, 462 U.S. at 879.

413) Meaningful appellate review is undercut by the failure of the Ohio statutes to require the jury recommending life imprisonment, or the judge who gives a life sentence upon such a recommendation, to identify the mitigating factors found to exist and to state why these outweigh the aggravating circumstances.

414) Without this information, no comparison of cases is possible since no written findings of fact exist to serve as a basis for comparison. Without this essential basis for comparison of cases, the Appellant respectfully asserts that there can be no meaningful appellate review.

415) Careful scrutiny in the comparison of cases is possible only if a sufficient data base and a standardized method of comparison exists. There must be as much information regarding as many cases as possible in order for a comparison to be accurate and significant--to provide a relevant basis for distinguishing cases and appropriate penalties from each other.

416) A standardized method of comparison is necessary for a consistent process of comparison. Yet Ohio's system provides for procedures which are incompatible with the meaningful comparison of cases. These include accelerated review, the requirement that only minimal information be included in written findings at sentencing, the vagueness of the method of comparison and the gathering of incomplete and inadequate data.

417) Ohio's death penalty statutory scheme is unconstitutional without the certainty of meaningful appellate review. A substantial risk exists that sentences of death will thus be arbitrarily and capriciously imposed. In fact, this is precisely what is occurring under this statute.

This Court Has Wholly Failed to Assure Against Arbitrary Death Sentences.

418) While this Court claims to perform an excessiveness, proportionality and arbitrariness review of the death penalty imposed in capital cases, this review is in fact quite illusory. The Court concluded that the review mandated by O.R.C. § 2929.04 of "similar cases" will be so limited that it can no longer serve to ensure against non-arbitrary sentences.

419) A short chronology of the Court's approach to its review reveals these inadequacies. This Court presently purports to consider only other death-sentence imposed cases. The court's sorting process of looking at only death-sentenced cases wholly abdicates the responsibility which the legislature entrusted to it pursuant to O.R.C. § 2929.05. The previously discussed statutes explicitly required notice to the Supreme Court of Ohio and the courts of appeals of the filing of capital indictments, the case number and the disposition thereof. O.R.C. § 2929.021. The statutes further require that an opinion be filed identifying the aggravating circumstances and mitigating factors and the reasons why the mitigating factors outweighed the aggravating circumstances in all cases that proceed to a sentencing hearing, at the very least those before a three-judge panel which result in the imposition of a life sentence. O.R.C. §

2929.03(F). In fact, a judgment cannot be deemed final until this opinion is filed with the Court of Appeals and the Supreme Court of Ohio. *Jenkins*.

420) The reasons for the legislature's mandates in these instances is patently obvious: these are the minimal tools for the reviewing courts to carry out their O.R.C. § 2929.05 responsibilities. Indeed, this Court recognized this purpose in the first death penalty case it reviewed and then proceeded to rely on these provisions to stave off claims that Ohio's capital sentencing scheme failed to assure against arbitrary sentencing. *Jenkins*.

421) In *Jenkins*, the Court rejected the arguments that the Ohio sentencing scheme violated the Eighth Amendment as it failed to specifically require "a jury, when recommending a sentence of life imprisonment over the imposition of the death penalty, to identify the existence of mitigating factors and why those factors outweigh the aggravating circumstances." *Jenkins*, at 177. The *Jenkins* Court acknowledged that "state courts traditionally compare the overall course of conduct for which a capital crime has been charged with similar courses of conduct for which a capital crime has been charged with similar courses of conduct and the penalties inflicted in comparable cases. See *Gregg*, 428 U.S. at 204-206, and *Proffitt v. Florida*, 428 U.S. 242, 259-260 (1976). The *Jenkins* Court then found that:

The system currently in place in Ohio enables this court to obtain a vast quantity of information with which to effectuate proportionality review, beginning with data pertinent to all capital indictments and concluding with the sentence imposed on the defendant, whether or not a plea is entered, the indictment dismissed or a verdict is imposed by the sentencing authority.

Id. at 177. See O.R.C. § 2929.021.

422) Due to this other information available to it, this Court rejected the claim that the statutes were inadequate:

Although appellant would have this court require juries returning a life sentence to specify which mitigating factors were found to exist and why they outweigh aggravating

circumstances, we conclude that such information is not an indispensable ingredient in assisting us to determine whether the imposition of a death sentence is disproportionate to sentences imposed for similarly proscribed courses of conduct.

Id. at 177.

423) The Court therefore relies on the information it is receiving pursuant to O.R.C. § 2929.021 to validate the statute, to demonstrate it adequately checks arbitrariness.

424) It is clear from cases following *Jenkins* that this avowed necessary check has been totally ignored. In *Jenkins*, the Court stated that nothing could be discovered in the cases cited by appellant which would establish that his sentence was “arbitrary.” *Id.* at 210. *Jenkins* also stands for the proposition that O.R.C. § 2929.05 does not require a comparison of death sentences with sentences imposed in non-capital murder cases. *Id.* at 209.

425) A review of the subsequent cases reveals that the court also does not compare death sentences with life sentences handed down in capital murder cases, or even the life sentences imposed on co-defendants in separate jury trials.

426) In *State v. Maurer*, 15 Ohio St. 3d 239, 246-247 (1984), no comparison of cases was undertaken at all. Further, the trial court wholly neglected to justify the imposition of the death sentence. This Court allowed the appellate court to provide the rationale for the death sentence even though O.R.C. § 2929.05 expressly requires the trial court to explain the death sentence. *Id.*, 15 Ohio St. 3d at 246-247.

427) Later cases reveal what *Jenkins* foreshadowed; that when a review of proportionality is conducted, it will only be conducted among cases in which the death sentence was imposed. Life sentences handed down in death cases are excluded. See *State v. Rogers*, 17 Ohio St.3d 174, 187 (1985), and *State v. Mapes*, 19 Ohio St. 3d 108, 118-119 (1985). *Rogers*

also held that the appellate courts need only consider death verdicts within their own geographical boundaries. *Rogers*, 17 Ohio St. 3d at 186.

428) In *State v. Martin*, 19 Ohio St.3d 122 (1985), the Court developed an expedited procedure for the proportionality review in certain cases holding that, "In view of the lack of mitigating factors in this case, the death sentence imposed in this case is not disproportionate to similar sentences imposed ..." Thus, in a case where no mitigation is presented, the sentence is automatically proportionate because death sentences have been affirmed in cases with mitigation. There is thus no consideration of the significance of the aggravating circumstances or their worthiness to call for a death sentence. See *Barclay v. Florida*, at 964 (Stevens, J., with Powell, J., concurring in judgment); *Smith v. North Carolina*, 459 U.S. 1056 (1982) (Stevens, J., dissenting from denial of certiorari).

429) In *State v. Williams*, 23 Ohio St. 3d 16 (1986), the Court developed an interesting counterpoint to *Martin*. The Court engaged in no independent proportionality review. Rather, it dealt with appellant's argument that his sentence was disproportionate because other capitally-charged defendants with only one aggravating circumstance had received life. The Court dismissed the argument noting that the United States Supreme Court has not held that, "the number of aggravating circumstances is the only factor permitted to be considered in a decision of whether to impose a death sentence." *Id.* at 25. Of course, little guidance is provided by the Court as to what is to be considered.

430) *State v. Buell* is the standard approach:

Additionally, we find the sentence of death to be appropriate as it is neither excessive nor disproportionate to the penalty imposed in similar cases.

Buell, 22 Ohio St. 3d at 144. No mention of which "similar cases" were used in the comparison, nor is there exposition as to why this particular case warrants similar treatment. As such the

notice provisions of the Due Process Clause are violated. Moreover, in *State v. Brooks*, 25 Ohio St. 3d 144 (1986), the Court held the death sentence was appropriate “. . . when compared to the other cases in Ohio where the death penalty has been imposed.”

431) In other Supreme Court of Ohio decisions, a similar pattern is followed: only other death sentences will be considered. *State v. Zuern*, 32 Ohio St.3d 56, 64-65 (1987); *State v. Steffen*, 31 Ohio St.3d 111 (1987), syllabus one; *State v. Stumpf*, 32 Ohio St.3d 95, 107 (1987). The Court now disavows any ability to assure equal treatment of all capital defendants, *Zuern*, 32 Ohio St. 3d at 64.

432) While this Court acknowledges “The purpose of a proportionality review is therefore to insure that the death penalty is not imposed in a random freakish, arbitrary or capricious manner” *Id.* at 64, the Court’s present review provides no means of achieving this.

433) The Court claims “Ohio’s system well documents why particular murderers receive the death sentence, which has removed the vestiges of arbitrariness.” *Id.* at 65. However, that documentation, provided by collection of life sentence opinions and dispositions, is never consulted by the Court.

434) This Court refuses to consider life sentence cases, even when these are presented to them by the capital defendant/appellant. *See Stumpf*, 32 Ohio St. 3d at 106-107. The Court simply states it need not consider these, then does not. *Id.* at 106-107.

435) In fact, this Court has proven itself unwilling to undertake meaningful review of any issues in capital cases. In *State v. Poindexter*, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988), the Court determined that it need not give any consideration to errors raised by a capital appellant. The Court held that when issues of law in capital cases have been considered and decided by the

Court and are raised again in a subsequent capital case, the Court will summarily dispose of the issues in all following cases.

436) In *State v. Spisak*, 36 Ohio St. 3d 80 (1988), the Court demonstrated the extent to which it applies the *Poindexter* ban on review. Upon being presented with a brief containing sixty-four (64) propositions of law and exceeding four hundred ninety-four (494) pages, the Court refused to review practically all of these errors and filed a four and one-half page opinion. Instead, the Court chastised appellant for vigorously exercising his rights to raise errors on appeal. *Id.* at 82, fn. 1.

437) In Ohio, the right to meaningful appellate review has been reduced to the right of having no review at all under *Poindexter* and *Spisak*. The constitutional requirement of meaningful appellate review recognized by *Zant v. Stephens*, *Pulley v. Harris* and *Barclay v. Florida*, is flagrantly violated by the Ohio courts. Under present Ohio "review" standards, capital appellants may raise errors, but by doing so they open themselves to criticism for seeking review. The only "guarantee" under present review standards is that Ohio courts can ignore the appellate errors raised. This situation is constitutionally intolerable.

438) This Court has no notion of whether the death case before it represents a departure from a common practice of life sentencing on the same facts since it refuse to consider its "collected documents." The Appellant agrees that the appellate courts' responsibility to assure against arbitrary sentencing does not require absolute equal treatment among capital defendants and does not require that every possibility of arbitrariness be obliterated. But, as the Supreme Court of the United States stated, the Eighth Amendment is offended if there is "a significant risk of arbitrary sentencing" that is unchecked. *McCleskey v. Kemp*, 481 U.S. 279 (1987). In *McCleskey*, the Court required "rationality in the system" and approved Georgia's practice of

reviewing the proportionality of sentences as achieving “a reasonable level of proportionality” among the class of eligible defendants. *Id.* 481 U.S. at 298. Georgia reviews life sentences, and actively compares life and death sentences. *Zant*, 462 U.S. at 879, fn. 19.

439) Common sense dictates that this Court’s approach cannot adequately check arbitrariness and clearly violates a defendant’s liberty interest in a fair proportionality review. If the frequency of jury leniency (i.e., life sentences in a particular kind of capital case) is high, then the occasional death sentence is the kind of case, even if justified by the evidence, that is aberrant and comparatively excessive. *See* Baldus, Pulaski, Woodworth and Kyle, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 *Stan. L. Rev.* 1, 16 (1980). *See Getsy*.

440) This Court cannot identify the aberrant death sentence, because it does not consider whether life sentences are generally imposed in this type of case. The oft-quoted saying that “justice is blind” has been turned on its head by the Supreme Court of Ohio. This type of blind justice, with claims of documentation while maintaining a willful blindness and conscious ignorance as to why persons receive life or death sentences in this state, creates a constitutionally intolerable risk of arbitrary sentencing.

441) Conclusory rulings regarding excessiveness or proportionality also deny capital defendants the findings necessary to support a just decision and deny a fair and adequate opportunity to refute or rebut this conclusion. Because Ohio appellate courts are sentencing courts, they must provide basic procedural due process guarantees to assure reliable determinations. Such is not the case under the present scheme and this also undermines the protection against cruel and unusual punishment.

442) When this Court does on occasion undertake some actual comparison of other death sentence cases, there is no rational explanation why it does in some cases and does not in others. The Court's practices perpetuate arbitrary decision-making by disparities in the level and scope of its own appellate review. This denies due process, equal protection, and cruel and unusual punishment protections to those Ohio capital defendants given short-shrift review. Even when attempted, the Court's comparative review is generally a totally one-sided analysis.

443) This Court does not refer to whether, in other cases, mitigation of a similar type has resulted in a life sentence. Those life and death sentence opinions could conceivably reflect that more than ninety-five percent of the cases with those aggravating circumstances and mitigating factors result in life sentences, but this Court's failure and refusal to consider this information and its consideration of only one half of the equation always arbitrarily leads to an affirmation of the death sentence.

444) Blind reliance on the presence of an aggravating circumstance cannot adequately assure against arbitrariness. Aggravating circumstances only make one capitally eligible. It is up to the Court to assure that the sentencing among those who are capitally eligible is done without a significant risk of arbitrary results. That requires examination of both sides of the equation, aggravation and mitigation.

445) It is not unreasonable to expect some consideration of life sentences. This check against arbitrariness is regularly followed in other states. *See, e.g., Herzog v. Florida*, 439 So. 2d 1372 (1983); *North Carolina v. Williams*, 301 S.E.2d 335 (1983); *Zant*.

446) This Court has obliterated any ability to rationally distinguish between life and death sentences. The Court's failure to know what a life sentence case looks like and what the lower courts have decided is mitigating have rendered it unable to ensure against arbitrariness.

447) If the Ohio courts had demonstrated a willingness to check excessive sentences by an occasional reversal on such grounds, there would be less concern. But that has not happened and there is serious doubt whether it ever will, given the state of capital appellate "review." The system and its application does not carry out the constitutionally and statutorily mandated responsibility to assure against arbitrariness.

448) Ohio's statutory scheme on its face has flaws; in application, these are compounded by a failure to exercise a constitutionally necessary review. No capital conviction can be sustained under these circumstances.

F. THE APPELLATE REVIEW PROVISION OF O.R.C. § 2929.05 FAILS TO SPECIFICALLY REQUIRE INQUIRY AND FINDINGS REGARDING ARBITRARINESS, PASSION, OR PREJUDICE, AND THUS IS CONSTITUTIONALLY INADEQUATE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 9 AND 16 OF THE OHIO CONSTITUTION.

449) Appellate review of sentences to determine whether the death sentence is "imposed under the influence of passion, prejudice, or any other arbitrary factor," serves as "a check against the random and arbitrary imposition of the death penalty." *Gregg v. Georgia*, 428 U.S. 153, 204, 206 (1976). Death sentences which are arbitrarily or capriciously imposed, due to freakish or infrequent imposition, bias, or discriminatory application, cannot be upheld under the Eighth and Fourteenth Amendments to the United States Constitution. *See Furman v. Georgia*, 408 U.S. 238, 309-310, 313 (1976).

450) O.R.C. § 2929.05 does not specifically require an inquiry and findings as to the possible influence of passion, prejudice, or any other arbitrary factor. Such an inquiry is constitutionally necessary according to the state and federal constitutions.

451) This Court's decision in *State v. Thompson*, 33 Ohio St. 3d 1 (1987), appears to engage in a review of whether passion or prejudice pervaded the capital sentencing proceeding.

If the appellate courts consistently consider whether the sentence was possibly influenced by passions or prejudice, this statutory omission may be cured.

452) As written, however, Ohio's statutory scheme is inadequate to assure compliance with the Eighth and Fourteenth Amendments to the United States Constitution. If this review is not required explicitly by O.R.C. § 2929.05(A), and is not deemed required by implication in every case through a construction of the statute, O.R.C. § 1.47(A)(B)(C), then Ohio's capital sentencing scheme must fail.

G. THE OHIO DEATH PENALTY STATUTE IMPERMISSIBLY MANDATES IMPOSITION OF THE DEATH PENALTY AND PRECLUDES A MERCY OPTION IN THE ABSENCE OF MITIGATING EVIDENCE OR WHEN AGGRAVATING CIRCUMSTANCES OUTWEIGH MITIGATING FACTORS. THE STATUTE ALSO FAILS TO REQUIRE A DETERMINATION THAT DEATH IS THE APPROPRIATE PUNISHMENT.

453) The Ohio death penalty statutory scheme precludes a mercy option, either in the absence of mitigation or when the aggravating circumstances "outweigh" the mitigating factors. The statutes in those situations mandate that death shall be imposed. O.R.C. §§ 2929.03, 2929.04. The sentencing authority is IMPERMISSIBLY limited in its ability to return a life verdict by this provision.

454) In *Gregg*, 428 U.S. at 199, the United States Supreme Court stated, "nothing" in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that "in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant."

Gregg requires the State to establish, according to constitutionally sufficient criteria of aggravation and constitutionally mandated procedures, that capital punishment is appropriate for the defendant. Nothing requires the State to execute defendants for whom such a finding is made. Indeed the Georgia statute, approved

in *Gregg* as being consistent with *Furman*, permits the jury to make a binding recommendation of mercy even though the jury did not find any mitigating circumstances in the case. *Fleming v. Georgia*, 240 S.E.2d 37 (1977); *Hayes v. Georgia*, 282 S.E.2d 208 (1981).

455) Subsequent to *Lockett*, the Fifth and Eleventh Circuits repeatedly reviewed and remanded cases for error in the jury instructions when the trial court failed to clearly instruct the jury that they had the option to return a life sentence even if the aggravating circumstances outweighed mitigation. *Chenault v. Stynchcombe*, 581 F.2d 444 (5th Cir. 1978); *Spivey v. Zant*, 661 F.2d 464 (5th Cir. 1981); *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1981); *Westbrooke v. Zant*, 704 F.2d 1487 (11th Cir. 1983); *Tucker v. Zant*, 724 F.2d 882 (11th Cir. 1984); *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982); *Prejean v. Blackburn*, 570 F. Supp. 985 (W.D. La. 1983).

456) Capital sentencing that is constitutionally individualized requires a mercy option. An individualized sentencing decision requires that the sentencer possess the power to choose mercy and to determine that death is not the appropriate penalty for this defendant for this crime. In *Barclay v. Florida*, 463 U.S. at 950, the Court stated that the jury is free to “determine whether death is the appropriate punishment.”

457) Absent the mercy option, the accused faces a death verdict resulting from *Lockett*-type statute, i.e., a statute that mandated a death verdict in the absence of one of three specific mitigating factors.

458) Under current Ohio law, the sentencer lacks the option of finding a life sentence appropriate in the face of a statute which requires that when aggravating circumstances outweigh mitigating factors “it shall impose a sentence of death on the offender.” O.R.C. § 2929.03(D)(3). A non-mandatory statutory scheme that affords the jury the discretion to recommend mercy in any case “overrides the risk that the death penalty will be imposed in spite of factors ‘too

intangible to write into a statute' which may call for a less severe penalty, and avoidance of this risk is constitutionally necessary." *Conner v. Georgia*, 303 S.E.2d 266 (1983).

459) Other state courts have also required a determination of "appropriateness" beyond mere weighing of aggravating circumstances and mitigating factors. *California v. Brown*, 726 P.2d 516 (1985), *reversed on other grounds*, 479 U.S. 538 (1987).

460) The most recent case from the United States Supreme Court respecting the need for consideration of mercy is *California v. Brown*, 479 U.S. 538 (1987), wherein the court repeated "the Eighth Amendment's need for reliability in the determination that death is the appropriate punishment in a specific case." In *Brown*, the Court agreed that jurors may be cautioned against reliance on "extraneous emotional factors," and that it was proper to instruct the jurors to disregard "mere sympathy." This instruction referred to the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase. The Court's analysis clearly approved and mandated that jurors be permitted to consider mercy, i.e., sympathy tethered or engendered by the penalty phase evidence.

461) The Ohio statute does not permit an appropriateness determination; a death sentence is mandated after a mere weighing. Finally, this Court has claimed that an "Ohio jury is not precluded from extending mercy to a defendant," *State v. Zuern*, 32 Ohio St.3d 56 (1987), Ohio jurors are not in fact informed of this capability. In fact, the Supreme Court of Ohio has permitted penalty phase jury instructions in direct contradiction to this extension of mercy capability.

462) The Ohio "no-sympathy" instructions to juries do not in any way distinguish between "mere" sympathy (untethered), and that sympathy tied to the evidence presented in penalty phase, and therefore commit the very violation of the Eighth Amendment which the

California instruction had narrowly avoided. While the Supreme Court of Ohio claims extending mercy is permissible in Ohio, and acknowledges that “[s]entencing discretion is an absolute requirement of any constitutionally acceptable capital punishment statute,” *Zuern*, at 65, there is in fact no such indication on the statute’s face, and no state court assurance that jurors are so informed. Bald, unsupported assertions of compliance with the constitution are inadequate.

H. O.R.C. §§ 2929.03, 2929.04 AND 2929.05 VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 9 AND 16 OF THE OHIO CONSTITUTION BY FAILING TO REQUIRE THE JURY TO DECIDE THE APPROPRIATENESS OF THE DEATH PENALTY.

463) Pursuant to O.R.C. § 2929.05, Ohio appellate courts, when reviewing a death sentence, must make a determination that death is the only appropriate penalty. The trial court is not required to make such a determination.

464) A finding of appropriateness is constitutionally required. *Coker v. Georgia*, 433 U.S. 584 (1977). In *Coker*, the Court stated that the death penalty is unconstitutional “if it makes no measurable contribution to acceptable goals of punishment.” *Id.* at 592. The death penalty is unconstitutional if, in a particular case, it is not the only penalty that will appropriately serve the State’s punishment goals.

465) The Court consistently refers to the “need for reliability in the determination that death is the appropriate punishment in a given case.” *Woodson v. North Carolina*, 428 U.S. 305 (1976); *see, also, Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Zant v. Stephens*, 462 U.S. 862 (1983); *Barclay v. Florida*, 463 U.S. 939, 958-959 (1983) (Stevens, J., with Powell, J., concurring in judgment); *California v. Ramos*, 463 U.S. 992, 998-999 (1983).

466) Merely concluding that the aggravating circumstances outweigh those in mitigation is inadequate, since a jury might still conclude that “a comparison of the aggravating factors with the totality of the mitigating factors leaves it in doubt as to the proper penalty,” i.e.,

in doubt as to whether death is the appropriate punishment in a specific case. *Smith v. North Carolina*, 459 U.S. 1056 (1982), (Stevens, J., dissenting from denial of certiorari).

467) Whether the “ultimate penalty is warranted,” *Proffitt v. Florida*, 428 U.S. 242, 253 (1976), must at times be considered by the jury in a manner analytically separate from the legislature’s choice as to the significance of particular facts, labeled as aggravating circumstances. The jury, and sentencing judges, “maintain a link between contemporary community values and the penal system.” *Gregg v. Georgia*, 428 U.S. 153, 190 (1976).

468) Thus, one of the constitutionally required functions of a death penalty scheme is that the aggravating circumstances “reasonably justify the imposition of a more severe sentence of the defendant compared to others found guilty of (aggravated) murder.” *Zant v. Stephens*, 462 U.S. at 877. An opportunity for the jury to find the death penalty inappropriate when “statutory aggravating circumstances exist, and arguably outweigh ... mitigating circumstances, but the (aggravating circumstances) are insufficiently weighty to support the ultimate penalty” “helps to fulfill (this) constitutionally required function.” *Barclay v. Florida*, 463 U.S. at 964, and fn. 7 (Stevens, J., with Powell, J., concurring in the judgment). *See also, Barclay* at 954-955, and fn. 12 (plurality opinion discussion of *Lewis v. Florida*, 398 So. 2d 432 (1981)). Thus, a jury’s “opposition to a particular aggravating circumstance is a legitimate consideration for imposing a life sentence, (as it) represent(s) factors which may call for a less severe penalty.” *Lockett v. Ohio*, 428 U.S. 586, 605 (1978).

469) The Ohio statute cannot be interpreted to in effect instruct the sentencer to ignore this fact calling for a less severe penalty. Ledewitz, The Requirement of Death: Mandatory Language in the Pennsylvania Death Penalty Statute, 12 Duq. L. Rev. 103, 139-140 (1982). When an aggravating circumstance is present and no facts in mitigation are presented, for

example, even though the aggravating circumstances outweigh the mitigating factors the sentencing body “must (still) determine whether the aggravating circumstances ... are of such value, weight, importance, consequence, or significance as to be sufficiently substantial to call for the imposition of the death penalty.” *North Carolina v. McDougall*, 301 S.E.2d 308, 324-328 (1983). See also, *Louisiana v. Watson*, 423 So. 2d 1130 (1983); *King v. Mississippi*, 461 U.S. 919 (1983) (Marshall, J., dissenting from the denial of certiorari); Note, Capital Punishment in Ohio, 31 *Cleve. St. L. Rev.* 495, 510-521 (1982).

470) The jury must be free to determine whether or not death is the appropriate punishment. *Barclay v. Florida*, 463 U.S. at 950, quoting *California v. Ramos*, 463 U.S. 992, 1008 (1983). The jury must make this decision and must make it in a fashion that will allow objective appellate review.

471) If the original sentencer does not make a finding that the penalty is appropriate in a particular case, then reviewing courts must speculate about whether the sentencer dealt with this issue. Arbitrary decisions will necessarily result where such a finding must be made for the first time on appeal because of speculation.

472) The present Ohio statutes create an unacceptable risk that death will be imposed in spite of factors in mitigation, or in the jury’s decision that death is simply not an appropriate punishment for that man and that crime.

I. THE OHIO DEATH PENALTY SCHEME PERMITS IMPOSITION OF THE DEATH PENALTY ON A LESS THAN ADEQUATE SHOWING OF CULPABILITY BY FAILING TO REQUIRE A CONSCIOUS DESIRE TO KILL, PREMEDITATION, OR DELIBERATION AS THE CULPABLE MENTAL STATE, BY DENYING LESSER OFFENSE INSTRUCTIONS AND BY ALLOWING AFFIRMANCE OF CAPITAL CONVICTIONS ON THE BASIS OF UNCONSTITUTIONAL PRESUMPTIONS RESPECTING THE PRESENCE OF AN INTENT TO KILL.

473) The Supreme Court of the United States has stated that as the death penalty “is an extreme sanction, (it is) only suitable to the most extreme crimes.” *Gregg*, 428 U.S. at 187. In *Coker*, 433 U.S. at 592, the Court reaffirmed its prior holding in *Gregg* that the death penalty for a deliberate murder was not grossly disproportionate. However, in *Lockett* at 613 (Blackmun, J., concurring), 619-620 (Marshall, J., concurring) and at 624 (White, J., concurring), members of the Court expressed their views that imposition of the death penalty upon one who did not possess at least a purpose to cause the death of the victim would likely violate the Eighth Amendment.

474) A majority of the Supreme Court in *Enmund v. Florida*, 458 U.S. 782 (1982), found the imposition of the death penalty upon a person who did not kill, attempt to kill, or intend to kill violated the Eighth and Fourteenth Amendments. The Court stated:

It is fundamental that “causing harm intentionally must be punished more severely than causing the same harm unintentionally: ... (To do otherwise is) “impermissible under the Eighth Amendment.”

Enmund, 458 U.S. at 798.

475) The Ohio Legislature has attempted to meet this constitutional issue by requiring that “No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another,” and “that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.” O.R.C. § 2903.01(D).

476) Nowhere, however, in the Ohio Revised Code is the phrase “specific intent” defined. There is considerable confusion over the meaning of this term in the criminal law sector, particularly when attempts are made to distinguish this from “general intent.”

477) Even if the O.R.C. § 2903.01(B) “discussion” of specific intent is deemed to result in a finding by the jury that the defendant had a conscious desire or objective to kill the victim, imposition of the death penalty would still be an excessive punishment. To avoid disproportionality, the defendant must have been found to have acted with premeditation and deliberation, or with prior calculation and design.

478) By failing to require the conscious desire to kill, or premeditation and deliberation as the culpable mental state, O.R.C. § 2903.01(B) and O.R.C. § 2929.04(A)(7) run afoul of the federal and state constitutions.

479) Even if Ohio’s definition of culpable mental state is deemed constitutional, the Ohio courts’ method of determining the presence or absence of the culpable mental state is often fatally flawed. It is fundamental that it is a violation of due process to allow a jury to rely on a presumption that a person is presumed to intend the natural and probable consequences of his voluntary acts to find intent. *Sandstrom v. Montana*, 442 U.S. 510 (1979). Yet this Court, even in capital cases, has expressly relied on this presumption to deny access to lesser included offense instructions, *Clark v. Ohio*, 38 Ohio St. 3d 252, 527 N.E.2d 844 (1988); *State v. Williams*, 74 Ohio St. 3d 569, 574, 660 N.E.2d 724, 730 (1996), and see also the non-capital case of *State v. Thomas*, 40 Ohio St. 3d 213, 533 N.E.2d 286 (1988).

480) This practice violates the Constitutional guarantee to a jury trial on the issue of intent, and violates due process and the cruel and unusual punishment provision. *Beck v. Alabama*, 447 U.S. 625, 635 (1980). Reliance on the unconstitutional presumption forecloses the ability to view the evidence in the light most favorable to the defendant, as is essential when determining what must be referred to the jury for its consideration, and amounts to a directed verdict on an element of the crime. *Id.*, see also *Gaudin v. United States*, 115 S.Ct. 2310 (1995).

481) Further, the presumption itself is not supported by the beyond-a-reasonable-doubt level of connection between the proven fact and the presumed fact that is required under the due process clause. *Barnes v. United States*, 412 U.S. 837 (1973). It is simply not consistent with present-day experience that every probable consequence of a voluntary act is intended, and thus the presumption fails as a matter of law for purposes of substituting for the prosecution's proof of intent.

482) This Court has also repeatedly relied on this unconstitutional presumption to find the evidence sufficient to sustain a capital conviction, *see e.g. State v. Jester*, 32 Ohio St. 3d 147, 152 (1987); *State v. Esparza*, 39 Ohio St. 3d 8 (1988); *State v. Seiber*, 56 Ohio St. 3d 4, 13 (1990); *State v. Carter*, 72 Ohio St. 3d 545, 553 (1995); *State v. Garner*, 74 Ohio St. 3d 49, 59 (1995). This denies a fair and reliable assessment of the evidence and so dilutes the *mens rea* element that it fails to meet that required for death-eligibility under the federal and state constitutions. *See Lockett v. Ohio*, 438 U.S. 586 (1978).

483) By maintaining a willingness to rely on this presumption, the Ohio courts maintain no rational distinction between the offenses of involuntary manslaughter and aggravated murder in terms of proof. This is wholly unconstitutional under the state and federal constitutions protections of due process, equal protection, and against cruel and unusual punishment. Finally, the Ohio court's inconsistent practice respecting demands for actual proof of intent (at times relying on the presumption and at other times making a genuine effort to engage a constitutionally appropriate analysis), produces arbitrary and inconsistent applications of the Ohio law denying rights guaranteed under the state and federal constitutions.

J. THE OHIO "BEYOND A REASONABLE DOUBT" STANDARD OF PROOF FAILS TO MEET THE REQUIREMENT OF HIGHER RELIABILITY FOR THE GUILT DETERMINATION PHASE OF A CAPITAL CASE.

The statutes fail to require proof beyond all doubt as to guilt that aggravating circumstances outweigh mitigating factors, and the appropriateness of death as a punishment before the death sentence may be imposed.

484) The standard of burden of proof required for capital cases should be proof beyond all doubt. The jury should be instructed during both phases that the law requires proof beyond all doubt of all the required elements. Most importantly, death cannot be imposed as a penalty except upon proof beyond all doubt of both the crime itself and the fact that the aggravating circumstances outweigh the mitigating circumstances.

485) Insistence on reliability in guilt and sentencing determination is a vital issue in the Supreme Court's capital decisions. This emphasis on the need for reliability and certainty is a product of the unique decision that must be made in every capital case - the choice of life or death. The Supreme Court has consistently emphasized the "qualitative difference" of death as a punishment, stating that "death profoundly differs from all other penalties" and is "unique in its severity and irrevocability." *Woodson*, 428 U.S. at 305; *Lockett*, 438 U.S. at 605; *Gardner v. Florida*, 430 U.S. 349 (1977); *Gregg*, 428 U.S. at 187.

486) Proof beyond all doubt, a higher standard than the statutory proof beyond a reasonable doubt, should be required in a capital case because of the absolute need for reliability in both the guilt and penalty phases. The irrevocability of the death penalty demands absolute reliability. Absent such a safeguard, the accused may be subject to a sentence of death in violation of his Eighth and Fourteenth Amendment rights.

487) The proof beyond a reasonable doubt standard is required in criminal cases "to safeguard men from dubious and unjust convictions." *In re Winship*, 397 U.S. 358, 363 (1970). The petitioner in *Winship* was a juvenile facing a possible six years imprisonment. Crucial to the Court's decision was its assessment of the importance of the defendant's right not to be deprived

of his liberty. Proof beyond a reasonable doubt was demanded in recognition that “the accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the convictions.” *Id.* Only this standard of proof adequately commanded “the respect and confidence of the community in applications of the criminal law.” *Id.* at 364.

488) In a capital case, far more than liberty and stigmatization are at issue. The defendant’s interest in his life must be placed on the scales. Only then can an appropriate balancing of the interests be performed; only then can one know whether the “situation demands” a particular procedural safeguard. Given the magnitude of the interests at stake in a capital case and the necessity that the community “not be left in doubt whether innocent men are being condemned” *Winship* at 364, a high standard is required which reduces the margin of error “as much as humanly possible,” *Eddings*, at 878. The most stringent standard of proof that is “humanly possible” is proof beyond all doubt.

489) The American Law Institute’s Model Penal Code, cited by the United States Supreme Court as a statute “capable of meeting constitutional concerns,” adopts the beyond-all-doubt standard at the sentencing phase. *See Gregg v. Georgia*, 428 U.S. 153, 191-195 (1976). The Model Penal Code mandates a life sentence if the trial judge believes that “although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant’s guilt.” Model Penal Code § 210.6(1)(f). If the trial judge has any doubt of the defendant’s guilt, life imprisonment is automatically imposed without a sentencing hearing. The words used are “all doubt,” not merely “doubt” or “reasonable doubt.”

Ohio’s definition of proof “beyond a reasonable doubt” results in a burden of proof insufficiently stringent to meet the higher reliability requirement in capital cases at the guilt phase, and this has not been cured by appellate courts in their review of convictions or death sentences.

490) Ohio law provides standard jury instructions of “reasonable doubt” and “proof beyond a reasonable doubt” as the applicable burden of proof in capital cases. O.R.C. § 2901.05(D). Both definitions have been repeatedly challenged in the courts as inadequate. “. . . [T]he restyling has changed and distorted the former definitions to such an extent that the statutory definition of reasonable doubt requires little more than a preponderance of the evidence.” *State v. Frost*, No. 77AP-728 (Franklin C.A. May 2, 1978) unreported (Whiteside, J., dissenting). See *Cross v. Ledford*, 161 Ohio St. 469 (1954); *Holland v. United States*, 348 U.S. 121 (1954); *Scurry v. United States*, 347 F.2d 468, 470 (D.C. Cir. 1965), *cert. denied*, 289 U.S. 883 (1967) (. . . [I]mportant affairs is the traditional test for clear and convincing evidence . . . The jury . . . is prohibited from convicting unless it can say beyond a reasonable doubt that defendant is guilty as charged. . . . To equate the two in the juror’s mind is to deny the defendant the benefit of a reasonable doubt.) *State v. Crenshaw*, 51 Ohio App. 2d 63, 65, (1977); *cf. State v. Nabozny*, 54 Ohio St. 2d 195 (1978); *State v. Seneff*, 70 Ohio App. 2d (1980). Recently, the Sixth Circuit found in a non-capital case that “although we may disapprove of the ‘willing to act language’ (in O.R.C. § 2901.05(D)) . . . the instructions here, when taken as a whole, adequately convey the concept of reasonable doubt to the jury.” *Thomas v. Arn*, 704 F.2d 865, 869 (6th Cir. 1983).

491) The Ohio reasonable doubt instructions, subject as they are to some challenge for inadequacy in non-capital cases, fail to satisfy the requirement of reliability in a capital case. Even in *Winship*, when considering the reasonable doubt standard, the Court stated that the fact finder must be convinced of guilt “with utmost certainty,” *Winship*, 397 U.S. 358, 364, and that the court must impress on the trier of fact the necessity of reaching a subjective state of certitude. *Id.*, 397 U.S. at 363. Ohio’s definition of a reasonable doubt is inadequate to meet even these

standards. The old "proof to a moral certainty" instruction should be required at a minimum in death cases.

492) Recent cases have illustrated the gross inadequacy of the reasonable doubt standard in capital cases. In *State v. Miller*, 49 Ohio St. 2d 198 (1977), the defendant was sentenced to death solely upon fingerprint evidence that he had explained in an exculpatory manner. A five-Justice majority of the Supreme Court of Ohio concluded that "there was sufficient substantial evidence for the triers of fact to conclude that Miller was the criminal agent of the crimes charged," *Miller*, 9 Ohio St. 2d at 203, and therefore affirmed the conviction and sentence of death. Two members of the Court dissented on the ground that the evidence did not exclude "every reasonable hypothesis of innocence" and listed other evidence inconsistent with Miller's guilt. According to the dissent, the result of the majority's affirmance was the "impos(ition of) the death penalty on evidence insufficient to sustain a conviction." *Id.*, at 206 (Brown, J., dissenting). George Miller's death sentence was eventually commuted as a result of the decision in *Lockett v. Ohio*, 438 U.S. 586 (1978). If no such decision had been rendered by the United States Supreme Court, Miller would have been executed.

493) In *Miller*, doubt existed as to guilt of the accused. Yet Miller received a death sentence affirmed on appeal. Doubt on guilt is absolutely untenable in a capital case. The defendant's interest is not merely in liberty, but life itself. The State's interest in justice is also a vital one. It is not advanced by doubt about guilt. A compromise sentence exacts too great a price from both the State and the accused. The result is a manifest injustice.

494) Given this inadequate definition of proof beyond a reasonable doubt, one would hope some appellate review could assure the innocent are not executed. Unfortunately, the lower courts cannot rely on the Supreme Court of Ohio's review to cure the inadequacies in the proof

standard. In *State v. Apanovitch*, 33 Ohio St. 3d 19 (1987), the four member court majority conceded the case before them was based solely on circumstantial evidence, and that the burden of proof then required exclusion of every reasonable hypothesis of innocence but then affirmed the conviction and death sentence as there was substantial evidence upon which a jury could reasonably conclude that the elements were proven beyond a reasonable doubt. The death sentence was affirmed as the evidence was not, as a matter of law, insufficient. In other words, the court will affirm as long as reasonable jurors could differ as to the proof beyond a reasonable doubt showing.

495) Three justices dissented from the affirmance of Apanovitch's death sentence, as they believed they were statutorily bound to engage in a review of the appropriateness of the death sentence that goes beyond a bare sufficiency of the evidence test, and as they believed "there [was] a substantial possibility that the defendant may not be guilty." *Apanovitch*, 33 Ohio St. 3d at (Sweeney, Locher, and Brown, JJ., concurring in part and dissenting in part). Obviously, it is encouraging that three members of the court were willing to affirm a conviction, but vacate a death sentence when there is "lack of certainty as to guilt," and "even though the crime would merit that penalty if there were no doubt as to the defendant's guilt." *Id.* at 31. But a minority of the Court cannot assure that an innocent will not be executed.

The Ohio death penalty statutes fail to require that the jury consider as a mitigating factor pursuant to O.R.C. § 2929.04(B) that the evidence fails to preclude all doubt as to the defendant's guilt.

496) The language of O.R.C. §§ 2929.04(B)(7) and 2929.03(D)(2) contemplate a balancing process focusing upon the mitigating factors present in the case as compared to the offender's "guilt" with respect to the aggravating specifications.

497) In determining the appropriateness of the death penalty, the fact that the evidence presented failed to foreclose all doubt as to guilt must be considered as a relevant mitigating factor. "The jury should have before it not only the prosecution's unilateral account of the offense but the defense version as well. The jury should be afforded the opportunity to see the whole picture" *California v. Terry*, 390 P.2d 381 (1964). The failure to require jury consideration of the fact that the evidence does not foreclose all doubt as to guilt violates the constitutional standards established for the imposition of the death penalty.

498) The United States Supreme Court ruled that Louisiana's definition of reasonable doubt as a grave or substantial uncertainty was unconstitutional, *Cage v. Louisiana*, 498 U.S. 39 (1990), but that another state's instructions of substantial doubt, in the context of other instructions respecting the standard as an abiding conviction to a moral certainty did not offend the federal constitution. *Victor v. Nebraska*, 511 U.S. 1 (1994). The federal courts have not yet reported on Ohio's definition in the context of a capital case. Assurances against mistake are vital to a fair and just system free of cruel and unusual death-sentencing.

K. THE AGGRAVATING CIRCUMSTANCE THE ACCUSED IS CHARGED WITH COMMITTING, O.R.C. § 2929.04(A)(7), IS CONSTITUTIONALLY INVALID WHEN USED TO AGGRAVATE O.R.C. § 2903.01(B) AGGRAVATED MURDER.

1. Basing a death sentence on O.R.C. § 2929.04(A)(7) and O.R.C. § 2903.01(B) would deny the accused due process and would result in cruel and unusual punishment.

499) The United States Supreme Court warned that "to avoid (the) constitutional flaw of (vagueness and over breadth under the Eighth Amendment), an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of a defendant as compared to others found guilty of (aggravated) murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Ohio's statutory

scheme fails to meet this constitutional requirement because the aggravating circumstance under O.R.C. § 2929.04(A)(7) fails to genuinely narrow the class of individuals eligible for the death penalty.

500) O.R.C. § 2903.01(B) defines the category of felony-murderers as anyone who:

... purposely cause(s) the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

501) If any one of the aggravating factors listed in O.R.C. § 2929.04(A) is specified in the indictment and proved beyond a reasonable doubt the defendant becomes eligible for the death penalty. O.R.C. §§ 2929.02(A) and 2929.03.

502) What makes this scheme unconstitutional is the fact that the O.R.C. § 2929.04(A)(7) aggravating circumstance merely repeats as an aggravating circumstance the factors that distinguish aggravated felony-murder from murder. Proof of the O.R.C. § 2929.04(A)(7) circumstance here fails to reasonably justify the imposition of a more severe sentence on the accused compared to others found guilty of aggravated murder. O.R.C. § 2929.04(A)(7) does not reasonably justify the imposition of a more severe sentence on felony-murderers as compared to other aggravated murderers. The aggravating circumstance must therefore fail. *Zant*, 462 U.S. at 877. The aggravating circumstance of O.R.C. § 2929.04(A)(7) merely repeats the definition of felony-murder as alleged to have been committed which automatically qualifies the defendant for the death penalty. As a result, the prosecuting attorney and the sentencing body is given unbounded discretion that maximizes the risk of arbitrary and capricious action and deprivation of a defendant's life without substantial justification.

503) As compared to other aggravated murderers, the felony-murderer is treated more severely. The person who purposely kills with prior calculation and design is not automatically

subjected to the death penalty. He will receive a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment--if he is on good behavior in prison, he may be paroled after approximately sixteen years. O.R.C. § 2903.01(A), O.R.C. § 2967.19(B). This is the maximum sentence he can receive, unless the prosecution can find and prove some evidence of additional facts beyond the fact that he killed, facts of the type described in O.R.C § 2929.04(A). Each O.R.C. § 2929.04(A) circumstance when used in connection with O.R.C. § 2903.01(A) adds additional measure of culpability to this offender such that society at least arguably should be permitted to punish him more severely with death.

504) But the aggravated murder defendant who is alleged to have actually killed another during the course of an enumerated felony pursuant to O.R.C. § 2903.01(B), is automatically eligible for the death penalty--not a single additional fact must be proven. If both of these persons who kill are aggravated murderers it makes no sense to accord one an ostensible opportunity for release after sixteen years, and to give the other death or imprisonment for at least twenty to thirty years, merely because one commits aggravated murder under O.R.C. § 2903.01(B) rather than § 2903.01(A).

505) To treat the killer who acts with prior calculation and design less severely is also nonsensical because his blame worthiness or moral guilt is clearly higher, and the argued ability to deter him lesser. From a retributive stance this is the most culpable of mental states, as shown by history, overall legislative action, and jury behavior (juries express reticence against the death penalty in felony-murder prosecutions even when the felon is the actual killer). Comment, The Constitutionality of Imposing the Death Penalty for Felony Murder, 15 Hous. L. Rev. 356, 375 (1978).

506) To treat the prior calculation and design killer to an easier punishment is an irrational exercise of legislative authority. The classification created by O.R.C. § 2929.01(A)(7) must fail.

507) The Ohio capital punishment felony-murder scheme also fails to reasonably justify the death sentence because the Supreme Court of Ohio has stated it will interpret O.R.C. § 2929.04(A)(7) as to not require that the intent to commit a felony precede the murder. *State v. Williams*, 74 Ohio St. 3d 569, 660 N.E.2d 724 (1996), syllabus 2. The historical basis for treating felony-murder as deserving of greater punishment is the fact that the offender began his conduct with a felonious purpose (indeed, under the traditional felony-murder rule, this bad intent substituted for the required proof of malice otherwise needed to prove murder). See discussion of English and other authorities in *Michigan v. Aaron*, 299 N.W.2d 304 (1980). The asserted state interest in doing so was to deter the commission of felonies in which individuals may die. To this end, courts have generally required that the killing be the result of an act done in furtherance of the felonious purpose and not merely coincidental to the perpetration of a felony. *Id.*, referencing the Model Penal Code. Without such a limitation, no state interest justifies a stiffer punishment; rather, the offender should simply be punished for the homicide (and let the prosecution prove intent) and any other felonies that may have been committed. Now the Supreme Court of Ohio has discarded the only arguable reasonable justification for the death sentence to be imposed on such individuals, a position that engenders constitutional violations. *Zant v. Stephens*, 462 U.S. 862 (1983). Ohio would appear to allow death eligibility when the felony was merely an afterthought to the murder. This is constitutionally intolerable. See *Mann v. Scott*, 41 F.3d 968 (5th Cir. 1994). Further, the Supreme Court of Ohio's current position is inconsistent with its previous announcements in *State v. Rojas*, 64 Ohio St. 3d 131, 592 N.E.2d 1376 (1992) and

earlier cases, thus creating the grave likelihood of arbitrary and inconsistent applications of the death penalty.

2. O.R.C. § 2929.04(A)(7) is unconstitutional as it delegates harsher punishment to the felony murderer than is the punishment imposed on a premeditation murderer who kills.

508) Equal protection of the law requires that legislative classifications be supported by, at least, a reasonable relationship to legitimate State interests. *Skinner v. Oklahoma*, 316 U.S. 535 (1941). Given that the State is attempting to take life, the most precious right of all, compelling State interest is necessary to sustain legislative classifications in capital sentencing statutes. The State has arbitrarily selected one class of murderers who may be subjected to the death penalty. This statutory scheme is inconsistent with the purported State interests. The most brutal, cold-blooded and premeditated murderers do not fall within the types of murder that are eligible for the death penalty. Surely, if deterrence is a State objective, then this type of killing would be a prime target for the imposition of the death penalty. Yet, this type of aggravated murderer is excluded from the group that is subject to the death penalty. There is no rational basis or any State interest for this distinction and its application is arbitrary and capricious.

L. O.R.C. §§ 2929.03, 2929.04 AND 2929.05 VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 9 AND 16 OF THE OHIO CONSTITUTION IN FAILING TO PROPERLY ALLOCATE THE BURDEN OF PROOF DURING MITIGATION PHASE OF TRIAL.

OHIO BURDEN OF PROOF ON MITIGATION

509) O.R.C. § 2929.03(D)(1) provides that the accused has the burden of going forward with the evidence in mitigation. The statute fails to allocate the burden of proof as to the existence of mitigating factors. This leaves the jury with no guidance. Arbitrary decisions will result from the vague scheme that now exists.

BEYOND A REASONABLE DOUBT STANDARD

510) The State of Ohio should have the burden of proving the absence of mitigating factors beyond a reasonable doubt because it will prevent arbitrary decisions in close cases. The accused cannot be obliged to bear the burden of proving the existence of mitigating factors. If the defense is so obligated, then in all close cases, where aggravation and mitigation are equally balanced, the jury would be required to recommend death. This statute must not be interpreted in a manner which allows the State to "win ties." This would be contrary to the requirements of the Constitution insofar as it mandates respect for humanity and the greater need for reliability as to the appropriateness of the death penalty. See *Woodson*, 428 U.S. at 305; *Lockett*, 438 U.S. at 604; and *Mullaney v. Wilbur*, 421 U.S. 684, 697-701, 703-704 (1975).

511) Placing the burden of proving the absence of mitigating factors on the prosecution will also prevent what has been called "state-administered suicide," *Godfrey*, 446 U.S. 420, 439.

512) This Court held in *State v. Jenkins*, that the defense has the burden by a preponderance at mitigation. If this is an obligation of the defense, it follows logically that this being in the nature of an affirmative defense, is one right which the client may waive. Thus under the present statutory scheme, the State may participate in aiding a capitally-charged defendant's suicide, where such defendants want to be executed despite the existence of mitigating factors.

513) There are at least two reasons why an accused may want to die. The most obvious is that death may understandably be preferable to a long prison term. Another reason is that the murderer may truly feel that death is what he deserves for the crime he committed. Death is not necessarily the proper penalty in either case, however. If death is preferable to the convicted murderer, then clearly the death penalty fails as a deterrent. If the defendant feels he deserves to die for what he has done, then he is repenting and could probably be rehabilitated. In any case,

society's decision to issue its most extreme sanction is not a decision to be based in any part upon a criminal defendant's desires. If it is to exist at all, then the penalty must be based upon external, objectively assessable factors.

514) O.R.C. § 2929.03(D)(1) puts the burden of going forward with evidence of mitigating factors on the accused. A particular defendant may have many items of mitigation in his favor. But if he declines to raise them, the death penalty is mandatory. The sentencing authority has no choice: it must weigh the aggravating circumstance(s) (already established) against the absence of mitigation. Thus, two men with the same background can commit the same murder and be sentenced to grossly different penalties, merely because one has the will to live and the other does not. A sentencing scheme which allows this result operates arbitrarily and capriciously in violation of equal protection and due process clauses. *See Greenberg, Capital Punishment As A System, 91 Yale L. J. 908 (1982).* In *Lenhard v. Wolff*, 444 U.S. 807 (1979), the defendant was allowed to stand mute in mitigation despite the readiness of standby counsel to go forward. Justice Marshall (dissenting) pointed out that:

We can have no assurance that the death sentence would have been imposed if the sentencing tribunal had engaged in the careful weighing process that was held to be constitutionally required in *Gregg v. Georgia* and its progeny. This Court's toleration of the death penalty has depended on its assumption that the penalty will be imposed only after painstaking review of aggravating and mitigating factors. In this case, that assumption has proved demonstrably false. Instead, the Court has permitted the state's mechanism of execution to be triggered by an entirely arbitrary factor: the defendant's decision to acquiesce in his own death. In my view, the procedure the Court approves today amounts to nothing less than state-administered suicide ...

Lenhard at 815. *See, also, Gilmore v. Utah*, 429 U.S. 1012 (1976).

515) Justice Stevens in his concurring opinion in *Barclay* maintained that both *Lockett v. Ohio* and *Eddings v. Oklahoma* condemn any procedure in which evidence of mitigation has no weight at all. 463 U.S. at 961, fn. 2. Yet, this is the effect of the Ohio statute under the suicide

fact pattern. The statutory procedure does not compel introduction of mitigating evidence. Making mitigation mandatory and proper allocation of the burden of proof would address these concerns. In the absence of this requirement, the statutory system is unconstitutional.

M. THE DEFINITION OF MITIGATING FACTORS IN O.R.C. § 2929.04(B)(7) CREATES AN UNRELIABLE DEATH SENTENCE BY CREATING NON-STATUTORY AGGRAVATING CIRCUMSTANCES.

516) In order to satisfy constitutional requirements on individualized sentencing, Ohio adopted a “catch-all” mitigating factor. O.R.C. § 2929.04(B)(7) permits introduction of “any other factors that are relevant to the issue of whether the offender should be sentenced to death.”

517) The problem with this definition is that it permits consideration of non-statutory aggravating circumstances. The plain wording of the statute instructs the jury to consider evidence relevant to “death.”

518) The jury is not limited to applying this factor in mitigation but is directly instructed to consider factors, whatever they may be, that also “aggravate” the crime and warrant a death sentence.

519) The creation of non-statutory aggravating circumstances in this case does not narrowly tailor and rationally guide the jury in its sentencing determination. *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987); *Lockett*.

520) Rather it creates a reasonable likelihood that the jury will find and consider non-statutory aggravators and improperly impose a death sentence. *Mills; Boyde; Stringer v. Black*, 503 U.S. 222, 231-235 (1992).

N. OHIO'S STATUTORY NATURE AND CIRCUMSTANCES MITIGATING FACTOR IS IMPROPERLY USED AS A NON-STATUTORY AGGRAVATING CIRCUMSTANCE.

521) In a further attempt to make Ohio's death penalty scheme constitutional, Ohio identified the nature and circumstances of the offense as a statutory mitigating factor. O.R.C. § 2929.04.(B)

522) The nature and circumstances are supposed to be mitigating factors. However, the vague nature of this factor renders it a non-statutory aggravator. The vague nature of "nature and circumstances," especially when combined with argument as outlined above, renders it impossible for the jury to consider this mitigating factor as anything other than an aggravator.

523) The jury's discretion is not limited nor is it permitted to give full effect to a defendant's mitigation evidence. Therefore, Ohio's death penalty scheme does not pass constitutional muster.

O. THE DEATH PENALTY VIOLATES INTERNATIONAL LAW.

524) The Ohio death penalty scheme violate Article VI of the United States Constitution and various international laws including, but not limited to, the Organization of American States Treaty, the International Covenant on Civil and Political Rights and the American Declaration of the Rights and Duties of Man.

525) Pursuant to the Supremacy Clause of Article VI of the United States Constitution, the judges of every state are bound by the terms of international treaties to which the United States of America ("United States") is a party. The Supremacy Clause states: "[A]ll 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." U.S. CONST. Art. VI.

526) Not only is this established by Article VI of the United States Constitution, but it has been repeatedly accepted by the courts. *See The Paquete Habana*, 175 U.S. 677 (1900); *The*

Nereide, 13 U.S. 9 Cranch 388, 13 U.S. 388, (1815); *United States v. Toscanino*, 500 F.2d 267 (2nd Cir. 1974); *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981); *Asakura v. City of Seattle*, 265 U.S. 332 (1924); see also Edwin D. Dickinson, THE LAW OF NATIONS AS PART OF THE NATIONAL LAW OF THE UNITED STATES, 101 U. Pa. L. Rev. 26 (1952). The Supreme Court has long held that a treaty entered into by the United States is the law of the land. *Edye v. Robertson*, 112 U.S. 580, 598-99 (1884); *United States v. Rauscher*, 119 U.S. 407, 418 (1886).

527) International agreements of the United States are laws of the United States and supreme over the law of the several states. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1) (1987). The law is clear that if a treaty conflicts with state law, the treaty controls. *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947). “[S]tate law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement. [citation omitted]”. *United States v. Pink*, 315 U.S. 203, 230-31 (1942).

528) Here, because Mr. Cunningham is under a sentence of death, and because he is confined in conditions that are cruel, inhuman and degrading, the State of Ohio is in violation of various international laws.

1.

529) On September 8, 1992, the United States ratified the International Covenant on Civil and Political Rights (“International Covenant”). 999 U.N.T.S. 171; S. 4783-84 102nd Congress (June 8, 1992). Article 6 paragraph 1 of the International Covenant states: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” Article 7 of the International Covenant states: “No one shall be

subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

530) The failure of Ohio to enforce the treaty is, unfortunately, consistent with a pattern of the “lack of awareness of United States International obligations.” United Nations, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/1998/681 (Add. 3) (1998); *see also* United Nations, Human Rights Committee, Comments on the United States of America, U.N. Doc. CCPR/79/Add.50 (1995) (the absence of formal mechanisms for the implementation of treaty rights in United States “may lead to a somewhat unsatisfactory application of the Covenant throughout the country”). International legal scholars and commentators, including Justice O’Connor, have also noted the necessity of enforcing international law obligations in the courts of this country.

I think domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations.

531) Sandra Day O’Connor, *Federalism of Free Nations*, (international law decisions in national courts) 13, 18 (Thomas M. Franck & Gregory H. Fox eds., 1996). The President has even found it necessary to issue an executive order, adopting a “policy and practice of the Government of the United States” to implement international human rights treaties. Exec. Order No. 13107,- C.F.R.- (December 10, 1998). President Clinton specifically referred to the International Covenant when ordering that the United States fully “respect and implement its obligations under the international human rights treaties[.]”²

²Exec. Order No. 13107 states, in part:

IMPLEMENTATION OF HUMAN RIGHTS TREATIES

By the authority vested in me as President by the Constitution and the laws of the United

532) The refusal of the state of Ohio to enforce an international treaty that prohibits Mr. Cunningham's execution and allows him to be held in cruel, inhuman and degrading conditions presents an important issue which must be resolved.

2.

533) Equally important issues this Court must address are the effect of customary international law and *jus cogens* prohibiting executions. The Supreme Court has recognized that, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1) (1987) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States"); *Id.* at § 702 cut. c ("[The customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts]").³ International human rights law has now become an established, essential and

States of America, and bearing in mind the obligations of the United States pursuant to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and other relevant treaties concerned with the protection and promotion of human rights to which the United States is now or may become a party in the future, it is hereby ordered as follows:

Section 1. Implementation of Human Rights Obligations.

(a) It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.

³Customary international law has been a part of U.S. federal law since our country was established. When Justice Jay stated that "the United States by taking a place among the nations of the earth [became] amenable to the law of nations," he was speaking of customary

universally accepted part of the life of the international community. Louis Henkin, *The International Bill of Rights: The Covenant on Civil and Political Rights* at 1 (Louis Henkin ed. 1981). Individuals, including the citizens of the United States, are now understood to possess remediable rights based on international law. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *see generally Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal 1987); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984). Under the Supremacy Clause, customary international law trumps state law. *Kansas v. Colorado*, 206 U.S. 46 (1907); *see Zschernig v. Miller*, 389 U.S. 429, 441 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947); *Missouri v. Holland*, 252 U.S. 416, 433-35 (1920).

a.

534) Customary international law prohibits executions. This conclusion is entirely consistent with the general rule for recognizing that a particular norm has attained the status of customary international law, if two conditions are met: the norm must be (1) reflected in a general practice by nations and (2) *opinio juris* ("a sense of legal obligation"). *See* Article 38,

international law, not merely the treaties the U.S. would one day make. *Chisholm v. Georgia*, 2 U.S. 419, 2 Dall. 419, 474 (1793); *see Ware v. Hylton*, U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence they were bound to receive the law of nations. . . ."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 877 (2d Cir. 1980) ("Upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law.") Even the obligations to obey future treaties stemmed from the customary international law principle of *pacta sunt servanda* ("Promises are to be kept").

The states, under the Articles of Confederation, had applied international law as common law, but with the signing of the U.S. Constitution, "the law of nations became preeminently a federal concern." *Id.* at 877-78. "[I]t is now established that customary international law in the United States is a kind of federal law, and like treaties and other international agreements, it is accorded supremacy over state law by Article VI of the Constitution." Henkin *et al.*, INTERNATIONAL LAW, CASES AND MATERIALS, 164 (3d ed. 1993); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (finding international law to be federal law).

Statute of the International Court of Justice, 26 June 1945, 59 Stat. 1005, 1060 (1945); *see also* Connie de la Vega, *The Right to Equal Education: Merely a guiding Principle or Customary International Legal Right*, 11 HARV. BLACKLETTER J. 37 (1994) (“Connie de la Vega”).

535) Through treaty ratification, nations promote the growth of customary international law norms that then become binding law. “International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (3); *see also* § 102 comment (I). State practice may be deduced from treaties, whether ratified or not. *See, North Sea Continental Shelf Cases*, 1969 I.C.J. 3; Connie de la Vega, at The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF LAW also provides that An agreement among a large number of parties may give rise to a customary rule of international law binding on non-party states.” *Id.* at § 324 cmt. e; *see also* cmt. I (1987). The adoption of those treaties dealing with this issue makes it clear that international law prohibits executions. Because there is such a wide consensus that the International Covenant is an authoritative statement of human rights law, the treaty has the status of customary international law. *See generally*, M. G. Kaladharan Nayar, *Introduction: Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT’L L.J. 813 (1978). In fact, the *travaux preparatoires*⁴ of the International Covenant indicates that Article 6

⁴*Travaux preparatoires* are records of the preparatory work of a treaty, similar to legislative history for statutes, used as a supplementary means of interpretation of the treaty. *See* Frank Newman & David Weissbrodt, (international human rights: law, policy, and process), at 15, n. 120, (2d ed. 1996).

was considered to be a codification of existing customary law representing a consensus of nations and existing norms.⁵

b.

536) Presently, at least 106 nations prohibit executions a list which notably includes the Russian Federation, South Africa, Angola, Cambodia, Haiti, Croatia, Slovenia and Venezuela.⁶ The 106 participating countries far exceeds the threshold numerical figure for establishing a customary international law norm. *Cf. Filartiga v. Pena-Irala*, 630 F.2d 876 (2d. Cir. 1980) (customary international law prohibition against torture reflected in torture convention to which only 95 countries were state parties).

537) A United Nations General Assembly resolution has also recognized that Article 6 of the International Covenant constitutes a “minimum standard” for all member states, not only ratifying states.⁷ The International Covenant was unanimously adopted by the United Nations by a vote of 106-0.

538) The United Nations Commission on Human Rights, at its 53rd session in 1997, passed a resolution calling on states to consider abolishing the death penalty. It urged states that retained a death penalty to limit it to only the most serious crimes.⁸ The commission on Human Rights again considered the issue at its 54th session. The commission passed another resolution

⁵See 12 U.N. GAOR C.3 (819th mtg.) at 287, U.N. Doc. A/C.3/SR.819; 12 U.N. GAOR C.3 (818th mtg.) at 281, U.N. Doc. A/C.3/SR.818 (1957); 12 U.N. GAOR C.3 (816th mtg.) at 271, U.N. Doc. A/C.3/SR.816 (1957); 12 U.N. GAOR C.3 (815th mtg.) at 268, U.N. Doc. A/C.3/SR.815 (1957); 12 U.N. GAOR C.3 (814th mtg.) at 263-64, U.N. Doc. A/C.3/SR.814 (1957); *see also*, Joan F. Hartman, (*Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*), 52 U. CIN. L. REV. 655, 671-72 (1983).

⁶See, <<http://www.amnesty.org/ailib/intcam/dp/index.html>>.

⁷G.A. Res. 35/172, U.N. GAOR Supp. (No. 48) at 195, U.N. Doc. A/35/48 (1980); (*See also*) Hartman, *supra* at 681 n. 94.

⁸See Question of Death Penalty, U.N. Hum. Rts. Comm. Res. 1997/12 *adopted* Apr. 3, 1997.

calling on states that maintained the death penalty to (among other things) comply with the International Covenant.⁹ What separates *jus cogens*¹⁰ from general international law is that the norm or practice in question is non-derogable. Article 4 of the International Covenant states: "No derogation from articles 6, 7, (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision." Because of the importance of these rights, other treaties have similar non-derogation clauses regarding the right to life. The language in these treaties, governing the non-derogability of the right to life, is nearly identical; therefore, the non-derogability of the prohibition of executions is clear and precise.¹¹

539) There is thus a clear *jus cogens* norm that does not permit executions. The final criterion of the Vienna Convention on treaties allows modification of this norm only by a new norm of the same status. There is no emerging norm allowing for executions; quite to the contrary, the practice is forbidden in virtually every civilized nation on the globe.

540) The prohibition on executions is a global *jus cogens* norm that is further reflected in multilateral human rights treaties as well as the case law of an international tribunal whose competence has been accepted by the United States. Just as South Africa could not overcome the

⁹See Question of the Death Penalty, U.N. Hum. Rts. Comm. Res. 1998/8.

¹⁰Article 53 of the Vienna Convention on the Law of Treaties defines *jus cogens* as, "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, art. 53, 1155 U.N.T.S. 331.

¹¹Federal courts of appeals have held that customary international law which has attained the stature of *jus cogens* is legally binding on domestic courts. See *United States v. Mata-Ballesteros*, 71 F.3d 754 (9th Cir. 1995); *In re Estate of Ferdinand E. Marcos Human Rights Litigation* ("Marcos II"), 25 F.3d 1467 (9th Cir. 1994); *In re Estate of Ferdinand E. Marcos Human Rights Litigation* ("Marcos I"), 978 F.2d 493 (9th Cir. 1992); *In Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, (D.C. Cir 1988); *White v. Paulson*, 997 F.Supp. 1380 (E.D. Wash. 1998).

prohibition against apartheid, the United States should not be able to overcome the prohibition against executions or allow its prisoners to be held in cruel, inhuman or degrading conditions. The death penalty is thus clearly inconsistent with international law and *jus cogens*, as well as federal court decisions.

541) The sentence of death denies Mr. Cunningham his rights as guaranteed by the American Declaration of the Rights and Duties of Man, The Organization of American States Charter, the International Covenant on Civil and Political Rights and Article VI of the United States Constitution.

CONCLUSION

542) In its present form, the Ohio statutory death penalty system violates Mr. Cunningham's rights to due process, fair trial, equal protection, fair and impartial jury, effective assistance of counsel, and against cruel and unusual punishment.

PROPOSITION OF LAW NO. XIV

THE CUMULATIVE IMPACT OF THE ERRORS ADDRESSED IN THIS APPLICATION RENDER MR. CUNNINGHAM'S CONVICTION AND SENTENCE UNRELIABLE AND UNCONSTITUTIONAL IN VIOLATION OF ARTICLE VI AND THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

543) Mr. Cunningham's convictions and sentences are void or voidable because of the cumulative effect of the errors that occurred in his case. The cumulative impact of the ineffective assistance of counsel, prosecutorial misconduct, trial court errors, invalid jury instructions, inadequate state remedies, and other errors all worked to render the convictions and sentences unreliable.

544) "[E]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone ... may cumulatively produce a trial setting that is fundamentally unfair." *United States v. Hernandez*, 227 F.3d 686, 697 (6th Cir. 2000) (citing *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983)) (internal quotation marks omitted). See also *Cooley v. Coyle*, 289 F.3d 882, 905 (6th Cir. 2002).

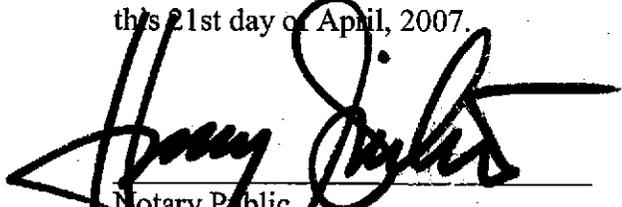
545) The merits of each asserted error are addressed in separate Propositions of Law. The cumulative impact of the errors deprived Mr. Cunningham of his rights under Article VI and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment of the United States Constitution.

546) Mr. Cunningham's convictions and sentence should be set aside, and he should be granted a new trial.



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Counsel for Appellant,
Jeronique Cunningham

Sworn to and subscribed before me
this 21st day of April, 2007.



Notary Public
HARRY P. REINHART, Attorney-at-Law
NOTARY PUBLIC, STATE OF OHIO
My commission has no expiration date.
Sec. 147.03 R.C.