

In the Supreme Court of Ohio

State of Ohio,

Plaintiff-Appellee,

v.

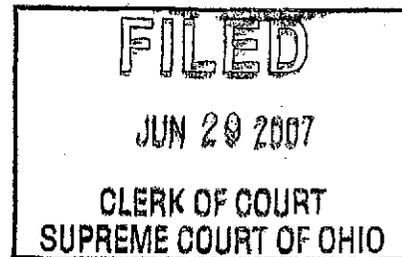
Case No. 2006-1366

Duane Allen Short,

Defendant-Appellant.

On Appeal from the
Court of Common Pleas
Montgomery County, Ohio

Merit Brief



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Proposition of Law No. One: A waiver of mitigation requires a knowing and intelligent waiver. Here the defendant did not have the benefit of a mitigation investigation, only conversations with between his family and his lawyers. Here the defendant took inconsistent positions from those of a person wanting to waive mitigation. Here the waive was being made on the next court day after the liability phase. A waiver under such circumstances is not knowingly and intelligently made...... 13

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Statement of Facts

Facts

This Case is about the demise of the marriage of Duane Allen Short and Rhonda Short—and the tragedy that ensued.

Short found out about Rhonda's leaving their marriage and taking two of their three children from a note that Rhonda sent home with their oldest son, Justin.¹ Short was at work, and Rhonda told the three children, Justin, Tiffany, and Jesse to get into the car.² They drove to a restaurant in Miamisburg where they met up with Rhonda's mother.³ Rhonda, Tiffany, and Jesse left without Justin.⁴ Justin wanted to stay with his father.⁵ Rhonda left a note with Justin telling Short that she was leaving him.⁶ Short got the note when he got home.⁷ Short said that there was another man involved.⁸ Short was upset:

Q. Okay, and do you recall his reaction when you gave him that note?

A. Upset and maybe angry at the time.

Q. Okay. And, do you recall what your dad did after he read that note?

A. Me and him we got in the truck and left.

Q. And, where did you go?

A. We went – we went looking for my mom and we seen my grandma Macy and we stopped and she pulled over. My dad went and talked to her.

Q. Keep your voice up.

And, you say what happened?

A. My dad went to talk to her and I stayed in the truck.

Q. Okay. And, do you know what happened after that?

¹ Tr. 2150.

² Tr. 1752, 2150.

³ Tr. 2151.

⁴ Tr. 2151.

⁵ Tr. 2152.

⁶ Tr. 2152.

⁷ Tr. 2152.

⁸ Tr. 2154.

A. We left and we just kept looking for my mom, and we went to my mom's friend's Leah's house.

Q. Okay. Is her last name Potter?

A. Yeah.⁹

Short's reaction was irrational. According to the description of his at-the-time-13-year-old son, Short was acting pretty sad.¹⁰ The police were called to the Short home on July 16, 2004. Mike Rosenbalm, a City of Monroe police officer, explained that he dealt with Short after first talking with a family member. The first encounter was over an hour.¹¹ The police took Short's shotgun.¹² Short went to the hospital.¹³ The second conversation the next day saw Short still emotional but not to the point that he had been the day before.¹⁴ This second conversation lasted five to ten minutes.¹⁵

Short tried to get another shotgun from a friend, Brandon Fletcher. Fletcher lied to Short:

Q. And, can you tell the jurors had you in fact sold that gun when you told the Defendant that you had sold it?

A. No, I lied.

Q. You didn't?

A. I lied about that.

Q. You lied about that?

And, why did you do that, sir?

A. Well, he was in—he wasn't in any state to be selling a gun.

Q. And, when you say that did you know about—did he tell you anything about real—his relationship with Rhonda?

A. He didn't elaborate very much on that.

Q. And, did you have concern about that relationship?

A. Yeah.

Q. Is that why you didn't sell him the gun?

⁹ Tr. 2152-53.

¹⁰ Tr. 2212.

¹¹ Tr. 2292.

¹² Tr. 2210.

¹³ Tr. 2212.

¹⁴ Tr. 2296.

¹⁵ Tr. 2296.

A. Yeah, with the problems he was having with his wife, I thought I shouldn't sell it to him.¹⁶

Short spent much of the next week looking for his wife:

A. During the next week, he went looking for my mom at a church, Faith Baptist Church in Miamisburg, and we looked there I believe twice. And, we went to Brenda's house.

Q. Okay. And, you mentioned Brenda. Who's Brenda?

A. She was a Sunday school teacher at church.

Q. And, the church that you're talking about, is that Faith Baptist?

A. Faith Baptist.

Q. Is that in Miamisburg?

A. Yes.

Q. Okay. And, do you know why your dad went to the church two times and to Brenda's house?

A. He was trying to figure out where my mom was.

Q. And, do you know if he ever found out where she was?

A. No, he never found out where she was.

Q. Okay. And, was your mom a member of that church that Brenda was a member of?

A. Yes.

Q. And, do you know – was your – was your mom a Sunday school teacher there?

A. Yeah¹⁷

Short continued to work at his job in the meat department.¹⁸ Short told his supervisor there that Rhonda had left him and that he was really down.¹⁹

Short did not make any threats to Rhonda—only to himself:²⁰

A. He had told me that—that she had left him and he was really down—really down.

Q. Okay. And, did he mention anything about carrying out his threat at that time?

A. No—no, only to himself.

Q. I'm sorry?

A. He only wanted—he just wanted to die. That's all that he talked about that last . . .

Q. That day?

A. Yes.²¹

¹⁶ Tr. 1876.

¹⁷ Tr. 2155.

¹⁸ Tr. 1783.

¹⁹ Tr. 1785.

²⁰ Tr. 1784.

²¹ Tr. 1785

The relationship between Rhonda and Donnie Sweeney was problematic! Sweeney's mother told Short that there was no inappropriate behavior going on between Sweeney and Rhonda.²² Others were not so sure. Tiffany did not tell her father about trips to get ice cream with Sweeney, Rhonda, and her brothers—she chose not to tell him this because she thought that it would make her father mad.²³ Jesse also did not tell his father about going with Sweeney and his mother.²⁴ Short told Loren Taylor that Rhonda left him for another man.²⁵ Brandon Fletcher told Short that he had seen Sweeney hugging Rhonda during a church service in the basement²⁶ and that it was not right:

While Short was searching, Rhonda was making other arrangements. After leaving the restaurant with the two younger children, she went the house of Sweeney's mom.²⁷ Rhonda, Tiffany, and Jesse spent nights in various hotels.²⁸ Sweeney's mother paid for the hotel.²⁹ Ultimately, Rhonda with the two younger children went to live at Pepper Drive in Huber Heights.³⁰ Sweeney's mother purchased \$600 worth of furnishings.³¹ Sweeney had helped plant flowers and was cooking supper outside.³² Rhonda was taking a shower.³³ Jesse and Tiffa-

²² Tr. 1810.

²³ Tr. 1737-39.

²⁴ Tr. 1766.

²⁵ Tr. 1817.

²⁶ Tr. 1882

²⁷ Tr. 1720.

²⁸ Tr. 1754.

²⁹ Tr. 1721, 1793& 1807.

³⁰ Tr. 1723, 1755.

³¹ Tr. 1807.

³² Tr. 1725, 1755.

³³ Tr. 1725.

ny were watching television.³⁴ The plan was for Tiffany to spend the night at a friend's house.³⁵

- Q. Okay. And, you had not just seen them together. What were they doing?
A. At one point, they were – well, he was kinda like holding – kinda hugging on her...
Q. Uh-huh.
A. ...and stuff.
Q. Uh-huh.
And, you personally saw that?
A. Yeah, I – I personally seen that.
Q. And, again I think you made some comments to him about their relationship, didn't you?
A. Yeah.
Q. And, what did you tell him?
A. I told him what I saw wasn't right.
Q. Uh-huh.
A. And, that I didn't like what I saw.³⁶

By using Rhonda's social security numbers, Short got the Huber Height's address from Dayton Power and Light.³⁷ He then got a map for the location from a realtor in Huber Heights.³⁸ He acquired another shotgun³⁹ and sawed off the barrel in a motel room.⁴⁰

Short went to Pepper Drive with the gun in a borrowed truck. Justin described Short's actions:

- Q. And, what happened when you parked the car there on that side street?
A. My—my dad—we both had the hats on and he put on the black raincoat and got out of the truck and went around to the back of the house and was lurking.
Q. Okay. And, could see your dad the whole time when he—when he left the truck?
A. The first time he left, I could still see where he was at.

³⁴ Tr. 1726.

³⁵ Tr. 1724-25.

³⁶ Tr. 1881.

³⁷ Tr. 1841-63.

³⁸ Tr. 1863-73.

³⁹ Tr. 1905-49.

⁴⁰ Tr. 2173-75.

- Q. Okay. And, do you know did he go a – where in the house that he went? Where did you see him go?
- A. He went around to the back of the house.
- Q. And, do you know – did you see how he got there?
- A. He just walked through the backyard.
- Q. And, what happened next?
- A. And, then he came back and he put the shotgun shells in his jacket and took the shotgun and put it under his jacket.
- Q. Keep your voice up.
Okay, and did he say anything to you at this point?
- A. He told me he'd probably go to prison for this and he told me that he loved me and to keep my head down.
- Q. And, did he say why you should keep your head down?
- A. So I wouldn't get shot.⁴¹

Short shot Sweeney and Rhonda with the shotgun. Sweeney was dead and Rhonda was taken to the hospital where she died later that morning. Short left the scene with his son, and then returned, waiting for the police.⁴²

Once arrested, Short provided the police with a complete story.⁴³ The police were able to corroborate his story to the extent of locating not only the video of Short purchasing the shotgun but also the video of him purchasing the hack-saw used to modify the shotgun.⁴⁴

Trial proceedings

About a month after the homicides, Short was indicted on Six Counts:

1. Breaking and Entering (land/premises)—OHIO REV. CODE § 2911.13(B)
2. Aggravated Murder of Sweeney (prior calculation/design)—OHIO REV. CODE § 2903.01(A)
3. Aggravated Burglary—OHIO REV. CODE § 2911.11(A)(2)

⁴¹ Tr. 2176.

⁴² Tr. 2178-79.

⁴³ Joint Ex. I Offense Report, pp. 28-30, pp. 31-34, & pp. 38-40.

⁴⁴ Tr. 1905-33, 1938-49.

4. Aggravated Murder of Rhonda (prior calculation/design)—OHIO REV. CODE § 2903.01(A)
5. Aggravated Murder of Rhonda (while committing Aggravated Burglary)— OHIO REV. CODE § 2903.01(B)
6. Unlawful Possession of Dangerous Ordnance—OHIO REV. CODE § 2923.17(A)

All six counts had a firearm specification—OHIO REV. CODE § § 2929.14 & OHIO REV. CODE § 2941.14. And each Aggravated Murder count contained a specification of two or more persons—OHIO REV. CODE § 2929.04(A)(5) OHIO REV. CODE § 2941.14 and a specification of felony murder with Aggravated Burglary—OHIO REV. CODE § 2929.04(A)(1) & OHIO REV. CODE § 2941.14.

After indictment and arraignment, the Court ordered a competency evaluation.⁴⁵ The evaluation was performed, finding Short competent.⁴⁶ At the competency hearing Short requested that he be allowed to fire his court-appointed counsel, plead guilty and waive all mitigation.⁴⁷ His counsel felt that he was not capable of making such a decision.⁴⁸ Because of the medication issues, defense counsel requested a psychiatric evaluation.⁴⁹ The Court rejected this and appointed a clinical psychologist.⁵⁰ The evaluation was completed and a hearing date set.⁵¹ That hearing was continued to facilitate plea negotiations.⁵² The hearing was not held but a scheduling entry was filed, setting deadlines for motions and for hearings.⁵³

⁴⁵ Dkt. 19 & 22.

⁴⁶ Tr. 9-17.

⁴⁷ Tr. 12-14.

⁴⁸ Tr. 14.

⁴⁹ Tr. 24.

⁵⁰ Tr. 25.

⁵¹ Tr. 29-31.

⁵² Tr. 32-33.

⁵³ Dkt. 38.

On May 19, 2005, Short entered a guilty plea to all counts in the indictment.⁵⁴ This was done to avoid his children being called as witnesses, having to testify and being cross-examined.⁵⁵ This was done under a plea agreement with the Government that assured Short that he would not be executed and would serve more than two consecutive life-without-parole sentences.⁵⁶ He waived various rights, including the right to make an unsworn statement to the jury during mitigation.⁵⁷ Such an arrangement required a three-judge panel to consummate,⁵⁸ such a panel was appointed.⁵⁹

Short's father retained the services of another attorney, L. Patrick Mulligan.⁶⁰ His court-appointed counsel withdrew and Mulligan became counsel of record.⁶¹

Further proceedings ensued. Mulligan then filed a suggestion of incompetency and a plea of not guilty by reason of insanity.⁶² Another examination was ordered on the NGRI plea.⁶³ A motion for a second opinion was filed in late July⁶⁴ and another examination was ordered.⁶⁵ A new scheduling order was entered, setting a defense motion deadline for September 30 and a response deadline for November 15, and hearings on December 5 & 6.⁶⁶ A series of mo-

⁵⁴ Dkt. 40 & 41; Tr. 46-90.

⁵⁵ Tr. 59-60.

⁵⁶ Dkt. 42.

⁵⁷ Tr. 69-70.

⁵⁸ Dkt. 43.

⁵⁹ Dkt. 44.

⁶⁰ Tr. 91.

⁶¹ Dkt. 45.

⁶² Dkt. 47 & 48.

⁶³ Dkt. 50.

⁶⁴ Dkt. 55.

⁶⁵ Dkt. 56.

⁶⁶ Dkt. 57.

tions attacking the validity of the death penalty were also filed. The matter proceeded to trial before a jury who ultimately determined that the aggravating circumstances outweighed the mitigating factors. The Trial Court sentenced Short to death.

Argument

Introduction

This statement was presented to the Trial Court at the sentencing hearing with the Trial Court after the jury consideration of the sentence:

MS. WATSON: My name is Tracy Watson. I'm Duane's sister.

I am reading this letter on behalf of my family, the family of Duane Allen Short.

I am so thankful to God for all of the blessings he has bestowed upon us in our lives. He had truly given us more than I can speak of at this time. But, today I would like to take a few moments to tell you about one in particular, my only brother, Duane Allen Short.

Those of us that love Duane that grew up with him shared a life, built memories and had a relationship with him. We are the ones that truly know him, who he really is. He adds many precious things to our entire family for the – for the sake of time I will not be able to expound on everything, but I would like to touch on just a few.

First, Duane is a son, an only son of my dad and mom who has loved and cared for him all of their lives. At short times they still see him as that little boy playing the backyard. Duane was their first child, their only son, and the love that they have for him can never be written in words. So, I will not try to explain it to you in this letter.

Duane is a brother, the only brother that my sister and I have. I have so many fond memories of my brother and I growing up together. I wouldn't trade them for the whole world. We had a lot of good times over the years. Sure, we had our disagreements, that's part of life. But, my brother has always been close to my heart and very precious to me, and not because we are siblings. Unfortunately, I know siblings that hate one another. Being someone's brother or sister does not add – automatically cause you to love them. You have to plant that seed, water it, give it warmth and only then will it grow.

I am thankful to my brother for being there for me, helping me as I grew up, for all of the precious memories and for his love. He's more than just my big brother, he's my – one of my best friends.

Although Duane and my little sister are farther apart in age than Duane and I, the gap in age was not greater than their love. My sister always looked to Duane as her protector, her big brother, the one who could make her laugh no matter what kind of day she was having.

Duane is also a father. He is the only father that Justin, Tiffany and Jesse have. Actually father is not the best choice to use here, because by definition a father is a man who has begotten a child, a man as his is related to his child or children. Duane is more than a father. Anyone

can be a father, but it takes someone special, someone who loves and cares for his children to be a dad. Duane has always loved his children and they loved their dad. Duane may not have been rich and worldly or material goods, but he always made provision for his family. He took care of them and provided for them.

I recall Tiffany talking about her dad and telling me that as long as dad was home she felt safe. She said she knew her dad would take care of them. Then many times the boys, Justin and Jesse, have talked of how their dad would camp out in the backyard with them. He could've slept indoors in the air conditioned house, but he chose to camp outside with his two sons because he loved them. He was a dad.

I heard the story told of how one Halloween Duane and his kids were carving a pumpkin together. As they carved that pumpkin, he pulled off the lid and stuck their fingers in all that goop. What did they find? They found money. What a great surprise. They had picked out a money pumpkin. Only a dad, their dad could figure out a way to turn carving an ordinary pumpkin into a memory that would last a lifetime. How many fathers take the time to do little things like that? Not any, but a dad does.

You can ask many that know Duane they would agree, he has a heart as big as the Grand Canyon. He would give of himself and help others at times when he needed help himself.

Kay, his next door neighbor would tell you of how Duane would come over and see what she needed from the grocery and he would go and get it for her, because you see, Kay is in a wheelchair. She's handicapped and she cannot walk.

Frankie who lived down the street from Duane would tell you of how Duane would pick him up and pay him to help with carpentry jobs that Duane sometimes did on the side to provide for his family. You may wonder why that is so special or so important? It was important to Frankie because Frankie is mentally handicapped and not everyone is willing to take the time to help someone like that, but Duane did.

There are pictures of Duane, his boys and Frankie camping out in the backyard. Frankie felt like a part of the family because Duane, Rhonda and the kids made him feel that way, because they truly was a family.

There are those here today that could stand and tell of times when Duane helped them in some way, times when he gave someone a place to stay, was there when they needed a friend, or stood up and defended their loved one when others had pointed out their mistakes.

We all make mistakes in life. We all as families and as individuals have regrets. It's easy to say I would never do that. But, people like you and me lose our way everyday and make wrong turns. None of us are perfect. We are all human and we all need a savior.

In First Corinthians, Chapter 2 Verse 12 the Bible reads: Wherefore, let him to think if he standeth take heed lest he fall.

The Bible also reads in Romans Chapter 3 Verse 23, that all have sinned and come short of the glory of God. Jesus died for man's sins that we must repent.

I have mentioned Duane as many things to our family, but in trying to close I would like to say, I have watched my brother during these past almost two years. I have never seen a human being so broken, so remorseful for what has happened. I am proud of my brother though because he has taken this tragedy and has truly found God and has done his best to help others find the saving forgiving power of our Lord Jesus Christ.

We have received word that other inmates who have spent time with Duane have told us how Duane has witnessed to them, led them to Christ, and caused them to turn their lives around. One man stated that meeting Duane in the jail was the best thing that ever happened to him. Duane encouraged him to turn his life around and now this man is studying to be a minister. He said, before he met Duane he was in and out of jail all of the time, but now he has purpose for his life.

We all as people can be perceived by others in a way of them not truly knowing who we are. They can and sometimes will label us as many different things, even when it's absolutely untrue. We've probably all been there. It's easy to judge others, but what about ourselves? Until we have lived a person's life or walked in their shoes, we need not label or judge.

When you truly love someone you know them better than anyone, and that is why God can truly judge us for what we really are. God knows each one of us on an individual basis. He knows the heart and good of each one.

Duane may be labeled by this world as many things, however no matter what this world labels him or how this world remembers him, Second Corinthians 5:17 reads: Therefore, if any man be in Christ he is a new creature. All things are passed away. If he hold off, things will become new, and God says Duane is his child.

There is much good in Duane. When he lost his family, he lost his ability to cope and think clearly. I know because I spent that whole week just about with him. He really tried. I spent a lot of time with him. God knows he tried, and he broke down.

Nevertheless, he is still a son that was loved, a brother that is loved, and a dad that is loved and needed by his children. His children have asked numerous times to see and talk to their dad. They need him and they love him.

You know, there'll be another empty chairs in our family, too, Judge Huffman. I know that everyone is suffering, but our family has suffered loss, too.

The State may penalize my brother by taking his freedom, they may even try to take his life, but they can't take his soul because it belongs to God. He alone will give a true and righteous judgment one day to us all. We may fool man, but we will never fool God.

I love you, Duane.

This loving tribute from Short's sister was never presented to the jurors that deliberated on Short's sentence. The jurors never heard the witnesses referred to by her, Short's parents, Short's two handicapped neighbors, or the inmates affected by Short. They saw only his emotional irrationality at the demise of his marriage.

Without this mitigation, the jury determined that death was appropriate. This bulk of this appeal is about how this information similar information littered through the record was not brought to the jury's attention.

Waiver of Mitigation

Proposition of Law No. One:

A waiver of mitigation requires a knowing and intelligent waiver. Here the defendant did not have the benefit of a mitigation investigation, only conversations with between his family and his lawyers. Here the defendant took inconsistent positions from those of a person wanting to waive mitigation. Here the waiver was being made on the next court day after the liability phase. A waiver under such circumstances is not knowingly and intelligently made.

The jury returned a verdict of guilty on Friday, May 5, 2006, and on Monday morning, May 8, 2006, Short was back before the Trial Court for a mitigation hearing. While couched in terms of waiver of mitigation, this was clearly not the case. Minutes after the dialogue with the Trial Court, Short's trial lawyer argued that the aggravating circumstances did not outweigh the mitigating factors. Within a few days, his actions showed that he wanted to present mitigating evidence.

His actions and the information presented or attempted to be presented to the Trial Court substantiated this. Short talked about his remorse and thanked persons who could have been witnesses. His sister talked about testimony from neighbors and persons whom Short had helped in jail. None of this was presented to the jury and its presentation to the Trial Court was such that she gave it no weight.

This Court has held that additional mitigating evidence is not a fundamental right needing a personal waiver by a defendant and that there is no duty of a trial court to secure such a waiver.⁶⁷ However, once the inconsistencies between Short's statements to the Court and his subsequent actions, the Trial Court should have inquired further. This is particularly true given that the dialogue occurred the morning of the next court date. Short's actions later were inconsistent with waiving further mitigation evidence.

The United States Supreme Court has long held that waivers are important and require a trial court's attention:

A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.⁶⁸

This requires an inquiry by the Court into what is being waived and assurances that the defendant comprehends the situation.⁶⁹

⁶⁷ *State v. Keith*, 79 Ohio St. 3d 514, 530, 684 N.E.2d 47, 63 (1997).

⁶⁸ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

⁶⁹ *E.g. Boykin v. Alabama*, 395 U.S. 238 (1969).

A. The record does not show a waiver of mitigation because as soon as the waiver was complete, the defense attorneys were arguing that the aggravating circumstances did not outweigh the mitigating factors.

It was never clear that Short was waiving mitigation. Yet, the Trial Court assumed that it was and reviewed⁷⁰ the legal standards under *State v. Ashworth*, 85 Ohio St. 3d 56, 706 N.E.2d 1231 (1999). *Ashford* does not contemplate the half-hearted-spur-of-moment process in this case. Rather, *Ashford* is focused on a guilty plea and a sentencing before a three-judge panel:

The trial court must decide whether the defendant is competent and whether the defendant understands his or her rights both in the plea process and in the sentencing proceedings. See *Wallace v. State* (Okla.Crim.App.1995), 893 P.2d 504, 512-513; *Grasso v. State* (Okla.Crim.App.1993), 857 P.2d 802, 806.

The Trial Court first informed Short that she would have provided a mitigation investigator to help him.⁷¹ This was not mentioned at the earlier conference with his counsel.⁷² Instead the discussion focused on the requirement that the Short's trial counsel provide discovery to the government lawyers. Katchmer specifically said that the defense was not going to **hire** any mitigation specialist.⁷³ There was no discussion at that time about the court providing such expertise at no cost to Short.

After this discussion of mitigation help, the Trial Court went on to discuss mitigation. The Trial Court did not inform Short of the right to present mitigating evidence⁷⁴ but did explain what mitigating evidence is.⁷⁵ The Trial Court did not inquire of Short whether he understood the importance of mitigating

⁷⁰ Tr. 2466-69.

⁷¹ Tr. 2466.

⁷² Tr. 271-72.

⁷³ Tr. 272.

⁷⁴ Tr. 2466.

⁷⁵ Tr. 2466-67.

evidence.⁷⁶ The Trial Court did discuss the use of such evidence to offset the aggravating circumstances.⁷⁷ The Trial Court did not discuss the effect of failing to present that evidence.

The Trial Court also reminded Short about discussions with one of the psychologists 15 months before.⁷⁸ The Trial Court received assurances from Short that his mental status had not changed in any way.⁷⁹ He also assured her that he understood everything that he had heard from the prosecutors, the defense lawyers, and her.⁸⁰

After being assured that the defendant understands these concepts, the court must inquire whether the defendant desires to waive the right to present mitigating evidence, and, finally, the court must make findings of fact as to the defendant's understanding and waiver of rights. This Court has cautions:

We are not holding that a competency evaluation must be done in every case in which a defendant chooses to waive the presentation of mitigating evidence. See Tyler, 50 Ohio St.3d at 29, 553 N.E.2d at 585. **A trial court should be cognizant of actions on the part of the defendant that would call into question the defendant's competence. However, absent a request by counsel, or any indicia of incompetence, a competency evaluation is not required.**⁸¹

After making the inquiries into the waiver of mitigation, the Court also reviewed the reports from the examinations from 15 months earlier.⁸² She accepted the stipulations that the psychologists would testify consistent with their reports.⁸³

⁷⁶ Tr. 2468-69.

⁷⁷ Tr. 2469.

⁷⁸ Tr. 2469.

⁷⁹ Tr. 2470.

⁸⁰ Tr. 2470.

⁸¹ Ashworth, 85 Ohio St. 3d at 62-64, 706 N.E.2d at 1237-38. Emphasis added.

⁸² Tr. 2469-74.

⁸³ Tr. 2474-75.

The reports did not address Short's competency after a jury verdict of guilty, only his competency 15 months earlier.

The Court noted an earlier waiver of mitigation investigation;⁸⁴ however, the record does not show that this was a knowingly and intelligent waiver by Short. Such a waiver could never be knowing and intelligent because a waiver of mitigation must be based on knowing the facts. Counsel has an obligation to investigate in order to have an opinion about what the client should do.⁸⁵

There was no inquiry into the actual reasons for waiving further evidence. The only time that the Trial Court inquired into the evidence was when the defense attempted to present information to the Trial Court after the jury had made its determination. This oblique inquiry was cut off with a claim of attorney-client privilege:

THE COURT: Why would the evidence have been inappropriate to present to the jury, given...

MR. KATCHMER: Your Honor...

THE COURT: Given that if they made a recommendation for any sentence other than death, the Court would have been bound by that.

MR. KATCHMER: I...

THE COURT: So, why would that have not been appropriate to present to the jury?

MR. KATCHMER: Your Honor, that was a strategic decision. I – I'm not going to go into that here, because that is covered under attorney-client privilege.

This is not a situation where the defendant is asking for the death penalty.⁸⁶ Instead Short's counsel was soon asking the jury to choose life over death.⁸⁷ The Trial Judge's question is proper. And the absence of a reason

⁸⁴ Tr. 2466.

⁸⁵ *Rompilla v. Beard*, 545 U.S. 374, 487 (2005); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *State v. Johnson*, 24 Ohio St. 3d 87, 494 N.E.2d 1061, (1986). See Proposition of Law No. Four.D. below.

⁸⁶ *E.g. Schriro v. Landrigan*, 127 S.Ct. 1933 (2007).

⁸⁷ Tr. 2502-10.

points not to strategic considerations but to a failure of counsel. The information noted below shows that Short wanted to present mitigating evidence.

B. The defendant's actions at the time of the jury consideration were inconsistent with knowing and intelligent waiver.

Within minutes of waiving mitigation, Short was asking the jury to find that the aggravating circumstances did not outweigh the mitigating factors. Short's counsel sought the waiver in a very rush-rush manner. The jury returned a verdict of guilty on Friday, May 5, 2006, and on Monday morning, May 8, 2006, his counsel were seeking the waiver of further evidence. In *State v. Mink*⁸⁸ and *State v. Ferguson*⁸⁹ the defendants had days if not months between their initial expressions and the carrying them out. They were not asked to make the decision the next court day after a jury verdict.

Short had already tried to get the information about his attempted suicide in through the Monroe police officer during his defense. When his counsel attempted to argue this during the closing, he was limited by the few facts before the jury.⁹⁰ Short noted this problem later during his unsworn statement to the Trial Court.⁹¹ Mike Rosenbalm, a City of Monroe police officer, was called to the Short home on July 16, 2004. Short was taken to the hospital for psychiatric evaluation and his shotgun was removed.⁹² The Government conceded that such testimony was relevant at the mitigation phase.⁹³ Rosenbalm was sub-

⁸⁸ 101 Ohio St.3d 350, 805 N.E.2d 1064 (2004).

⁸⁹ 108 Ohio St.3d 451, 844 N.E.2d 806 (2006).

⁹⁰ Tr. 2504.

⁹¹ Tr. 2565-66.

⁹² Tr. 2292-93.

⁹³ Tr. 2286-91.

poenaed to testify during the liability phase,⁹⁴ but defense counsel issued no subpoenas for the mitigation phase.

C. The defendant's actions after the jury consideration and before the judge imposed her sentence were inconsistent with knowing and intelligent waiver.

There was apparently no logic in waiving presenting the evidence and then trying to argue the matter without the evidence. His children had already testified. And Tracey Watson, Short's sister made a statement to the Trial Court later.⁹⁵ She revealed not only family testimony but also significant non-family testimony. Short had testimony available from both family and non-family members. He complained about the problems of the testimony of Officer Rosenbalm.⁹⁶ He also discussed the hospital where he was taken for suicide.⁹⁷ He also had the chaplain at the jail or the other pastors whom he specifically thanked in his unsworn statement to the judge.⁹⁸ Having these persons testify did not raise emotional issues that calling family members would cause.

By the time of the sentencing hearing, such emotional issues were gone. Subpoenas were issues for the three children for the sentencing hearing.⁹⁹ Short's counsel attempted later on to add evidence. At the hearing with the Court, the defendant wanted to add testimony. The inconsistency of not presenting the information to the jury but presenting it to the Trial Court was noted by the Court:

⁹⁴ Dkt. 378.

⁹⁵ Tr. 2588-92.

⁹⁶ Tr. 2565-66.

⁹⁷ Tr. 2566.

⁹⁸ Tr. 2579.

⁹⁹ Dkts. 418, 419 & 420.

MR. KATCHMER: I think the statute allows that [additional evidence].

THE COURT: Why would the evidence have been inappropriate to present to the jury, given...

MR. KATCHMER: Your Honor...

THE COURT: Given that if they made a recommendation for any sentence other than death, the Court would have been bound by that.

MR. KATCHMER: I...

THE COURT: So, why would that have not been appropriate to present to the jury?

MR. KATCHMER: Your Honor, that was a strategic decision. I – I'm not going to go into that here, because that is covered under attorney-client privilege. However, again, we believe that the statute permits us to do this and there is no conflict between the two statutes.¹⁰⁰

This inability to provide a reason for this decision demonstrates the lack of any rational basis for such a recommendation to a client. The Short's trial counsel wanted to add information from Short's children and had subpoenaed them to appear for the hearing before the Trial Court¹⁰¹

D. The Court had an obligation to inquire into these circumstances.

The timing of the waiver of mitigation should have been a signal of a problem. The defendants in *Mink* and *Ferguson* consistently over a long period of time chose to waive all mitigation against the advice of counsel. These two defendants waived all mitigation and plead guilty. Here Short was making the waiver the morning of the next court date after the jury verdict.

The lack of investigation should have been a signal that the mitigation was not being knowingly and intelligently waived.

This Court has cautioned trial judges to be alert to matters of competency at the time of the waiver of mitigation.¹⁰² At one point the Trial Court did ask a question of Short.

¹⁰⁰ Tr. 2547.

¹⁰¹ Dkts. 418, 419 & 420.

¹⁰² *Ashworth*, 85 Ohio St. 3d at 64, 706 N.E.2d at 1238.

THE COURT: All right. Had you been considering that issue, sir, even before this weekend, before the jury's verdict? Had you been giving it thought before this weekend?

DUANE: As to having mitigation?

THE COURT: Correct.

DUANE: Yes, I – I had given it thought.

THE COURT: All right.

DUANE: But...

THE COURT: Go ahead.

DUANE: ...you know, I don't know...

THE COURT: That you had made a decision?

DUANE: It – it's just – I don't know what I'm wanting to say, if I should say it, you know, in front of everyone.

THE COURT: Why don't you say it – tell Mr. Mulligan first since he's next to you and then you – you can con – consider that first, sir?

MR. MULLIGAN: Thank you, Your Honor.

THE COURT: Is there anything you wanted to ask me or say, sir?

DUANE: No – no, Mr. Mulligan suggested I should just reserve that comment.

THE COURT: All right. And, that you had an opportunity to talk with your counsel about this matter and he answered any question that you have today, correct?

DUANE: Yes.¹⁰³

Without prompting Short explained to the Trial Court at the sentencing hearing what happened during the dialogue with his trial counsel. His explanation again called into question the waiver at the time of the jury consideration of mitigation:

One thing I would like to make known in open court today is on Monday, May 8, 2006, my court was in session, the jurors were not present, but on the record with the prosecution and myself and my counsel present, you Judge Huffman asked me, Duane, is there any particular reason why you don't want to put on mitigation?

My response to you, was yes, but I don't know if I should say it on the record. So, you Judge Huffman asked me to console with my counsel before I said anything. After consoling with my counsel, I said nothing in response at that time. **But today, in this courtroom I would like to make known what I said to my counsel and the reason I personally didn't want to put on mitigation, and that reason was that I felt like what little mitigation I had was insignificant compared to the aggravating circumstances and it would not bear much weight for the consideration of the jurors' recommendation**

¹⁰³ Tr. 2471-72.

for sentencing. And, I – and I just wanted everything to be over with.

My counsel on the other hand had already previously advised me that putting on mitigation would not be part of their strategy anyway. But, when these issues arise during court and you Judge Huffman ask me directly why there is a particular reason for going a certain direction, I try my best to answer you to the way I feel towards the issue and not the way my counsel views or suggests a certain strategy or direction they advise me I should go.

I for the most part have kept silent during this whole ordeal, but today I would like to make known, my counsel advised me it would – it was their opinion and strategy to – not to take the stand, which I agreed to do or not to do.¹⁰⁴

The Court relied on stale mental evaluations not done with the purpose of waiving mitigation.

Thus, Short's right to fairly present his mitigation case to the fact-finders, guaranteed by the OHIO CONST. ART. I, § 9 and U.S. CONST. AMEND VIII, and Short's right to adequate counsel, guaranteed by OHIO CONST. ART. I, § 10 and U.S. CONST. amend. VI, , were violated in the process used at trial which resulted in the fact finders not having the appropriate information to balance the aggravating circumstances against the mitigating factors. Thus the sentence must be reversed.

¹⁰⁴ Tr. 2570-71. Empahsis added.

Proposition of Law No. Two:

Under Ohio's death penalty scheme, the trial judge has the final determination on imposing a death system. The defendant attempted and was denied the opportunity to present further information. This violates his right to present mitigation evidence.

The jury returned a verdict of guilty on all counts on May 5.¹⁰⁵ The mitigation hearing began on May 8.¹⁰⁶ At the beginning of the hearing, Short's counsel announced that they would waive further presentation of witnesses.¹⁰⁷

On May 30, 2006, during a sentencing hearing subsequent to a jury's sentencing recommendation, Short was denied his right to due process of law when the court abused its discretion and refused to allow him to present additional mitigating evidence. During the mitigation phase of an aggravated murder trial, a defendant is entitled to present mitigating evidence to be considered prior to sentencing. Short argues that the trial court erred in assuming that it did not have the discretion to allow such evidence to be admitted at a sentencing hearing, and that such discretion is not only granted by Ohio common and statutory law but is required by the rules of Criminal Procedure. Furthermore, the court abused its discretion in denying Short the opportunity to present additional mitigating evidence during his sentencing hearing, due to its misplaced reliance on case law and the statutory requirements of OHIO REV. CODE § 2929.03, which violated Short's constitutional due process rights.

¹⁰⁵ Dkt. 399.

¹⁰⁶ Tr. 2465.

¹⁰⁷ Tr. 2465.

Under OHIO REV. CODE § 2929.03(D)(1), “when death may be imposed as a penalty for aggravated murder, the court shall proceed under this division.” The Ohio Supreme Court has held that, while not explicitly defined in the code, use of the word “section” denotes a reference to “the decimal-numbered statutes of the code” and use of the word “division” denotes a reference to “a capital-lettered paragraph of a section.” *State v. Porterfield*, 106 Ohio St. 3d 5, 8, 829 N.E.2d 690, 691 (2005). Therefore, it can reasonably be concluded that in Short’s trial, the court was proper in proceeding under the general, overall structure of OHIO REV. CODE § 2929.03(D) during the mitigation phase of Short’s trial. The defendant, under OHIO REV. CODE § 2929(D)(1) has “the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death.” While Short was provided an opportunity to present such evidence at an earlier time, he was denied such a right when he requested to present evidence at a sentencing hearing subsequent to the jury’s recommendation.

A. Refusing to allow Defendant to present evidence to the final fact-finder on whether he receives a sentence of death violates the OHIO CONST. art. I, § 9 and § 16 and U.S. CONST. amend. VIII and amend. XIV.

It is settled law that a capital defendant has a plenary right to present evidence going to any aspect of his character, background, or record, as well as to any circumstance particular to the offense, that might justify a sentence less than death, *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978), including evidence of the defendant's behavior after the offense, *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986). The law is equally explicit that the sentencer may not refuse to con-

sider any evidence in mitigation, or be precluded from giving it whatever effect it may merit. *Penry*, 492 U.S. at 318-320; *Eddings*, 455 U.S. at 113-114.

In *California v. Brown*, 479 U.S. 538, 541(1987), the United States Supreme Court held that its own Eighth Amendment jurisprudence establishes that in order for a death sentence to be considered valid, a capital defendant must be allowed to introduce any relevant mitigating evidence regarding his character or record and any of the circumstances of the offense.. Consideration of such evidence is a constitutionally indispensable part of the process of inflicting the penalty of death. *Id.*

In the case at hand, defense counsel requested that the trial court permit them to present additional mitigating evidence before the court, but the court declined. The United States Supreme Court has mandated a defendant be allowed to present all mitigating evidence that could have a potential impact on the defendant's sentence. In a capital murder case, the defendant's life is at stake, in that the state is attempting to justify the use of police power and force to deprive a citizen of the most fundamental right, the right to life. The defendant should be given every opportunity possible to present information that could potentially save his life. Accordingly, the trial court should have allowed the Appellant to present additional mitigating evidence before the judge.

Refusing to permit Short to present evidence before the final fact-finder violated his rights guaranteed by the OHIO CONST. art. I, § 9 and § 16 and U.S. CONST. amend. VIII and amend. XIV. Thus the sentence must be reversed.

B. This Court should reconsider its holding in *State v. Roe*, 41 Ohio St.3d 18 (1989).

This Court should reconsider its ruling in *State v. Roe*, 41 Ohio St.3d 18, 25-26, 535 N.E.2d 1351, 1362 (1989):

OHIO REV. CODE 2929.03(D)(1) provides that all mitigating evidence must be presented to the jury, if the offender was tried by a jury, and that the reports requested must be requested immediately following the trial phase so that they may be presented to the jury.

This Court focused upon compliance with OHIO REV. CODE 2929.03(D)(1).

OHIO CRIM. R. 32(A) states:

(A) Imposition of sentence

Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

- (1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or **present any information in mitigation of punishment.**
- (2) Afford the prosecuting attorney an opportunity to speak;
- (3) Afford the victim the rights provided by law;
- (4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.

(emphasis added).

OHIO CRIM. R. 32(A)(1) requires that the defendant have the opportunity to present additional mitigating evidence. OHIO CRIM. R. 32(A)(1) states that at the time of imposing sentence both the defense counsel and the defendant must be given an opportunity to present any mitigating evidence. There is no case law indicating that this particular statute is trumped by OHIO REV. CODE § 2929.03(D)(1) when the two statutes are applied to the same case. As such, even if the trial court did not feel that the Defendant was entitled to present additional mitigating evidence under OHIO REV. CODE § 2929.03(D)(1), the Defendant should have been allowed to do so under OHIO CRIM. R. 32(A)(1).

This Court should do this for four reasons. First, Ohio statutory law places the burden of presenting any mitigating evidence on the defendant. Thus, the court's denial of any opportunity to meet this burden would abridge a defendant's rights. Second, a defendant is explicitly granted "great latitude" in the presentation mitigating evidence, and the court's decision severely restricted his ability to do so. Third, each capital murder case is unique, thereby making it appropriate for a court to make such determination on a case-by-case basis. Finally, because the final decision regarding the imposition of a sentence of death rests with the court—and not with the jury—the court's refusal to allow a defendant to argue at this stage renders the court's sentencing decision an arbitrary decision of the court.

First, OHIO REV. CODE § 2929.03(D)(1) specifically places a burden on the defendant to bring forth evidence of any mitigating factors. The court's decision to deny a sentencing hearing clearly prevented Short from presenting evidence prior to the court's decision to impose a sentence of death. While Short did waive his right to present mitigating evidence prior to the jury's sentencing deliberations, this did not necessarily imply a complete waiver of any ability to present mitigating evidence, nevertheless a waiver of his ability to make an argument prior to the court's separate and independent sentencing deliberations. Therefore, to deny Short the ability to present evidence at a sentencing hearing was a violation of his right to argue on his behalf in a court proceeding, which constitutes a violation of his rights to due process. Because the court's discretionary decision violated a defendant's right to due process of law, it must be considered an abuse of discretion.

Second, OHIO REV. CODE § 2929.03 (D)(1) explicitly states that a defendant shall be granted “great latitude” in the presentation of evidence of mitigating factors. During the trial, the court refused to grant the defendant “great latitude” by not allowing him to present additional evidence at a sentencing hearing. While it is reasonable to assume that “great latitude” should not be extended to allow a mere repetition of previously-made arguments, or to grant the defendant a “second bite at the apple,” the instant case possesses neither of these factors. Allowing Short the opportunity to present mitigating evidence at the sentencing hearing would not place an undue burden on the court in this trial, because the defendant had made the choice to present all evidence of mitigating factors to the judge alone, and was not merely repeating or re-arguing evidence that had already been presented. Therefore, because the defendant was denied the statutorily-mandated “great latitude” to present evidence of mitigating factors, the court abused its discretion when it refused to allow Short a sentencing hearing.

Third, the unique nature of each capital murder trial warrants a court’s ability to consider each defendant on a case-by-case basis. While the trial court in the instant case primarily based its decision upon the Court’s resolution in *Roe*, the trial court failed to take into account any factors specific to Short’s case. In particular, the *Roe* defendant was denied from presenting types of evidence that were explicitly prohibited by statute. However, such a decision does not necessarily imply a complete bar on presenting all types of evidence during a sentencing hearing. Because each capital murder case is different, the trial

court should take into account situational factors specific to Short's case that would make it unfair to prevent him from presenting mitigating evidence

Finally, the court's decision to refuse a sentencing hearing is an abuse of discretion because this denied Short the opportunity to make an argument to the final decision-maker during the sentencing phase. It is well-regarded that the jury's recommendation of death is not mandatory upon the court.¹⁰⁸ The court may even go so far as to instruct a jury prior to deliberations that a jury decision to recommend a sentence of death is not binding on the court and that the ultimate decision regarding the imposition of a sentence of death rests with the court. This emphasis on the lack of finality in the jury's decision clearly implicates a different position for the jury that is distinct from that of the court, and an argument to each would clearly be structured differently. Additionally, the court is not bound to merely review the jury's deliberation process, but is required to make its own consideration and determination to impose the sentence of death. Clearly, the defendant should be allowed the opportunity to present evidence prior to this decision. It is perfectly reasonable that a defendant would structure an argument differently when arguing before a jury of peers who merely make a recommendation, and a court that sits as the final decision-maker literally of life and death. Obviously, a defendant may not wish to make the same argument before each of these parties, and while an allowance for a defendant to present duplicative evidence could possibly cause undue burden on the court, the opportunity to present mitigating factors only to the trial judge and not the jury, (as Short desired to do in the instant case)

¹⁰⁸ *State v. Jenkins*, 15 Ohio St. 3d 164, 204, 473 N.E.2d 264, 299 (1984).

would not impose an excessive burden. Therefore, the denial of Short's opportunity to present evidence of mitigating factors at a sentencing hearing abused the court's discretion because of the structure of the penalty scheme that grants the final decision to the court.

Because the court's refusal to allow Short the opportunity to argue on his behalf, the court's failure to grant Short "great latitude" as required by statute, and the court's refusal to allow evidence despite its different position that is distinct from that of the jury, the court abused its discretion when it denied Short's request for a sentencing hearing.

Thus this Court should hold that Short's was entitled to present additional evidence to the final trier of fact in his death sentence. Thus the sentence must be reversed.

Access to Children

Proposition of Law No. Three:

Defendant's rights to Due Process were violated when the Trial Court did not hold a hearing on the involvement of the Victim Witness Division of the Prosecutor's Office in the decision to deny the Defendant's counsel access to his children to prepare for trial and mitigation.

Such interviews would have enhanced the mitigation presentation and may have helped in the cross-examination at the trial phase. Short moved to interview his children.¹⁰⁹ Short's trial lawyers explained to the Trial Court during jury selection that Jeffrey D. Livingston, the Guardian Ad Litem, was not mak-

¹⁰⁹ Dkt. 281.

ing the decision about whether to permit Short's children to meet with his trial lawyers but was allowing the person have physical custody.

MR. MULLIGAN: Yeah, he's actually trying to coordinate it for us, and we thought that it would be better it would be at his office and supervised by him for a whole lot of reasons, and we thought that we had that. And, it's on is actually working smooth enough which is, I think the Court asked us just on Monday if we wanted to deal with this issue and we said, no, it's fine because we thought we were making progress. But, apparently we have now run into a brick wall.

THE COURT: All right. Is there any evidence that the State in any manner has interfered with this attempt to contact these children?

MR. MULLIGAN: Any direct evidence, no. The only thing that I know from Mr. Livingston was that Amy supposedly is going to contact Victim Witness before making a decision. I don't know if that's been done or not, and I could not seek what was sent to them by Victim Witness.¹¹⁰

Victim Witness is a part of the Montgomery County Prosecutor's Office.¹¹¹

The matter was deferred until trial. During the trial, Short's trial lawyers discussed calling the Guardian Ad Litem, Justin Short's Guardian, and the people from Victim Witness.¹¹² They made this request because Rhonda's family refused to permit the children to meet with the lawyers at the office of the Guardian Ad Litem. Mr. Mulligan specifically represented to the Trial Court the Victim Witness was involved:

THE COURT: Well, but you were informed by the Guardian Ad Litem that the...

MR. MULLIGAN: Guardian Ad Litem.

THE COURT: ...the...

MR. MULLIGAN: Yeah.

THE COURT: ...legal custodians of the children would not permit an interview?

¹¹⁰ Tr. 1046.

¹¹¹ The Victim / Witness Division is a section of the Montgomery County Prosecutor's Office. Established in 1974, this Division is designed to help those individuals who have been a victim or witness of a violent crime. http://www.mco-hio.org/revize/montgomery/government/prosecutor/victim__witness_division.html .

¹¹² Tr. 2189.

MR. MULLIGAN: It's my understanding that the contact with the Victim Witness and they indicated that they wouldn't agree. That's where we're at.

We believe that Victim Witness would if asked would – would say that, that's correct.

That's what we got.

THE COURT: Well, that's different than I've heard before. I – I've not heard before that Victim Witness told somebody not to testify.

So...¹¹³

Soon after this a hearing was held but only the Guardian Ad Litem testified.

The Guardian Ad Litem had stated that he had delegated the decision to the deceased-spouse's family.¹¹⁴ He did not have any knowledge of any conversations with Victim Witness and did not call the conversation with Mulligan.¹¹⁵

The Government repeatedly stated that the Prosecutor's Office had nothing to do with the decision to refuse to permit defense counsel to interview the children.¹¹⁶ This representation did not include any representation that he had talked with the any on in the Victim Witness before making the representation. Short's trial lawyers then proffered into the record that one of the legal guardians had contacted Victim Witness. They did not introduce any of the various entries appointing any of the various guardians or attempt to call any one from the Prosecutor's Office, Victim Witness Division.

This failing of the Trial Court to hold a hearing with the guardians and the Victim Witness personnel involved violated Short's Right to Due Process, guaranteed by the U.S. CONST. amend. V, VIII & XIV and the OHIO CONST. art. I, §§ 9 & § 16. Thus, the conviction and sentence must be reversed.

¹¹³ Tr. 2196.

¹¹⁴ Tr. 2202-03.

¹¹⁵ Tr. 2203-04.

¹¹⁶ Tr. 2189.

Inadequacy of Trial Counsel

Proposition of Law No. Four:

A defendant has a right to counsel until the time that a court accepts the waiver of the right. The defendant never waived that right.

One of the reasons that most of the mitigating facts were not presented to the jury was the failure of defense counsel to properly investigate and prepare for mitigation. Trial counsel also had other failings as we detail below.

A. The standard of conduct.

The United States Supreme Court has set forth the standard for the adequacy of counsel:¹¹⁷

We established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Id.*, at 687, 104 S. Ct. 2052. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.*, at 688, 104 S. Ct. 2052.

In a capital case defense counsel have an obligation to investigate mitigation and to raise and preserve legal issues.¹¹⁸

¹¹⁷ *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). *Wiggins v. Smith*, 539 U.S. 510 (2003)

¹¹⁸ *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 10.7 & 10.8 (2003). See also *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, (2000); and *Wiggins v. Smith*, 539 U.S. 510 (2003).

B. The defendant's trial counsel failed to protect his rights by not properly pursuing the issue of contact with his children.

Such interviews would have enhanced the mitigation presentation. Short moved to interview his children.¹¹⁹ Short's trial lawyers explained to the Trial Court during jury selection that Jeffrey D. Livingston, the Guardian Ad Litem, was not making the decision about whether to permit Short's children to meet with his trial lawyers but was allowing the person with custody decide.

MR. MULLIGAN: Yeah, he's actually trying to coordinate it for us, and we thought that it would be better it would be at his office and supervised by him for a whole lot of reasons, and we thought that we had that. And, it's on is actually working smooth enough which is, I think the Court asked us just on Monday if we wanted to deal with this issue and we said, no, it's fine because we thought we were making progress. But, apparently we have now run into a brick wall.

THE COURT: All right. Is there any evidence that the State in any manner has interfered with this attempt to contact these children?

MR. MULLIGAN: Any direct evidence, no. The only thing that I know from Mr. Livingston was that Amy supposedly is going to contact Victim Witness before making a decision. I don't know if that's been done or not, and I could not seek what was sent to them by Victim Witness.¹²⁰

Victim Witness is a part of the Montgomery County Prosecutor's Office.¹²¹

The matter was deferred until trial. During the trial, Short's trial lawyers discussed calling the Guardian Ad Litem, Justin Short's Guardian, and the people from Victim Witness.¹²² They made this request because Rhonda's family refused to permit the children to meet with the lawyers at the office of the

¹¹⁹ Dkt. 281.

¹²⁰ Tr. 1046.

¹²¹ The Victim / Witness Division is a section of the Montgomery County Prosecutor's Office. Established in 1974, this Division is designed to help those individuals who have been a victim or witness of a violent crime. http://www.mco-hio.org/revize/montgomery/government/prosecutor/victim__witness_division.html.

¹²² Tr. 2189.

Guardian Ad Litem. Mr. Mulligan specifically represented to the Trial Court the Victim Witness was involved:

THE COURT: Well, but you were informed by the Guardian Ad Litem that the...

MR. MULLIGAN: Guardian Ad Litem.

THE COURT: ...the...

MR. MULLIGAN: Yeah.

THE COURT: ...legal custodians of the children would not permit an interview?

MR. MULLIGAN: It's my understanding that the contact with the Victim Witness and they indicated that they wouldn't agree. That's where we're at.

We believe that Victim Witness would if asked would – would say that, that's correct.

That's what we got.

THE COURT: Well, that's different than I've heard before. I' – I've not heard before that Victim Witness told somebody not to testify.

So...¹²³

Soon after this a hearing was held but only the Guardian Ad Litem testified.

The Guardian Ad Litem had stated that he had delegated the decision to the deceased-spouse's family.¹²⁴ He did not have any knowledge of any conversations with Victim Witness and did not call the conversation with Mulligan.¹²⁵

The Government repeatedly stated that the Prosecutor's Office had nothing to do with the decision to refuse to permit defense counsel to interview the children.¹²⁶ This representation did not include any representation that he had talked with the any on in the Victim Witness before making the representation. Short's trial lawyers then proffered into the record that one of the legal guardians had contacted Victim Witness. They did not introduce any of the various

¹²³ Tr. 2196.

¹²⁴ Tr. 2202-03.

¹²⁵ Tr. 2203-04.

¹²⁶ Tr. 2189.

entries appointing any of the various guardians or attempt to call any one from the Prosecutor's Office, Victim Witness Division.

This failing of his trial counsel to protect his rights by interviewing the children violated Short's Right to Counsel, guaranteed by the U.S. CONST. amend. VI and the OHIO CONST. art. I, § 10. Thus, the conviction and sentence must be reversed.

C. The defendant's trial counsel failed to protect his rights by not properly pursuing the issue of his response to the note informing him of his wife's departure.

During the trial, the defense attempted to get before the jury the information that Short responded to the note from Rhonda by attempting suicide. This was attempted through the testimony of Mike Rosenbalm, a City of Monroe police officer, who was called to the Short home on July 16, 2004. Short was taken to the hospital for psychiatric evaluation and his shotgun was removed.¹²⁷ The Government successfully argued that such testimony was not relevant at the liability phase.¹²⁸ Rosenbalm was subpoenaed to testify during the liability phase, May 3, 2006.¹²⁹ The docket does not show the defense issuing any subpoenas for the mitigation hearing.

This witness was really testifying about mitigation evidence. Yet when it came to mitigation, no further evidence was presented.

This failing of his trial counsel to protect his rights by pursuing the issue of his response to the note informing him of his wife's departure violated Short's

¹²⁷ Tr. 2292-93.

¹²⁸ Tr. 2286-91.

¹²⁹ Dkt 378.

Right to Counsel, guaranteed by the U.S. CONST. amend. VI and the OHIO CONST. art. I, § 10. Thus, the conviction and sentence must be reversed.

D. The defendant's trial counsel failed to protect his rights by not properly pursuing mitigation.

Short's counsel did not investigate mitigation. In fact the Court noted that she had taken a waiver mitigation investigation:

THE COURT: All right. Sir, further if you will recall previously we discussed on the record the fact that it was your choice not to hire a mitigation specialist that was someone to assist your – your attorneys with mitigation, and that could have been provided to you. I would have provided it to you through the State Public Defender's Office, you understand that? DUANE: Yes, I do.¹³⁰

A defendant can waive presentation of mitigation evidence, but for that to be an intelligent waiver, the decision must be based on full knowledge of available evidence.¹³¹ An attorney in a death penalty case has an obligation to investigate.¹³² Here all that the attorneys indicated was that they had no intention of hiring a mitigation expert, that they were not going to have any psychological reports or medical reports, and that one of the co-counsel was going to the parent's home the next week.¹³³

This failing of his trial counsel to protect his rights by pursuing mitigation violated Short's Right to Counsel, guaranteed by the U.S. CONST. amend. VI and the OHIO CONST. art. I, § 10. Thus, the conviction and sentence must be reversed.

¹³⁰ Tr. 2466.

¹³¹ *Wiggins v. Smith*, 539 U.S. 510, 534 (2003).

¹³² *Rompilla v. Beard*, 545 U.S. 374, 487 (2005).

¹³³ Tr. 272.

E. The defendant's trial counsel failed to protect his rights by objecting when the Court did not define mitigating factors during the voir dire.

The voir dire process did not include what in this case was the most important feature, the concept of mitigating factors, evidence about an individual or an offense that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate.¹³⁴

You will again be deciding the facts, but your job at this time and in this phase is to determine whether or not the aggravating circumstances, which I will define for you, outweigh what are known as mitigating factors.

Again, I will define those for you at a later time.¹³⁵

The rest of the jurors heard essentially the same information from the Court.¹³⁶

The definition of mitigation was not given by the Trial Court until the last thing in the case, the instructions in the mitigation phase.

The matter proceeded to trial in April and May 2006. The voir dire was handled with groups.¹³⁷ During voir dire the information about mitigation varied. The Court talked about mitigation but never defined it for the prospective jurors.¹³⁸ The preparation for mitigation was not apparent in the voir dire examination by the defense. Defense counsel did not seem to have a clear concept:

MS. FERRARO: I would consider mitigating circumstances.

MR. KATCHMER: Okay – okay, and give them a fair – well, whatever weight you think is fair. There's no direction. I mean, honestly it – it's almost

¹³⁴ 4 Ohio Jury Instructions § 503.011(10).

¹³⁵ Tr. 313.

¹³⁶ Tr. 325, Tr. 375, Tr. 409, Tr. 436, Tr. 443, Tr. 490, Tr. 519, Tr. 560, Tr. 595, Tr. 745, Tr. 780, Tr. 824, Tr. 906, Tr. 1011, Tr. 1129, Tr. 1178, Tr. 1260, Tr. 1313, Tr. 1367.

¹³⁷ Tr. 308, Tr. 373, Tr. 407, Tr. 431, Tr. 477, 516, Tr. 556, Tr. 590, Tr. 640, Tr. 727, Tr. 799, Tr. 819, Tr. 1129.

¹³⁸ Tr. 313,

laughable when they say weigh it, because you decide what it is, what it isn't.¹³⁹

According to defense counsel mitigation did not have anything to do with the first part of the case:

And, we get to put on evidence to mitigate that. And, that evidence may have nothing to do with that first part of the case. It may just be about Duane, about this human being, who he is, how he was brought up, where he goes to church, any problems he's had. So, you know a little bit better about the person that you're considering the death penalty for.¹⁴⁰

One group of jurors did get a definition not from the Trial Court but from defense counsel:

MR. KATCHMER: ...yet, but there's a term that we've been banting about called mitigating factors.

And, I can't explain them to you right now because that's the Judge's, but – but basically, it's something that would show that this person doesn't – that the death penalty would not be appropriate.

Does everybody understand that concept?¹⁴¹

This happened only once, with the first group: Rochelle Culver, Vicki Dunning, Lena Estes, Sebastian Gabriel, Kenneth Guidas, Elizabeth Jackomed, Wanda Johnson, and John Kennedy. Of that group, only Kennedy served on the jury.¹⁴² The rest of the jurors heard no definition until the end—and no one heard any definition of mitigating factor from the judge, only defense counsel.

This failing of Short's trial counsel to protect his rights by not objecting to the lack of definition of mitigating factors during voir dire violated Short's Right to Counsel, a right guaranteed by the U.S. CONST. amend. VI and the OHIO CONST. art. I, § 10. Thus, the conviction and sentence must be reversed.

¹³⁹ Tr. 581.

¹⁴⁰ Tr. 578.

¹⁴¹ Tr. 357.

¹⁴² Tr. 1641.

F. The defendant's trial counsel failed to protect his rights under international law and federal and state constitutional law by asserting the rights in the trial court.

The trial counsel failed to assert the Defendant's rights under international law and his federal and state constitutional rights. The merits of these issues are raised in International Law and in Constitutionality of Death Penalty Scheme.

Failing to preserve these issues fell below the standard required for capital defense counsel in capital cases. Competent defense counsel are required to raise and preserve issues for future litigation.¹⁴³ This failing of his trial counsel to protect his rights provided by federal and state constructional law and international law violated Short's Right to Counsel, guaranteed by the U.S. CONST. amend. VI and the OHIO CONST. art. I, § 10. Thus, the conviction and sentence must be reversed.

Nature and Circumstances Instruction

Proposition of Law No. Five:

Under Ohio's death penalty scheme, the nature and circumstances of the offense can be used only to support mitigation.

The Trial Court overruled the Short's objection to the use by the State of the nature and circumstances of the offense until raised by the defense.¹⁴⁴ The nature and circumstances of the offense can only be used as mitigation.¹⁴⁵

¹⁴³ *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 10.7 (2003).

¹⁴⁴ Dkt 392.

¹⁴⁵ *State v. Wogenstahl*, 75 Ohio St.3d 344, 356, 662 N.E.2d 311, 322 (1996).

We note that this Court has previously ruled against defendants on this point.¹⁴⁶

This violated defendant's rights guaranteed by the U.S. CONST. amend VIII and the OHIO CONST. art. I, § 9.

International Law

Proposition of Law No. Six:

The execution of the Defendant violates international law.

A. The International law binds the State of Ohio

"International law is a part of our law[.]"¹⁴⁷ A treaty made by the United States is the supreme law of the land.¹⁴⁸ Where state law conflicts with international law, it is the state law that must yield.¹⁴⁹ In fact, international law creates remediable rights for United States citizens.¹⁵⁰

B. The State of Ohio has obligations under international charters, treaties, and conventions

The United States' membership and participation in the United Nations and the Organization of American States creates obligations in all fifty states.

¹⁴⁶ *E.g. State v. Hancock*, 108 Ohio St.3d 57, 76-77, 840 N.E.2d 1032, 1054 (2006).

¹⁴⁷ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

¹⁴⁸ U.S. CONST. art. VI.

¹⁴⁹ *See Zschernig v. Miller*, 389 U.S. 429, 440 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947); *United States v. Pink*, 315 U.S. 203, 230 (1942); *Kansas v. Colorado*, 206 U.S. 46, 48, 27 S. Ct. 655, 656 (1907). *The Paquete Habana*, 175 U.S. at 700; *The Nereide*, 13 U.S. 388, 422 (1815); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924).

¹⁵⁰ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980); *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal. 1987).

Through the U.N. Charter, the United States committed itself to promote and encourage respect for human rights and fundamental freedoms.¹⁵¹ The United States bound itself to promote human rights in cooperation with the United Nations.¹⁵² The United States again proclaimed the fundamental rights of the individual when it became a member of the Organization of American States.¹⁵³

The United Nations has sought to achieve its goal of promoting human rights and fundamental freedoms through the creation of numerous treaties and conventions. The United States has ratified several of these including: the International Covenant on Civil and Political Rights ratified in 1992, the International Convention on the Elimination of All Forms of Racial Discrimination (“Convention on Racial Discrimination”) ratified in 1994, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture”) ratified in 1994. Ratification of these treaties by the United States expressed its willingness to be bound by these treaties. Pursuant to the Supremacy Clause, the Covenant on Civil and Political Rights, the Convention on Racial Discrimination, and the Convention Against Torture are the supreme laws of the land. As such, the United States must fulfill the obligations incurred through ratification.

Ohio is not fulfilling the United States’ obligations under these conventions. Rather, Ohio’s death penalty scheme violates each convention’s requirements and thus must yield to the requirements of international law.

¹⁵¹ Article 1(3).

¹⁵² Article 55-56.

¹⁵³ OAS Charter, Article 3.

i. Executing this defendant violates the requirement of the Covenant on Civil and Political Rights that capital punishment be limited to the most serious offenses.

The Covenant on Civil and Political Rights provides:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.¹⁵⁴

The facts of this case do not show that this is the most serious crime. While rejecting many of these as mitigating factors or giving them limited weight, the Trial Court did not articulate why this is one of the most serious crimes to occur here.

For these reasons, executing this defendant violates Article 6(2) of the Covenant on Civil and Political Rights.

ii. Ohio's statutory scheme violates the protection against arbitrary execution of the Covenant on Civil and Political Rights

The Covenant on Civil and Political Rights speaks explicitly to the use of the death penalty. The Covenant on Civil and Political Rights guarantees the right to life and provides that there shall be no arbitrary deprivation of life.¹⁵⁵ It allows the imposition of the death penalty only for the most serious offenses.¹⁵⁶ Juveniles and pregnant women are protected from the death penalty.¹⁵⁷ Moreover, the Covenant on Civil and Political Rights contemplates the abolition of the death penalty.¹⁵⁸

¹⁵⁴ Article 6(2).

¹⁵⁵ Article 6(1).

¹⁵⁶ Article 6(2).

¹⁵⁷ Article 6(5).

¹⁵⁸ Article 6(6).

However, several aspects of Ohio's statutory scheme allow for the arbitrary deprivation of life. Punishment is arbitrary and unequal.¹⁵⁹ Ohio's sentencing procedures are unreliable. Ohio's statutory scheme lacks individualized sentencing.¹⁶⁰ Ohio's statutory definition of the (B)(7) mitigator renders sentencing unreliable. The (A)(7) aggravator maximizes the risk of arbitrary and capricious action by singling out one class of murderers who may be eligible automatically for the death penalty.¹⁶¹ The vagueness of OHIO REV. CODE § 2929.03(D)(1) and § 2929.04 similarly render sentencing arbitrary and unreliable.¹⁶² Ohio's proportionality and appropriateness review fails to distinguish those who deserve death from those who do not.¹⁶³ As a result, executions in Ohio result in the arbitrary deprivation of life and thus violate the death penalty protections of the Covenant on Civil and Political Rights. This is a direct violation of international law and a violation of the Supremacy Clause of the United States Constitution.

iii. Ohio's statutory scheme violates the Convention on Racial Discrimination's protections against race discrimination

The Convention on Racial Discrimination, speaking to racial discrimination, requires that each state take affirmative steps to end race discrimination at all levels.¹⁶⁴ It requires specific action and does not allow states to sit idly by when confronted with practices that are racially discriminatory. However, Ohio's statutory scheme imposes the death penalty in a racially discriminatory man-

¹⁵⁹ See discussion *infra*, Proposition of Law No. Seven.

¹⁶⁰ See discussion *infra*, Proposition of Law No. Nine.

¹⁶¹ See discussion *infra*, Proposition of Law No. Eleven.

¹⁶² See discussion *infra*, Proposition of Law No. Twelve.

¹⁶³ See discussion *infra*, Proposition of Law No. Thirteen.

¹⁶⁴ Article 2.

ner.¹⁶⁵ A scheme that sentences to death blacks and those who kill white victims more frequently and which disproportionately places African-Americans on death row is in clear violation of the Convention on Racial Discrimination. Ohio's failure to rectify this discrimination is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

iv. Ohio's statutory scheme violates the prohibitions against cruel, inhuman or degrading punishment of the Covenant on Civil and Political Rights and the Convention Against Torture.

The Covenant on Civil and Political Rights prohibits subjecting any person to torture or to cruel, inhuman or degrading treatment or punishment.¹⁶⁶ Similarly, the Convention Against Torture requires that states take action to prevent torture, which includes any act by which severe mental or physical pain is intentionally inflicted on a person for the purpose of punishing him for an act committed.¹⁶⁷ As administered, Ohio's death penalty inflicts unnecessary pain and suffering¹⁶⁸ in violation of both the Covenant on Civil and Political Rights and the Convention Against Torture. Thus, there is a violation of international law and the Supremacy Clause of the United States Constitution.

v. Ohio's statutory scheme violates the guarantees of equal protection and due process of the Covenant on Civil and Political Rights and Convention on Racial Discrimination.

Both the Covenant on Civil and Political Rights and the Convention on Racial Discrimination guarantee equal protection of the law.¹⁶⁹ The Covenant on

¹⁶⁵ See discussion *infra* Proposition of Law No. Seven.

¹⁶⁶ Covenant on Civil and Political Rights, Article 7.

¹⁶⁷ See Convention Against Torture, Article 1-2.

¹⁶⁸ See discussion *infra* § .

¹⁶⁹ Covenant on Civil and Political Rights Article 2(1), 3, 14, 26; Convention on Racial Discrimination Article 5(a).

Civil and Political Rights further guarantees due process via Articles 9 and 14, which includes numerous considerations including: a fair hearing,¹⁷⁰ an independent and impartial tribunal¹⁷¹ the presumption of innocence¹⁷² adequate time and facilities for the preparation of a defense¹⁷³ legal assistance,¹⁷⁴ the opportunity to call and question witnesses,¹⁷⁵ the protection against self-incrimination¹⁷⁶ and the protection against double jeopardy,¹⁷⁷ However, Ohio's statutory scheme fails to provide equal protection and due process to capital defendants as contemplated by the Covenant on Civil and Political Rights and the Convention on Racial Discrimination.

Ohio's statutory scheme denies equal protection and due process in several ways. It allows for arbitrary and unequal treatment in punishment.¹⁷⁸ Ohio's sentencing procedures are unreliable.¹⁷⁹ Ohio's statutory scheme fails to provide individualized sentencing.¹⁸⁰ Ohio's statutory scheme burdens a defendant's right to a jury.¹⁸¹ Ohio's requirement of mandatory submission of reports and evaluations precludes effective assistance of counsel. OHIO REV. CODE § 2929.04 (B)(7) arbitrarily selects certain defendants who may be automatically eligible for death upon conviction.¹⁸² Ohio's proportionality and appropriate-

¹⁷⁰ Covenant on Civil and Political Rights, Article 14(1)).

¹⁷¹ Covenant on Civil and Political Rights, Article 14(1)).

¹⁷² Covenant on Civil and Political Rights, Article 14(2)).

¹⁷³ Covenant on Civil and Political Rights, Article 14(3)(a).

¹⁷⁴ Covenant on Civil and Political Rights, Article 14(3)(d))

¹⁷⁵ Covenant on Civil and Political Rights, Article 14(3)(e)

¹⁷⁶ Covenant on Civil and Political Rights, Article 14(3)(g))

¹⁷⁷ Covenant on Civil and Political Rights, Article 14(7))

¹⁷⁸ See discussion *infra*, Proposition of Law No. Seven.

¹⁷⁹ See discussion *infra*, Proposition of Law No. Eight.

¹⁸⁰ See discussion *infra*, Proposition of Law No. Eight

¹⁸¹ See discussion *infra*, Proposition of Law No. Nine.

¹⁸² See discussion *infra*, Proposition of Law No. Eleven.

ness review is wholly inadequate.¹⁸³ As a result, Ohio's statutory scheme violates the guarantees of equal protection and due process of the Covenant on Civil and Political Rights and the Convention on Racial Discrimination. This is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

vi. Ohio's obligations under the Covenant on Civil and Political Rights, the Convention on Racial Discrimination, and the Convention Against Torture are not limited by the reservations and conditions placed on these conventions by the Senate

While conditions, reservations, and understandings accompanied the United States' ratifications of the Covenant on Civil and Political Rights, the Convention on Racial Discrimination, and the Convention Against Torture, those conditions, reservations, and understandings cannot stand for two reasons. Art. 2 § 2 of the United States Constitution provides for the advice and consent of two-thirds of the Senate when a treaty is adopted. However, the United States Constitution makes no provision for the Senate to modify, condition, or make reservations to treaties. The Senate is not given the power to determine what aspects of a treaty the United States will and will not follow. Their role is to simply advise and consent.

Thus, the Senate's inclusion of conditions and reservations in treaties goes beyond that role of advice and consent. The Senate picks and chooses which items of a treaty will bind the United States and which will not. This is the equivalent of the line-item veto, which is unconstitutional.¹⁸⁴ The United States Supreme Court specifically spoke to the enumeration of the President's powers

¹⁸³ See discussion *infra*, Proposition of Law No. Thirteen.

¹⁸⁴ *Clinton v. City of New York*, 524 U.S. 417, 438 (1998).

in the Constitution in finding that the President did not possess the power to issue line item vetoes. *Id.* If it is not listed, then the President lacks the power to do it. *See id.* Similarly, the Constitution does not give the power to the Senate to make conditions and reservations, picking and choosing what aspects of a treaty will become law. Thus, the Senate lacks the power to do just that. Therefore, any conditions or reservations made by the Senate are unconstitutional.¹⁸⁵

The Vienna Convention on the Law of Treaties further restricts the Senate's imposition of reservations. It allows reservations unless: they are prohibited by the treaty, the treaty provides that only specified reservations, not including the reservation in question, may be made, or the reservation is incompatible with the object and purpose of the treaty.¹⁸⁶ The Covenant on Civil and Political Rights specifically precludes derogation of Articles 6-8, 11, 15-16, and 18. Pursuant to the Vienna Convention, the United States' reservations to these articles are invalid under the language of the treaty.¹⁸⁷ Further, it is the purpose of the Covenant on Civil and Political Rights to protect the right to life and any reservation inconsistent with that purpose violates the Vienna Convention. Thus, United States reservations cannot stand under the Vienna Convention as well.

¹⁸⁵ *See id.*

¹⁸⁶ Vienna Convention on the Law of Treaties, Article 19(a)-(c).

¹⁸⁷ *See id.*

vii. Ohio's obligations under the Covenant on Civil and Political Rights are not limited by the Senate's declaration that it is not self-executing.

The Senate indicated that the Covenant on Civil and Political Rights is not self-executing. However, the question of whether a treaty is self-executing is left to the judiciary.¹⁸⁸ The function of the courts is to say what the law is.¹⁸⁹

Further, requiring the passage of legislation to implement a treaty necessarily implicates the participation of the House of Representatives. By requiring legislation to implement a treaty, the House can effectively veto a treaty by refusing to pass the necessary legislation. However, Art. 2, § 2 excludes the House of Representatives from the treaty process. Therefore, declaring a treaty to be not self-executing gives power to the House of Representatives not contemplated by the United States Constitution. Thus, any declaration that a treaty is not self-executing is unconstitutional.¹⁹⁰

C. The State of Ohio has obligations under customary international law.

International law is not merely discerned in treaties, conventions, and covenants. International law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law."¹⁹¹ Regardless of the source "international law is a part of our law{.}"¹⁹²

¹⁸⁸ *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985) (citing Restatement (Second) of Foreign Relations Law of the United States, Sec. 154(1) (1965)).

¹⁸⁹ See *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁹⁰ See *Clinton*, 524 U.S. at 438, 118 S. Ct. at 2103.

¹⁹¹ *United States v. Smith*, 18 U.S. 153, 160-61 (1820).

¹⁹² *The Paquete Habana*, 175 U.S. at 700, 20 S. Ct. at 299.

The judiciary and commentators recognize the Universal Declaration of Human Rights as binding international law. The Declaration of Human Rights “no longer fits into the dichotomy of ‘binding treaty’ against ‘non-binding pronouncement,’ but is rather an authoritative statement of the international community.”¹⁹³

The Declaration on Human Rights guarantees equal protection and due process (Article 1, 2, 7, 11), recognizes the right to life (Article 3), prohibits the use of torture or cruel, inhuman or degrading punishment (Article 5) and is largely reminiscent of the Covenant on Civil and Political Rights. Each of the guarantees found in the Declaration on Human Rights are violated by Ohio’s statutory scheme.¹⁹⁴ Thus, Ohio’s statutory scheme violates customary international law as codified in the Declaration on Human Rights and cannot stand.

However, the Declaration on Human Rights is not alone in its codification of customary international law. *Smith*¹⁹⁵ directs courts to look to “the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law” in ascertaining international law.¹⁹⁶

Ohio should be cognizant of the fact that its statutory scheme violates numerous declarations and conventions drafted and adopted by the United Nations and the Organization of American States, which may, because of the

¹⁹³ *Filartiga*, 630 F.2d at 883 (internal citations omitted); see also WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE* (1996).

¹⁹⁴ See discussion *infra* § ~ K(2)(a)-(c).

¹⁹⁵ *United States v. Smith*, 18 U.S. 153, 160-61 (1820).

¹⁹⁶ 18 U.S. at 160-6 1.

sheer number of countries that subscribe to them, codify customary international law.¹⁹⁷ Included among these are:

The American Convention on Human Rights, drafted by the Organization of American States and entered into force in 1978. It provides numerous human rights guarantees, including: equal protection (Article 1, 24), the right to life, (Article 4(1)), prohibition against arbitrary deprivation of life (Article 4(1)), imposition of the death penalty only for the most serious crimes (Article 4(2)), no re-establishment of the death penalty once abolished (Article 4(3)), prohibits torture, cruel, inhuman or degrading punishment (Article 5(2)), and guarantees the right to a fair trial (Article 8).

The United Nations Declaration on the Elimination of All Forms of Racial Discrimination proclaimed by U.N. General Assembly resolution 1904 (XVIII) in 1963. It prohibits racial discrimination and requires that states take affirmative action in ending racial discrimination.

The American Declaration of the Rights and Duties of Man adopted by the Ninth International Conference of American States in 1948. It includes numerous human rights guarantees: the right to life (Article 1), equality before the law (Article 2), the right to a fair trial (Article 16), and due process (Article 26).

Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the U.N. General Assembly in Resolution 3452 in 1975. It prohibits torture, defined to include severe mental or physical pain intentionally inflicted by or at the instigation of a public official for any purpose including punishing

¹⁹⁷ See *id.*

him for an act he has committed, and requires that the states take action to prevent such actions. Article 1,4.

Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty adopted by the U.N. Economic and Social Council in Resolution 1984/50 in 1984. It provides numerous protections to those facing the death penalty, including: permitting capital punishment for only the most serious crimes, with the scope not going beyond intentional crimes with lethal or other extremely grave consequences (1), requiring that guilt be proved so as to leave no room for an alternative explanation of the facts (4), due process, and the carrying out of the death penalty so as to inflict the minimum possible suffering (9).

The Second Optional Protocol to the Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted and proclaimed by the U.N. General Assembly in Resolution 44/128 in 1989. This prohibits execution (Article 1(1)) and requires that states abolish the death penalty (Article 1(2)).

These documents are drafted by the people *Smith* contemplates and are subscribed to by a substantial segment of the world. As such they are binding on the United States as customary international law. A comparison of the issues discussed under this issue clearly demonstrates that Ohio's statutory scheme is in violation of customary international law.

The Eighth Amendment to the United States Constitution and art. I, § 9 of the Ohio Constitution prohibit the infliction of cruel and unusual punishment. The Eighth Amendment's protections are applicable to the states through the

Fourteenth Amendment.¹⁹⁸ Punishment that is “excessive” constitutes cruel and unusual punishment.¹⁹⁹ The underlying principle of governmental respect for human dignity is the Court’s guideline to determine whether this statute is constitutional.²⁰⁰ Short challenged the death penalty.²⁰¹

Constitutionality of Death Penalty Scheme

Proposition of Law No. Seven:

Ohio’s death penalty scheme violates OHIO CONST. art. I, § 9 and § 16 and U.S. CONST. amend. VIII and amend. XIV barring arbitrary and unequal punishment.

The Fourteenth Amendment’s guarantee of equal protection requires similar treatment of similarly situated persons. This right extends to the protection against cruel and unusual punishment.²⁰² A death penalty imposed in violation of the Equal Protection guarantee is a cruel and unusual punishment.²⁰³ Any arbitrary use of the death penalty also offends the Eighth Amendment.²⁰⁴

Ohio’s capital punishment scheme allows the death penalty to be imposed in an arbitrary and discriminatory manner in violation of *Furman* and its progeny. Prosecutors’ virtually uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death penalty. Mandatory death penalty statutes were deemed fatally flawed because they lacked standards for imposi-

¹⁹⁸ *Robinson v. California*, 370 U.S. 660 (1962).

¹⁹⁹ *Coker v. Georgia*, 433 U.S. 584 (1977).

²⁰⁰ *See Furman v. Georgia*, 408 U.S. 238 (1972) (Brennan, J., concurring); *Rhodes v. Chapman*, 452 U.S. 337, 361 (1981); *Trop v. Dulles*, 356 U.S. 86 (1958).

²⁰¹ Dkt. 68.

²⁰² *Furman*, 408 U.S. at 249 (Douglas, J., concurring).

²⁰³ *See id.*

²⁰⁴ *Id.*

tion of a death sentence and were therefore removed from judicial review.²⁰⁵ Prosecutors' uncontrolled discretion violates this requirement.

Ohio's system imposes death in a racially discriminatory manner. Blacks and those who kill white victims are much more likely to get the death penalty. While African-Americans are less than twenty percent of Ohio's population, over half of Ohio's death row inmates are African-American.²⁰⁶ While few Caucasians are sentenced to death for killing African-Americans, over forty African-Americans sit on Ohio's death row for killing a Caucasian.²⁰⁷ Ohio's statistical disparity is tragically consistent with national findings. The General Accounting Office found victim's race influential at all stages, with stronger evidence involving prosecutorial discretion in charging and trying cases.²⁰⁸

Ohio courts have not evaluated the implications of these racial disparities. While the General Assembly established a disparity appeals practice in post-conviction that may encourage the Ohio Supreme Court to adopt a rule requiring tracking the offender's race,²⁰⁹ no rule has been adopted. Further, this practice does not track the victim's race and does not apply to crimes committed before July 1, 1996. In short, Ohio law fails to assure against race discrimination playing a role in capital sentencing.

²⁰⁵ *Woodson v. North Carolina*, 428 U.S. 280 (1976).

²⁰⁶ See OHIO PUBLIC DEFENDER COMMISSION REPORT (June 1998); see also THE REPORT OF THE OHIO COMMISSION ON RACIAL FAIRNESS (1999).

²⁰⁷ *Id.*

²⁰⁸ U.S. GENERAL ACCOUNTING OFFICE, REPORT TO SENATE AND HOUSE COMMITTEES ON THE JUDICIARY DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (February 1990).

²⁰⁹ OHIO REV. CODE § 2953.21(A)(2).

Due process prohibits the taking of life unless the State can show a legitimate and compelling state interest.²¹⁰ Moreover, where fundamental rights are involved personal liberties cannot be broadly stifled “when the end can be more narrowly achieved.”²¹¹ To take a life by mandate, the State must show that it is the “least restrictive means” to a “compelling governmental end.”²¹²

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

Proposition of Law No. Eight:

Ohio’s death penalty scheme violates OHIO CONST. art. I, § 9 and § 16 and U.S. CONST. amend. VIII and amend. XIV because the scheme has unreliable sentencing procedures.

The Due Process and Equal Protection Clauses prohibit arbitrary and capricious procedures in the State’s application of capital punishment.²¹³ Ohio’s scheme does not meet those requirements. The statute does not require the State to prove the absence of any mitigating factors or that death is the only appropriate penalty.

The statutory scheme is unconstitutionally vague which leads to the arbitrary imposition of the death penalty. The language “that the aggravating circumstances ... outweigh the mitigating factors” invites arbitrary and capricious

²¹⁰ *Commonwealth v. O’Neal II*, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring); *Utah v. Pierre*, 572 P.2d 1338 (Utah 1977) (Maughan, J., concurring and dissenting).

²¹¹ *Shelton v. Tucker*, 364 U.S. 479 (1960).

²¹² *O’Neal*, 339 N.E.2d at 678.

²¹³ *Gregg v. Georgia*, 428 U.S. 153, 188, 193-95 (1976); *Furman*, 408 U.S. at 255, 274.

jury decisions. “Outweigh” preserves reliance on the lesser standard of proof by a preponderance of the evidence. The statute requires only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors. This creates an unacceptable risk of arbitrary or capricious sentencing.

Additionally, the mitigating circumstances are vague. The jury must be given “specific and detailed guidance” and be provided with “clear and objective standards” for their sentencing discretion to be adequately channeled.²¹⁴

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor is within the individual decision-maker’s discretion.²¹⁵ Giving so much discretion to juries inevitably leads to arbitrary and capricious judgments. The Ohio open discretion scheme further risks that constitutionally relevant mitigating factors that must be considered as mitigating youth or childhood abuse,²¹⁶ mental disease or defect,²¹⁷ level of involvement in the crime,²¹⁸ or lack of criminal history²¹⁹ will not be factored into the sentencer’s decision. While the federal constitution may allow states to shape consideration of mitigation,²²⁰ Ohio’s capital scheme fails to provide adequate guidelines to sentencer, and fails to assure against arbitrary, capricious, and discriminatory results.

²¹⁴ *Gregg; Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759 (1980).

²¹⁵ *State v. Fox*, 69 Ohio St. 3d 183, 193, 631 N.E.2d 124, 132 (1994).

²¹⁶ *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

²¹⁷ *Penry v. Lynaugh*, 492 U.S. 302 (1989).

²¹⁸ *Enmund v. Florida*, 458 U.S. 782 (1982).

²¹⁹ *Delo v. Lashley*, 507 U.S. 272 (1993)

²²⁰ *see Johnson v. Texas*, 509 U.S. 350 (1993).

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 making.²²¹ This confusion violates the federal and state constitutions. Because of these deficiencies, Ohio's statutory scheme does not meet the requirements of *Furman* and its progeny.

Proposition of Law No. Nine:

Ohio's death penalty scheme violates OHIO CONST. art. I, § 9 and § 16 and U.S. CONST. amend. VIII and amend. XIV because the scheme lacks individualized sentencing.

The Ohio statutes are unconstitutional because they require proof of aggravating circumstances in the trial phase of the bifurcated proceeding. The Supreme Court of the United States has approved schemes that separate the consideration of aggravating circumstances from the determination of guilt. Those schemes provide an individualized determination and narrow the category of defendants eligible for the death penalty.²²² Ohio's statutory scheme cannot provide for those constitutional safeguards.

The jury must be free to determine whether death is the appropriate punishment for a defendant. Requiring proof of the aggravating circumstances simultaneously with proof of guilt effectively prohibits a sufficiently individualized determination in sentencing as required by post-Furman cases.²²³ This is

²²¹ See Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 549-557 (1994), and findings of Zeisel discussed in *Free v. Peters*, 12 F.3d 700 (7th Cir. 1993).

²²² See, *Zant v. Stephens*, 462 U.S. 862 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983).

²²³ See *Woodson*, 428 U.S. at 303-04.

especially prejudicial because this is accomplished without consideration of any mitigating factors.

Proposition of Law No. Ten:

Ohio's death penalty scheme violates OHIO CONST. art. I, § 9 and § 16 and U.S. Const. amend. VIII and amend. XIV because the scheme burdens the Defendant's right to a jury.

The Ohio scheme is unconstitutional because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. A defendant who pleads guilty or no contest benefits from a trial judge's discretion to dismiss the specifications "in the interest of justice."²²⁴ Accordingly, the capital indictment may be dismissed regardless of mitigating circumstances. There is no corresponding provision for a capital defendant who elects to proceed to trial before a jury.

Justice Blackmun found this discrepancy to be constitutional error.²²⁵ This needlessly burdened the defendant's exercise of his right to a trial by jury. Since the Supreme Court's decision in *Lockett*,²²⁶ this infirmity has not been cured and Ohio's statute remains unconstitutional.

²²⁴ OHIO CRIM. R. 11 (C)(3).

²²⁵ *Lockett v. Ohio*, 438 U.S. 586, 617 (1978) (Blackmun, J., concurring).

²²⁶ *United States v. Jackson*, 390 U.S. 570 (1968)

Proposition of Law No. Eleven:

Ohio's death penalty scheme violates OHIO CONST. art. I, § 9 and § 16 and U.S. Const. amend. VIII and amend. XIV because OHIO REV. CODE § 2929.04 (A)(7) is constitutionally invalid when used to aggravate OHIO REV. CODE § 2903.01 (B) aggravated murder to a capital offense.

The Defendant was sentenced to death pursuant to merged counts of aggravated murder under OHIO REV. CODE § 2903.01(A) and (B), with the aggravating circumstances found in § 2929.04 (A)(4), (A)(5) and (A)(7). “[T]o avoid [the] constitutional flaw of vagueness and over breadth under the Eighth Amendment, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of a defendant as compared to others found guilty of (aggravated) murder.”²²⁷ Ohio’s statutory scheme fails to meet this constitutional requirement because OHIO REV. CODE § 2929.04 (A)(7) fails to genuinely narrow the class of individuals eligible for the death penalty.

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

The scheme is unconstitutional because the OHIO REV. CODE § 2929.04 (A)(7) aggravating circumstance merely repeats, as an aggravating circumstance, factors that distinguish aggravated felony-murder from murder. OHIO REV. CODE § 2929.04 (A)(7) repeats the definition of felony-murder as alleged, which automatically qualifies the defendant for the death penalty.

²²⁷ *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

OHIO REV. CODE § 2929.04 (A)(7) does not reasonably justify the imposition of a more severe sentence on felony-murderers. But, the prosecuting attorney and the sentencing body are given unbounded discretion that maximizes the risk of arbitrary and capricious action and deprivation of a defendant's life without substantial justification. The aggravating circumstance must therefore fail.²²⁸

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

The killer who kills with prior calculation and design is treated less severely, which is also nonsensical because his blameworthiness or moral guilt is higher, and the argued ability to deter him less. From a retributive stance, this is the most culpable of mental states.²²⁹

Felony-murder also fails to reasonably justify the death sentence because the Ohio Supreme Court has interpreted OHIO REV. CODE § 2929.04 (A)(7) as not requiring that intent to commit a felony precede the murder.²³⁰ The asserted state interest in treating felony-murder as deserving of greater punish-

²²⁸ *Zant*, 462 U.S. at 877.

²²⁹ Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 HOUS. L. REV. 356, 375 (1978).

²³⁰ *State v. Williams*, 74 Ohio St. 3d 569, 660 N.E.2d 724 (1996) (holding in syllabus, ¶2).

ment is to deter the commission of felonies in which individuals may die. Generally courts have required that the killing result from an act done in furtherance of the felonious purpose.²³¹ Without such a limitation, no state interest justifies a stiffer punishment. The Court has discarded the only arguable reasonable justification for the death sentence to be imposed on such individuals, a position that engenders constitutional violations.²³² Further, the Court is current position is inconsistent with previous cases, thus creating the likelihood of arbitrary and inconsistent applications of the death penalty.²³³

Equal protection of the law requires that legislative classifications be supported by, at least, a reasonable relationship to legitimate State interests.²³⁴ The State has arbitrarily selected one class of murderers who may be subjected to the death penalty automatically. This statutory scheme is inconsistent with the purported State interests. The most brutal, cold-blooded and premeditated murderers do not fall within the types of murder that are automatically eligible for the death penalty. There is no rational basis or any State interest for this distinction and its application is arbitrary and capricious.

Proposition of Law No. Twelve:

Ohio's death penalty scheme violates OHIO CONST. art. I, § 9 and § 16 and U.S. Const. amend. VIII and amend. XIV because OHIO REV. CODE § 2929.03(D)(1) and § 2929.04 are unconstitutionally vague.

OHIO REV. CODE § 2929.03(D)(1)'s reference to "the nature and circumstances of the aggravating circumstance" incorporates the nature and circum-

²³¹ *Id.*, referencing the Model Penal Code.

²³² *Zant v. Stephens*, 462 U.S. 862 (1983).

²³³ *See, e.g., State v. Rojas*, 64 Ohio St. 3d 131, 592 N.E.2d 1376 (1992).

²³⁴ *Skinner v. Oklahoma*, 316 U.S. 535 (1941).

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

To avoid arbitrariness in capital sentencing, states must limit and channel the sentencer's discretion with clear and specific guidance.²³⁵ A vague aggravating circumstance fails to give that guidance.²³⁶ Moreover, a vague aggravating circumstance is unconstitutional whether it is an eligibility or a selection factor.²³⁷ The aggravating circumstances in OHIO REV. CODE § 2929.04 (A)(1)-(8) are both.

OHIO REV. CODE § 2929.04 (B) tells the sentencer that the nature and circumstances of the offense are selection factors in mitigation. Moreover, because the nature and circumstances of the offense are listed only in OHIO REV. CODE § 2929.04 (B), they must be weighed only as selection factors in mitigation.²³⁸ However, the clarity and specificity of OHIO REV. CODE § 2929.04 (B) is eviscerated by OHIO REV. CODE § 2929.03(D)(1); selection factors that are strictly mitigating become part and parcel of the aggravating circumstance.

Despite wide latitude, Ohio has carefully circumscribed its selection factors into mutually exclusive categories. See, OHIO REV. CODE § 2929.04 (A) and

²³⁵ *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Maynard v. Cartwright*, 486 U.S. 356, 362, (1988).

²³⁶ *Walton v. Arizona*, 497 U.S. 639, 653 (1990); *Godfrey*, 446 U.S. at 428.

²³⁷ *Tuilaepa v. California*, 512 U.S. 967 (1994).

²³⁸ See, *State v. Wogenstahl*, 75 Ohio St. 3d 344, 356, 662 N.E.2d 311, 321-22 (1996).

(B);²³⁹ OHIO REV. CODE § 2929.03(D)(1) makes OHIO REV. CODE § 2929.04 (B) vague because it incorporates the nature and circumstances of an offense into the aggravating circumstances. The sentencer cannot reconcile this incorporation. As a result of OHIO REV. CODE § 2929.03(D)(1), the “nature and circumstances” of any offense become “too vague” to guide the jury in its weighing or selection process.²⁴⁰ OHIO REV. CODE § 2929.03(D)(1) therefore makes OHIO REV. CODE § 2929.04 (B) unconstitutionally arbitrary.

OHIO REV. CODE § 2929.03(D)(1) is also unconstitutional on its face because it makes the selection factors in aggravation in OHIO REV. CODE § 2929.04 (A)(1)-(8) “too vague.”²⁴¹ OHIO REV. CODE § 2929.04 (A)(1)-(8) gives clear guidance as to the selection factors that may be weighed against the defendant’s mitigation. However, OHIO REV. CODE § 2929.03(D)(1) eviscerates the narrowing achieved. By referring to the “nature and circumstances of the aggravating circumstance,” OHIO REV. CODE § 2929.03(D)(1) gives the sentencer “open-ended discretion” to impose the death penalty.²⁴² That reference allows the sentencer to impose death based on (A)(1)-(8) plus any other fact in evidence arising from the nature and circumstances of the offense that the sentencer considers aggravating. This eliminates the guided discretion provided by OHIO REV. CODE § 2929.04 (A).²⁴³

²³⁹ *Wogenstahl*, 75 Ohio St. 3d at 356, 662 N.E.2d at 32 1-22.

²⁴⁰ *See Walton*, 497 U.S. at 654.

²⁴¹ *See, Walton*, 497 U.S. at 654.

²⁴² *See Maynard*, 486 U.S. at 362.

²⁴³ *See Stringer v. Black*, 503 U.S. 222, 232 (1992).

Proposition of Law No. Thirteen:

Ohio's death penalty scheme violates OHIO CONST. art. I, § 9 and § 16 and U.S. Const. amend. VIII and amend. XIV because the scheme provides for inadequate proportionality and appropriateness review.

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

Adequate appellate review is a precondition to the constitutionality of a state death penalty system.²⁴⁴ The standard for review is one of careful scrutiny.²⁴⁵ 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.²⁴⁶

Ohio's statutes' failure to require the jury or three-judge panel recommending life imprisonment to identify the mitigating factors undercuts adequate appellate review. Without this information, no significant comparison of cases is possible. Without a significant comparison of cases, there can be no meaningful appellate review.

The comparison method is also constitutionally flawed. Review of cases where the death penalty was imposed satisfies the proportionality review re-

²⁴⁴ *Zant*, 462 U.S. at 879; *Pulley v. Harris*, 465 U.S. 37 (1984).

²⁴⁵ *Zant*, 462 U.S. at 884-85.

²⁴⁶ *Id.*

quired by OHIO REV. CODE § 2929.05(A).²⁴⁷ However, this prevents a fair proportionality review. There is no meaningful manner to distinguish capital defendants who deserve the death penalty from those who do not.

The Ohio Supreme Court's appropriateness analysis is also constitutionally infirm. OHIO REV. CODE § 2929.05 (A) requires appellate courts to determine the appropriateness of the death penalty in each case. The statute directs affirmation only where the court is persuaded that the aggravating circumstances outweigh the mitigating factors and that death is the appropriate sentence.²⁴⁸ Ohio Courts have not followed these dictates. The appropriateness review conducted is very cursory. It does not "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not."²⁴⁹

The cursory appropriateness review also violates the capital defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The General Assembly provided capital appellants with the statutory right of proportionality review. When a state acts with significant discretion, it must act in accordance with the Due Process Clause.²⁵⁰ The review currently used violates this constitutional mandate.

The Defendant's death sentence is both disproportionate and inappropriate. An insufficient proportionality review violated the Defendant's due process, liberty interest in OHIO REV. CODE § 2929.05.

²⁴⁷ *State v. Steffen*, 31 Ohio St. 3d 111, 509 N.E.2d 383 (1987) (holding of court in syllabus).

²⁴⁸ *Id.*

²⁴⁹ *Spaziano v. Florida*, 468 U.S. 447, 460 (1984).

²⁵⁰ *Evitts v. Lucey*, 469 U.S. 387, 401 (1985).

Weighing of the Aggravating Circumstances

Proposition of Law No. Fourteen:

Where the weight afforded the aggravating circumstance is comparatively light, and the weight afforded the mitigating factors is high, the aggravating circumstances will not outweigh the mitigating factors and the death sentence may not be imposed.

In weighing the evidence, the Court must consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and the statutory mitigating factors of OHIO REV. CODE § 2929.04(B).²⁵¹

Under these circumstances the government failed to meet its burden of proving that the aggravating circumstances outweigh the mitigating factors.

OHIO REV. CODE § 2929.04(B) requires that the jury “shall consider, and weigh” the nature and circumstances of the offense, the history, character, and background of the offender, and any other mitigation proved by a preponderance of the evidence against the aggravating circumstance. Only if the jury determines that the aggravating circumstance outweighs those considerations beyond a reasonable doubt, is it to recommend a death sentence. OHIO REV. CODE § 2929.03(D)(2). The trial court is then required, independently, to determine whether the aggravating circumstance outweighs the mitigating factors, and only if it so determines, impose a death sentence. OHIO REV. CODE § 2929.03(D)(3). When the trial court imposes a death sentence, the appellate court is to determine whether the trial court properly weighed the aggravating

²⁵¹ *State v. Tenace*, 109 Ohio St.3d 255, 272, 847 N.E.2d 386, 402 (2006).

circumstance against the mitigating factors and is also to determine, again independently, whether the aggravating circumstance does, in fact, outweigh the mitigating factors. Only if it finds that the aggravating circumstance outweighs the mitigating factors, **and** if it determines that death is the appropriate sentence, may it affirm the death sentence. OHIO REV. CODE § 2929.05(A).

The relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.²⁵² Failure to do this violates defendant's Right to Due Process, guaranteed by the U.S. CONST. amends V and XIV, and OHIO CONST. art. I, § 16 and the Right to be free from Cruel and Unusual Punishment, guaranteed by the U.S. CONST. amend VIII, and OHIO CONST. art. I, § 9.

In the discussion below, appellant will first explain why and how the trial court's weighing is flawed and second why and how proper evaluation reveals that this Court should, upon its independent evaluation of the aggravating circumstance against the mitigating factors, conclude that the proper sentence in this case is a sentence other than death.

A. Mitigation

During the sentencing hearing before the Trial Court, Short made an unsworn statement. Short's sister also made a statement supporting Short, a statement quoted in the Introduction to this Merit Brief.

²⁵² *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), and *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Short told the Trial Court that he had wanted to make this statement to the jury but that his trial lawyers told him that it did not fit their strategy.²⁵³

Short initially expressed his frustration about the media coverage and its accuracy.²⁵⁴ Then he explained his feelings about his actions to what he perceived to be an affair between Rhonda and Sweeney:

First of all I'd like to say that I accept full responsibility for my actions. I never tried to blame anyone for my actions, but there has been – but there's more to this story and by no means am I trying to justify my actions. But, other people played crucial parts in what led up to my actions and although it does not matter now that I've been found guilty on all charges and have received a verdict. Like I said before, I just want to clarify a few things since this will be my last opportunity to ever speak freely.

First of all, I wasn't bothering anybody. I was going to work each day minding my own business, taking care of my wife and our three children, making the house payment and paying the bills. And, although it may not seem like it from what has happened, I love my wife more than any human being on earth. She meant the world to me as well as our three children. And, not only was she my – my wife, but she was my best friend. She was a wonderful mother. She was a beautiful person both inside and out, and – and I miss her so very much. My heart and my arms ache for her everyday.

Do I feel like I failed at being a good or a better husband at times? Yes, I could have been more attentive, affectionate, compassionate and moral emotionally supportive. But, there have been statements made that I was abusive to my wife and children and those statements are untrue.²⁵⁵

He talked about his frustration because the information about from Officer Rosenbalm did not come before the jury:

During the trial, the Monroe police officer, Officer Rosenbalm that took the stand came to my home that night through I feel was strategically shut down by the prosecution was nye – when he was not able to fully testify. I would like to make known the reason that he was at my home that night. It was because I was pacing back and forth with a loaded shotgun contemplating suicide because I couldn't deal with the fact that my wife had left me. I eventually surrendered the gun and

²⁵³ Tr.

²⁵⁴ Tr. 2562.

²⁵⁵ Tr. 2562-63.

was taken by ambulance to Middletown Regional Hospital for observation and evaluation. Hours later, I was released with Ativan nerve medication and Ambien sleep medication, which did not help me.²⁵⁶

He also took issue with the two facts testified to by two witnesses. The testimony about the newspaper article by Amy Spurlock,²⁵⁷ and the testimony of Sweeney's mother, Brenda Barian that he did not ask her where Rhonda was.²⁵⁸

He disagreed with the prosecution's contention that he went to the house to kill Rhonda and Sweeney. He snapped.²⁵⁹ He noted his return to house after the shooting:

Why did I go back to the house and wait for the police? Because I was trying to help my wife. I could have easily put up resistance with the Huber Heights Police being armed, but that was never my intention. I was in an emotional hurricane of hurt, anger, confusion and hopelessness, but I surrendered cooperate – cooperately with no more incident.²⁶⁰

He again accepted responsibility for his actions:

We all live and die according to the choices we make. I never in my life thought that I would be where I am at today and the terrible events that have taken place in my life, my loved ones' lives and my acquaintances lives. And, any one of you could just as easily be in my shoes. Everyone has their own breaking point, and this one was mine.

Mr. Daidone's opening statement was, if you leave me, I'll kill you. But, he was wrong. Close, but incorrect.

For if there is one thing that I am, that is truthful and I have been truthful about everything in this entire trial from the very beginning, from the first time that I spoke with Detective Colvin about every issue and everything that happened.

The statement I did make was, if you leave me and I find you with another man, I don't think I could handle it and someone could get hurt or possibly killed. That was the correct statement that I made.²⁶¹

²⁵⁶ Tr. 2565-66.

²⁵⁷ Tr. 1776.

²⁵⁸ Tr. 1810. But see Tr. 1795.

²⁵⁹ Tr. 2569.

²⁶⁰ Tr. 2570.

²⁶¹ Tr. 2574.

Short recognized the tragedy that affected all involved in this case.

There were no winners in this tragedy, only – only loss, which grieves my heart beyond words. But there is – there is some good news for any of us who done wrong concerning this tragedy, no matter how great or small a part that was played in getting to the point where I stand today. And, I'm gonna – I'm gonna refer to the Bible one last time.

In the Bible quotes, it says, if we say that we have no sin we deceive ourselves and the truth is not in us. If we say that we have not sinned we made God a liar and his Word's not in us. But, if we confess our sins God is faithful and just to forgive us our sins and to cleanse us from all unrighteousness. Sadly though, sin has consequences even if we are remorseful and sincerely repent.

I pray that God help us all in the midst of all of our mixed emotions and turmoil of hurt, anger, bitterness, unforgiveness, and possibly for some vengeance and hatred. And, may we sincerely learn from this tragedy the serious consequences of our actions no matter how great or small or no matter what part we played in this tragedy that led us to where we are today and where I stand before this court today.²⁶²

Short addressed the loss of the Sweeney family, of his wife's family, and his own family:

I'd like to address Mr. Sweeney's family and apologize for all the hurt I've inflicted upon them. When I came home from work on Thursday, July 15, 2004, it was never in my thought or entered my mind that my wife would be gone. I never had any intentions on taking anyone's life. I thought it would be just a another normal day like every other day. I – I – I'm extremely sorry for the loss of their loved one Mr. Sweeney and I pray that they forgive me, not for my sake, but for their own sakes.

I would also like to address my wife's family and the love that I have for them, for they – they were my family for nearly 15 years.

My wife's mother-in-law Macy – my – my – my mother-in-law Macy Lane, which was my wife's mother, my wife's sister Amy, Gina, Pam, her sister Tiny and her brother Danny, her Uncle Floyd, Sidney, and all the people that I knew in my wife's family that I really loved and still do love dearly, although they may not feel the same way about me after what has happened, I'm very sorry for the loss of their loved one, which was my wife Rhonda.

I would also like to address the ones from my family, my mother, my dad, my sisters Tracy and Tina, I'm sorry that I have brought shame to my family. I – I never intended to put them or any – any other – other of the three family members – other two family members

²⁶² Tr. 2578.

through this emotional pain and heartache, and I am extremely sorry to everyone in this triangle tragedy for what has happened.

Finally he addressed his own loss:

Lastly, I would like to address my loss, 'cause I have lost a great deal myself because of everything that has happened and my actions.

I've lost a beautiful wife – a beautiful wife of nearly 15 years. I've lost – excuse me, I'm sorry.

I've lost two – two precious sons and a daughter who I love dearly. I've lost my home to my freedom. I've lost everything that means anything to a man.

Lastly, I want to thank all the clergy and pastors that have stuck by my side through this whole – whole ordeal to include Mr. Larry Lane, who is the head chaplain of Montgomery County Jail, Mr. Tom Messenger, Mr. Todd Jenkins, Mr. Russ Comers, Mr. Daniel Williamson, Mr. Sidney Sloan, Pastor Calloway, Mike Davis, Ron Asher, Pastor Jim Setser, Pastor Bruce McGuire, and mostly I'd like to thank God, Jesus Christ, and the Holy Ghost for giving me the strength to endure what I've had to endure.²⁶³

B. Balancing Below

Because Ohio does not require a jury to state which mitigating factors presented, if any, it found to have been proved by a preponderance of the evidence, it is impossible to determine what the jury weighed or how it conducted the balancing required by OHIO REV. CODE § 2929.03(D)(2). However, the Opinion mandated by OHIO REV. CODE § 2929.03(F) and filed by the trial court on June 7, 2006, permits analysis of what the trial court weighed and how it conducted the balancing.

The court first related the facts presented and the procedural posture of the case. When it came to the weighing process, she noted that, “[t]here is very little evidence in the record regarding the history, character and background of

²⁶³ Tr. 2578-79.

the Defendant.” Sentencing Opinion, p. 8. She then proceeded to give little weight or no weight to the various factors.

In reviewing whether, at the time of committing the offense, Short, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law; she said:

There was no testimony relating to this factor, except possible for evidence that the Defendant was upset that his wife left him, presumably for another man. Justin Short testified that, in the week preceding the deaths of Donnie Sweeny and Rhonda short, his father was sad, angry and upset. Bob Thomas, Short’s co-worker, testified that in the days prior to July 22, 2004, Short was “down” and “wanted to die.” However, following the shootings at 5035 Pepper Drive, Short was supervised while in a holding cell and then transported to the jail by Officer Brad Reaman of the Huber Heights Police Department. Reaman described Short as being calm and in command of his faculties. Short reported in the court-ordered psychological evaluation that he has been treated for some time for depression and anxiety and for sleep difficulties. He also reported having been diagnosed with Bipolar Disorder in 2002, said diagnosis having been unconfirmed in the medical records provided to the evaluating psychologist. Short reported that he went to the hospital and was treated for several hours after his wife left him, as he was despondent. The psychological evaluations made part of the record also reveal that Short’s treating physicians made repeated recommendations that he seek treatment and psychological counseling, but he failed to do so. Based upon the evaluations, Short was diagnosed with a thought disorder. However, the planning and calculation that preceded the offenses belie mental disease or defect, or lack of substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The court notes that the Defendant offered no other testimony, including no expert testimony, that he suffered from a mental disease or defect, that he lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The court gives little weight to this factor.

She did not consider these matters under the catchall provision of OHIO REV. CODE § 2929.04(B)(7), something that this Court has noted. *State v. Hughesbanks*, 99 Ohio St.3d 365, 388, 792 N.E.2d 1081, 1104 (2003); *State v. Braden*,

98 Ohio St.3d 354, 381, 785 N.E.2d 439, 467 (2003); *State v. Seiber*, 56 Ohio St.3d 4, 8-9, 564 N.E.2d 408, 416 (1990). The Court did not note, nor did Short's trial counsel call to her attention, the comments made by Officer Reaman at the time of the arrest in his report, namely that Short seemed extremely nervous and could not stop pacing.²⁶⁴ Nor did the Trial Court indicate what mental health authority holds that one cannot be mentally unstable and do the things Short did. Being mentally ill or dysfunctional does not mean that one is comatose.

Similarly, the Court gave little weight to the lack of significant criminal history. Short was a hard working man who tried to provide for his family within the norms of society.

The Trial Court disposed of the other items with similar dispatch. For example, she gave little weight to the cooperation provided by Short to the police. It is hard to imagine what Short could have done to have cooperated with the officers any more. Without his statements, detailed in the Offense Report,²⁶⁵ the Government would not have had the vast array of evidence of Short's actions leading up to this homicide. The Trial Court dispatched the remorse that Short expressed with a conclusion that he was blaming others for his conduct. He did express concern for the role that Sweeney's mother played in this tragedy, bankrolling the entire venture.

As this summary of the opinion suggests, the court's approach touched upon all it was obliged to. However, it was also a perfunctory analysis, and based on exacting considerations and faulty reasoning.

²⁶⁴ Joint Ex. I, Offense Report, p. 9.

²⁶⁵ Id.

C. Independent weighing and Appropriateness

i. *Nature and Circumstances of the Offense*

It is by now well-settled that the nature and circumstances of the offense must be weighed, and may only be weighed, on the side of mitigation, though they may receive no weight, *State v. Wogenstahl*, 75 Ohio St. 3d 344, 662 N.E.2d 311 (1996). Here the nature and circumstances of the offense relate to the breakdown of a marriage and what happens to the husband and his family, to the murdered wife and her family, and to the friend, whose mother bank-rolled the matter, and his family.

ii. *Blame*

Mitigation is not about blame, culpability, or excuse. As this Court explained in *State v. Getsey*, 84 Ohio St.3d 180, 702 N.E.2d 866 (1998):

In *State v. Holloway* (1988), 38 Ohio St.3d 239, 527 N.E.2d 831, the court explained that “mitigating factors under R.C. 2929.04(B) are not related to a defendant’s culpability but, rather, are those factors that are relevant to the issue of whether an offender convicted under R.C. 2903.01 should be sentenced to death.” *Id.* at 242, 527 N.E.2d at 835. See, also, *State v. Lawrence* (1989), 44 Ohio St.3d 24, 28-29, 541 N.E.2d 451, 457. Further, the court has frequently stated that a mitigating factor “lessens the moral culpability of the offender or diminishes the appropriateness of death as the penalty.” *State v. DePew* (1988), 38 Ohio St.3d 275, 292, 528 N.E.2d 542, 560, quoting *State v. Steffen* (1987), 31 Ohio St.3d 111, 129, 31 OBR 273, 289, 509 N.E.2d 383, 399.

The inclusion of the words “lessening, weakening, excusing,” which are typically associated with blame or culpability for the crime, resulted in an instruction that strayed from the definition approved in *Holloway*.²⁶⁶

²⁶⁶ *Getsey* at 200-01, 702 N.E.2d at 886.

iii. Mitigating Factors

a. Substantial Capacity and Mental Illness

Short's actions after receiving the note from his wife were such that his family contacted authorities. His shotgun was confiscated and a friend refused to give him another shotgun because of his mental status. He was given medication.

Substance abuse and mental health issues are appropriate mitigating factors and deserve consideration, *State v. Smith*, 89 Ohio St.3d 323, 338-39, 731 N.E.2d 645, 660 (2000); *State v. Otte*, 74 Ohio St.3d 555, 568, 660 N.E.2d 711, 723 (1996); *State v. Allard*, 75 Ohio St.3d 482, 502, 663 N.E.2d 1277, 1293-94 (1996); *State v. Wilson*, 74 Ohio St.3d 381, 400, 659 N.E.2d 292, 310 (1996); and) *State v. Green*, 66 Ohio St.3d 141, 152, 609 N.E.2d 1253, 1262-63 (1993). His mental problems deserve weight.

b. Cooperation

Duane cooperated with police and confessed to the crime. He returned to the scene before the police arrived and submitted to arrest. He also provided a detailed statement about the facts, so that the government was able to obtain extensive evidence. The government had not only video of the purchase of the gun but of the purchase of the hacksaw to modify the gun. Moreover, he has repeatedly expressed his remorse for what occurred. It is almost impossible to conceive of a case where the defendant was more cooperative, except when the defendant seeks to be executed.

Short's cooperation should have been given significant weight. See *State v. Rojas*, 64 Ohio St.3d 131, 144, 592 N.E.2d 1376, 1387 (1992), where the Supreme Court of Ohio held that "remorse and assistance to the police are mitigating factors."

c. Love for Family

Short's sister's statement demonstrates his love of his children and his family. *State v. Bays*, 87 Ohio St. 3d 15, 34, 716 N.E.2d 1126, 1145 (1999); and *State v. Fox*, 69 Ohio St. 3d 183, 195-96, 631 N.E.2d 124, 134 (1996);

d. History and Background

Short's history of working and providing for his family deserves significant weight.

D. Balance

What does all of this mean? This suggests that if mitigation means anything, it means this case. The weight properly afforded the single aggravating circumstance is comparatively light. The weight properly afforded mitigation is great.

Appellant does not suggest that aggravated murder is gentle. He does not suggest that there is not substantial aggravation. He does insist that the trial court's weighing was faulty. And he maintains that, on proper balance, the aggravating circumstance will be found not to outweigh the mitigating factors. When families fall apart, the trauma goes everywhere.

F. Appropriateness

The aggravated murder at issue in this case was senseless.

But the appropriateness of a death sentence is not to be measured purely by the senselessness of the crime. The issue, as the United States Supreme Court has repeatedly emphasized, is how to balance the narrow discretion to impose a death sentence so as to avoid caprice with the broad discretion not to impose a death sentence so as to permit individualized consideration in the determination of whether the offender should live or die. *Furman v. Georgia*, 408 U.S. 238 (1972) (narrow discretion); *Lockett v. Ohio*, 438 U.S. 586 (1978) (broad discretion).

The Texas Court of Criminal Appeals has observed that it is not just any individual murder that is senseless but so is “every murder in the course of a robbery.” The imposition of a death sentence simply because the crime was callous or the offense senseless

would mean that virtually every murder in the course of a robbery would warrant the death penalty. Such a construction would destroy the purpose of the punishment stage in capital murder cases, which is to provide a reasonable and controlled decision on whether the death penalty should be imposed, and to guard against its capricious and arbitrary imposition.

Roney v. State, 632 S.W.2d 598, 603 (Tex. Crim. 1982) (citations omitted). A similar principal underlies the holding of the United States Supreme Court in *Godfrey v. Georgia*, 446 U.S. 420 (1980). The Court vacated Godfrey's death sentence holding that the aggravating circumstance that the murder was outrageously or wantonly vile, horrible or inhuman was overbroad. The Court reasoned that a person of ordinary sensibility could fairly conclude that virtually

every murder is outrageously or wantonly vile, horrible or inhuman. Thus, the Court said, the aggravating circumstance did not sufficiently distinguish Godfrey's case, in which a death sentence was imposed, from other cases in which death sentences were not imposed. See, generally, the discussion of *Godfrey* in *State v. Maurer*, 15 Ohio St.3d 239, 242-243, 473 N.E.2d 768, 775 (1984).

This Court recently vacated the death sentence of Troy Tenace.²⁶⁷ That case did not involve the intricate family relations reflecting intimate relations linking family and church. That case did involve a man who took advantage of an elderly man. Short's actions in this case reflect a man unable to control his emotions at the demise of his most important relationship. For these reasons, the government has failed to meet its burden of proving that the aggravating circumstances outweigh the mitigating factors.

This failure of the government to meet its burden of proof on the sentencing violates the defendant's Right to Due Process, guaranteed by the U.S. CONST. amends V and XIV, and OHIO CONST. art. I, § 16 and the Right to be free from Cruel and Unusual Punishment, guaranteed by the U.S. CONST. amend VIII, and OHIO CONST. art. I, § 9. Thus the defendant's sentence must be reversed.

²⁶⁷ *State v. Tenace*, 109 Ohio St.3d 255, 847 N.E.2d 386 (2006).

Conclusion

Thus, this Court should reverse the convictions and return the case to the Court of Common Pleas.

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Certificate of Service

I, counsel for Duane Allen Short, certify that on June 29, 2007, I served a copy of this Merit Brief and the Appendix on the government by depositing it in the United States mail, first class postage prepaid, addressed to:

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Appendix

In the Supreme Court of Ohio

State of Ohio,

Plaintiff-Appellee,

v.

Case No. 06-1366

Duane Allen Short,

Defendant-Appellant.

On Appeal from the
Montgomery County Court of Common Pleas
Case No. 2004 CR 02635

**Notice of Appeal of
Duane Allen Short**

**The Case Involves a Sentence
of Death**

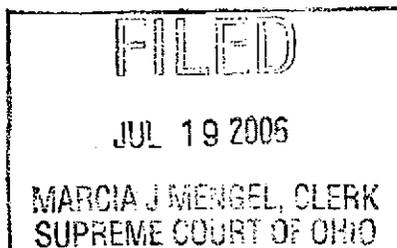
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Notice of Appeal of Duane Allen Short

Counsel on behalf of Duane Allen Short give notice that he appeals to the Ohio Supreme Court from the sentence pronounced on May 30, 2006, and entered by the Montgomery County Court of Common Pleas, in Case No. 02-CR-0353 on June 12, 2003. The Sentencing Opinion required by OHIO REV. CODE § 2929.03(F) was filed on June 7, 2006. There that court sentenced the defendant to death.

This Court is required to review all cases where the defendant has received the death sentence, OHIO REV. CODE § 2929.05; *State v. Ashworth*, 85 Ohio St.3d 56, 706 N.E.2d 1231 (1999).

Respectfully Submitted,

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Certificate of Service

I certify that on July 18, 2006, I served a copy of this Notice of Appeal by depositing it in the United States mail, first class postage prepaid, addressed to:

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GARY W. CRIM



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MONTGOMERY CO. OHIO

**IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CRIMINAL DIVISION**

STATE OF OHIO

CASE NO. 2004 CR 02635

Plaintiff

JUDGE MARY KATHERINE HUFFMAN

vs.

**DUANE ALLEN SHORT
DOB: 12/16/1967 SSN: 272-78-8966**

TERMINATION ENTRY

Defendant

The defendant herein having been convicted of the offenses and specifications of:

- COUNT 1: BREAKING AND ENTERING (land/premises) 2911.13(B) F5
Three (3) Year Firearm Specification 2929.14/2941.145**
- COUNT 2: AGGRAVATED MURDER (prior calculation/design) 2903.01(A)
Unclassified Felony
Three (3) Year Firearm Specification 2929.14/2941.145
Aggravating Circumstance Specification 2929.04(A)(5)/2941.14
Aggravating Circumstance Specification 2929.04(A)(7)/2941.14**
- COUNT 3: AGGRAVATED BURGLARY (deadly weapon) 2911.11(A)(2) F1
Three (3) Year Firearm Specification 2929.14/2941.145**
- COUNT 4: AGGRAVATED MURDER (prior calculation/design) 2903.01(A)
Unclassified Felony
Three (3) Year Firearm Specification 2929.14/2941.145
Aggravating Circumstance Specification 2929.04(A)(5)/2941.14
Aggravating Circumstance Specification 2929.04(A)(7)/2941.14**
- COUNT 5: AGGRAVATED MURDER (while committing Aggravated Burglary)
2903.01(B) Unclassified Felony
Three (3) Year Firearm Specification 2929.14/2941.145
Aggravating Circumstance Specification 2929.04(A)(5)/2941.14
Aggravating Circumstance Specification 2929.04(A)(7)/2941.14**

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CASE NO. 2004 CR 02635
STATE VS. DUANE ALLEN SHORT

COUNT 6: UNLAWFUL POSSESSION OF DANGEROUS ORDNANCE 2923.17(A)
F5
Three (3) Year Firearm Specification 2929.14/2941.145

was on May 30, 2006, brought before the Court;

WHEREFORE, it is the JUDGMENT and SENTENCE of the Court that the defendant herein be delivered to the CORRECTIONS RECEPTION CENTER there to be imprisoned, confined and sentenced as follows:

- COUNT 1: TWELVE (12) MONTHS;**
- COUNT 2: DEATH;**
- COUNT 3: TEN (10) YEARS;**
- COUNT 4: DEATH;**
- COUNT 5: DEATH;**
- COUNT 6: TWELVE (12) MONTHS;**

The sentences on COUNTS 1, 3 and 6 are to be served CONSECUTIVELY to each other. COUNT 4 is hereby merged into COUNT 5;

The Court hereby merges the Firearm Specification in Counts 1, 2, 3, 4, 5 and 6 into ONE (1) Firearm Specification and imposes an additional term of THREE (3) years ACTUAL INCARCERATION on the Firearm Specification, which shall be served CONSECUTIVELY to and prior to the definite term of imprisonment; FOR A TOTAL SENTENCE OF DEATH ON COUNT 2, DEATH ON COUNT 5, PLUS FIFTEEN (15) YEARS.

Further, it is the JUDGMENT and SENTENCE of the Court that on Counts 2 and 5 of AGGRAVATED MURDER, the defendant is sentenced to the Corrections Reception Center to be delivered to the Warden of the Southern Ohio Correctional Facility, Lucasville, Ohio, where the defendant shall be kept until the day designated for his execution and where he shall be executed pursuant to O.R.C. 2949.22 by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death. The application of the drug or combination of drugs shall be continued until the person is dead. The warden of the correctional institution in

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STATE VS. DUANE ALLEN SHORT

which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed, said punishment to be inflicted within the walls of the Southern Ohio Correctional Facility on the 12th day of October, 2006; and

The defendant is to submit to a DNA specimen collection procedure pursuant to Section 2901.07 of the Ohio Revised Code.

Court costs to be paid in full in the amount determined by the Montgomery County Clerk of Courts.

The defendant is to receive credit for _____ days spent in confinement; Further the defendant shall receive _____ days credit from the Sheriff from the day of sentencing _____ to the day of transport _____.

The Court finds the defendant IS NOT eligible for placement in a program of shock incarceration under Section 5120.031 of the Revised Code and IS NOT eligible for placement in an intensive program prison under Section 5120.032 of the Revised Code.

The Court notifies the defendant that, as a part of this sentence, as to Counts 1, 3 and 6 only, the defendant will be supervised by the Parole Board for a period of FIVE years Post-Release Control after the defendant's release from imprisonment.

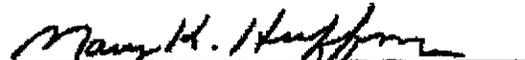
Should the defendant violate any post-release control sanction or any law, the adult parole board may impose a more restrictive sanction. The parole board may increase the length of the post-release control. The parole board could impose an additional nine (9) months prison term for each violation for a total of up to fifty percent (50%) of the original sentence imposed by the court. If the violation of the sanction is a felony, in addition to being prosecuted and sentenced for the new felony, the defendant may receive from the court a prison term for the violation of the post-release control itself.

Pursuant to R.C. 2929.19(B)(3)(f), the defendant is ordered not to ingest or be injected with a drug of abuse. The defendant is ordered to submit to random drug testing as provided in section 341.26, 753.33, or 5120.63 of the Revised Code. The results of the drug test administered shall indicate that the defendant did not ingest and was not injected with a drug of abuse.

The Court did fully explain to the defendant his appellate rights and the defendant informed the Court that said rights were understood.

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CASE NO. 2004 CR 02635
STATE VS. DUANE ALLEN SHORT

The defendant is sentenced under Sections 2911.13(B), 2911.11(A)(2), 2903.01(A), 2903.01(B), 2923.17(A), 2929.14/2941.145, 2929.04(A)(5)/2941.14 and 2929.04(A)(7)/2941.14 of the Ohio Revised Code. **BOND IS RELEASED.**


JUDGE MARY KATHERINE HUFFMAN

MATHIAS H. HECK, JR.
Prosecuting Attorney
Montgomery County, Ohio

By: 
LEON J. DAIDONE, #0017354

By: 
ROBERT C. DESCHLER, #0059445

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Caseload Services

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DAN FOLEY
CLERK OF COURTS
MONTGOMERY CO., OHIO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,

CASE NO. 2004 CR 02635

Plaintiff,

JUDGE MARY KATHERINE HUFFMAN

v.

DUANE SHORT,

OPINION OF TRIAL JUDGE
(O.R.C. §2929.03)

Defendant.

This matter came on to be heard pursuant to Ohio Revised Code Section 2929.03(F). On September 20, 2004, the Grand Jury of Montgomery County, Ohio returned an Indictment charging the Defendant, Duane Allen Short with, among other crimes, the Aggravated Murders of Donnie R. Sweeney and Rhonda M. Short. The Grand Jury also charged two aggravating circumstances for each of the three charges of aggravated murder.

The Defendant entered a plea of not guilty and the matter proceeded to trial commencing on April 17, 2006. On May 5, 2006 the jury returned unanimous verdicts of guilty as to Counts Two, Four and Five of the Indictment for the Aggravated Murder involving the deaths of Donnie R. Sweeney and Rhonda M. Short. In addition, the jury convicted the Defendant of the two aggravating circumstances which were attached to Counts Two, Four and Five of the Indictment.

The two aggravating circumstances, or death specifications, which were appended to Counts Two, Four and Five are: (1) that the offenses were part of a course of conduct involving the purposeful killing of two or more persons, and (2) the offenses were committed while the Defendant was committing, attempting to commit, or fleeing immediately after committing or

attempting to commit the offense of aggravated burglary, and the Defendant was the principal offender in the commission of the aggravated murder.

Each of the aggravating circumstances must be considered with the count to which it is appended, and each count must be considered separately. Pursuant thereto, the court makes the following findings regarding the aggravating circumstances:

1. The testimony at trial was that the Defendant, Duane Allen Short, purposefully killed Donnie R. Sweeney and Rhonda M. Short on July 22, 2004. Short's wife, Rhonda M. Short had separated from him on approximately July 15, 2004. She had left a note for Duane Short with their son, Justin Short, who gave the note to his father the same day that his mother left. Rhonda Short took the two younger Short children, Tiffany and Jesse, with her when she left the home of the parties located in Middletown, Ohio. Short searched for his wife over the course of several days, going to several different churches, looking for his wife as well as praying.

On July 22, 2004, Short contacted DP&L and learned through subterfuge where his wife was residing. Short then traveled with his son, Justin, to Huber Heights, to locate the property address he had been provided by DP&L, the property being located at 5035 Pepper Drive, Huber Heights, Ohio. Short stopped at a local real estate office and was given directions to the home. Short and Justin then returned to their home in Middletown where Short attempted to buy a gun from a friend, Brandon Fletcher. Fletcher knew that Short and his wife had recently separated. He refused to sell Short the gun. Short also called his employer, Robert McGee, and asked if he could borrow McGee's truck to move some furniture to Miamisburg. McGee consented and Short exchanged his own truck for that owned by McGee. Later that evening Short and his son traveled in McGee's truck to Miamisburg, Ohio, where Short purchased a shotgun at Dick's Sporting Goods. Prior to leaving his residence in Middletown, Short took hats, a long black coat,

gloves, a towel and shotgun shells and put them in McGee's truck. Short told his son that he wanted to go hunting and he was buying a gun to hunt. After purchasing the gun Short and his son, Justin, traveled approximately two miles to a Meijer store and purchased a hacksaw. They then traveled to Huber Heights and drove past the home located at 5035 Pepper Drive where Short and Justin observed Rhonda Short walking outside the home and also observed Donnie Sweeney's automobile at the residence. Prior to driving past the home at 5035 Pepper Drive, Short told Justin to put on a hat so that his mother would not recognize them. Short and Justin then checked into a motel in Huber Heights where Short, after turning the television on loud and putting a "do not disturb" sign on the door, proceeded to have his son sit on the butt of the gun while he sawed off the barrel.

The evidence further indicates that Defendant entered the property located at 5035 Pepper Drive, Huber Heights, Ohio, at about 10:30PM on July 22, 2004, and went around the home to the back yard, where he entered the yard and shot Donnie R. Sweeney one time in the chest from a relatively close range. Some noise in the backyard attracted two of Defendant's children, Tiffany and Jesse, who had been in the home at 5035 Pepper Drive, watching television in the living room. When Tiffany and Jesse heard the noise they went to the back window of the home, but could see nothing outside. Jesse then began opening the door to see what was going on outside, when both Tiffany and Jesse observed their father, Duane Allen Short, enter into the home, without permission, with a gun in his hand. Tiffany and/or Jesse called out to their father, but he did not respond to them. Instead, Defendant proceeded into the home at 5035 Pepper Drive. Tiffany and Jesse then ran out of the home.

Defendant then proceeded to kick open the door to the bathroom located in the hallway of the residence at 5035 Pepper Drive and shoot his wife, Rhonda M. Short. Shortly thereafter

Defendant was apprehended on the back porch of the residence at 5035 Pepper Drive by officers from the Huber Heights Police Department. Rhonda Short was still alive when paramedics arrived. She stated to Adam Blake and David Develbiss, both firefighter/paramedics with the Huber Heights Fire Department, words to the effect that "he shot me." Rhonda Short was also shot at relatively close range. At the scene, David Develbiss removed shotgun wadding from the wound that had been inflicted to Rhonda Short's upper right chest. Rhonda M. Short died at approximately 4:38AM the following morning, approximately six hours after the shooting as a result of a shotgun wound to the right chest. Donnie Sweeney was dead at the scene. His cause of death was a shotgun wound to the left chest.

In the weeks prior to her mother's death, Tiffany Short heard her parents arguing and heard her father, Duane Short, tell her mother, Rhonda Short, more than one time, "if you ever leave I'll kill you." Approximately one to two months before Rhonda Short's death, Amy Spurlock, a friend of Rhonda Short, and a relative of her mother's boyfriend, heard Duane Short ask Rhonda to read a newspaper article about a man who had killed his wife. Rhonda did not want to do so, but Duane was described by Amy as being "angry, upset and mad." Duane then said to Rhonda, "if you ever leave me or cheat on me I'll kill you, the kids and myself." Bob Thomas, a co-worker with the Defendant in the meat department at McGee's IGA, also heard Short make a similar statement. A few months prior to the shooting, Short told Thomas "if my wife ever leaves me for another man, I'll kill both of them and myself." On July 21, 2004, the day prior to the shootings, Duane Short approached a relative of his father, Loren Taylor, at the Abundant Life Tabernacle. Loren was on the pulpit directing a music practice when he was approached by Short, who stated that he was looking for his parents. Short told Loren that Rhonda had left him and stated "I think she left me for another man, I just thought about going

over there and killing him." The court finds the aforementioned testimony is sufficient to find that said killings were purposeful and involved the killing of two persons.

2. The evidence disclosed that the Defendant and Rhonda M. Short had separated on approximately July 15, 2004, at the will of Rhonda Short. Rhonda and the children, Tiffany and Jesse, moved from hotel to hotel for several nights. Rhonda and her friend, Brenda Barrion, who was Donnie Sweeney's mother, rented the home located at 5035 Pepper Drive for Rhonda and her children on July 17, 2004. Rhonda and the children moved into the home on July 20, 2004. Brenda Barrion had attempted to rent furniture for Rhonda's use in the home but because she was afraid of leaving a paper trail, she and Rhonda chose not to rent the furniture. Rhonda had put the utilities at the residence in her maiden name. Brenda Barrion testified that she was the person who had rented the home located at 5035 Pepper Drive, Huber Heights, Montgomery County, Ohio, and that at no time had she given Duane Short permission to enter the premises. Tiffany Short testified that no one gave her father permission to enter the residence. Jesse Short also testified that his father shoved open the door to the house and entered. There is no evidence that Rhonda Short, nor anyone authorized to do so, gave Duane Short permission to enter upon the premises located at 5035 Pepper Drive, Huber Heights, Ohio, on July 22, 2004.

The court finds that no open permission was granted for Defendant to enter upon the premises at 5035 Pepper Drive. Rhonda Short was clearly attempting to hide her whereabouts from Defendant. The court further finds the entrance upon the property at 5035 Pepper Drive by Defendant was unwarranted and a trespass, and he lacked privilege or permission to enter upon the land. Further, the Defendant, after gaining entrance committed a violent felony against the person of Rhonda M. Short, who had authority to grant or revoke any privilege to enter upon the land. The court finds that the evidence was legally sufficient to establish that Duane M. Short

committed the aggravated murders of Donnie R. Sweeney and Rhonda M. Short while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary. The court further finds that the evidence was legally sufficient to establish that Defendant was the sole perpetrator of the killings of Donnie R. Sweeney and Rhonda M. Short.

During the trial phase of these proceedings, there was some evidence submitted by the Defendant which was mitigating in nature, such as Defendant was employed, was the father of three children, and that he attended church. There was also some evidence that Defendant was dependable when it came to his employment and he was a hard-worker.

The sentencing phase of the case began on May 8, 2006. Prior to proceeding in the presence of the jury, Defendant's counsel advised the court that Defendant did not intend to present any additional mitigation evidence, other than that which was presented during the trial phase. The court then conducted a detailed inquiry of the Defendant, pursuant to *State of Ohio v. Ashworth*, 85 Ohio St. 3d 56 (1999). Defendant specifically stated, on the record, outside of the presence of the jury, after being advised of his rights pursuant to *Ashworth*, that he was well aware of his right to present mitigation evidence, that he knew the purpose of mitigation evidence, that he had given the matter considerable thought, that he had discussed the matter with his counsel and any other person that he considered to be important to his decision, that it was his choice not to present any additional mitigation evidence and, further, that he understood that by failing to present any additional mitigation evidence that the jury, more than likely, may impose the death penalty. The court then found Defendant competent to waive any additional mitigation evidence. The court also advised Defendant of his right to make either a sworn or unsworn statement, and the Defendant acknowledged to the court that he understood his right

and he was waiving his right to make a statement in the presence of the jury.

The court then proceeded to instruct the jury on the law and procedures to be followed in the sentencing phase of the case. Counsel for the State and the Defendant both waived opening statements. The State proffered all the evidence it had produced in the trial phase, as did the Defendant. The State relied upon the jury's three verdicts of Aggravated Murder along with the second and third specifications, or aggravating circumstances, attached to each count of Aggravated Murder. The Defendant did not present any additional evidence in mitigation.

At the conclusion of the evidence, counsel argued their positions to the jury and the court instructed the jury on the law. Part of those instructions set forth the aggravating circumstances that the jury should weigh and some of the mitigating factors they could consider. The jury was informed that each count was to be considered separately.

The jury deliberated on May 8 and May 9, 2006. On May 9, 2006, the jury announced its verdicts and found beyond a reasonable doubt that the aggravating circumstances which the Defendant was found guilty of committing in the aggravated murders as set forth in Counts 2, 4 and 5 outweighed the mitigating factors in this case and they, therefore, recommended the Defendant be sentenced to death as to Counts 2, 4 and 5.

The Defendant was given a further opportunity to allocute on May 30, 2006, at which time Defendant made a length statement, which the court has considered.

The court must now conduct its own independent review of the evidence and determination of whether the aggravating circumstances outweigh the mitigating evidence beyond a reasonable doubt, pursuant to O.R.C. §2929.03. The court is required to weigh the two aggravating circumstances for which the Defendant was found guilty against any mitigating factors the court may find in its independent search of the entire record.

The court notes that the nature and circumstances of the offense are only to be considered as a mitigating factor, and never as an aggravating circumstance. In fact, the court is confined to considering the aggravating circumstances attached to each count, as detailed above. As a result of Defendant's waiver of the presentation of any additional mitigation evidence, this court is required to search the record for evidence in favor of mitigation. The court is cognizant of the fact that the absence of a mitigating factor does not add to existing aggravating circumstances.

The court also acknowledges its duty to assess the penalty for each individual count when a defendant is convicted of more than one count of aggravated murder with aggravating circumstances. The court further acknowledges that only the aggravating circumstances related to a given count may be considered in assessing the penalty for that count.

The court has reviewed the entire record for evidence of mitigation.

The court now shall consider the mitigating factors as they relate to Counts 2, 4, and 5. O.R.C. §2929.04(B) lists seven specific mitigating factors, all of which will be addressed by the court. The court must determine whether the State has proved beyond a reasonable doubt that the aggravating circumstances, for which Defendant was found guilty, outweigh the mitigating factors. If the State has met this burden of proof, the death penalty shall be imposed. The court must also consider, as set forth in O.R.C. §2929.04(B), the nature and circumstances of the offense and the history, character and background of the offender.

When considering the nature and circumstances of the offense, and the history, character and background of the Defendant, the court has search the entire record for evidence. There is very little evidence in the record regarding the history, character and background of the Defendant. Defendant was married and had three children, for whom he provided. The evidence, including a letter from Justin Short to his father, reveals that Defendant's children love

him, despite the events of July 22, 2004. Defendant was employed at the time of the offense. The court has also reviewed the psychological evaluations made part of the record herein. Specifically, the court has reviewed and considered the Competency to Stand Trial Report prepared by Dr. Scott Kidd, and dated January 6, 2005, and the Competency Evaluation Report prepared by Dr. Kim Stookey, and dated February 21, 2005. The defendant reported that he had a good relationship with his family, he frequently attended church and that he is a high school graduate. He reported having some social adjustment issues and that his mother was very strict while he was growing up. Short did not report any incidents of abuse during his childhood. He reported a head injury resulting from a motorcycle accident in 1997. As a result of injuries sustained in that accident, Short reported that he developed a dependency to prescription drugs. He also reported a history of drug and alcohol abuse. The statements contained in the psychological evaluations were somewhat conflicting, as the information reveals that Defendant last abused prescription drugs in 1999 and in 2002. The court gives little weight to these issues.

The court will now address the seven statutorily delineated mitigating factors.

1. Whether the victim of the offense induced or facilitated it. Defense counsel argued that the details of the crime evidenced a man who was upset or despondent over the loss of his wife and his perception that she had left him for another man. The court finds that there is no evidence that the victims of the offense, Donnie R. Sweeney or Rhonda M. Short, facilitated the offense. While Defendant argued that his wife leaving him and another man, Donnie Sweeney, being at her home, facilitated the offense and induced him to commit the aggravated murders, there is nothing about the conduct of the victims that induced or facilitated Defendant's actions. Donnie Sweeney was in the backyard of the home at 5035 Pepper Drive

when he was set upon and shot at close range by Defendant. Rhonda Short was in the bathroom, apparently just having showered, when Defendant kicked in the door and shot her at close range. There is no evidence to indicate that either victim committed any act toward Defendant. While the defendant clearly was upset that his wife had left him, the fact that his wife was at a home that she had rented while another man was in the backyard grilling dinner, is not sufficient to give any weight to the mitigating factor that the victims of the offense induced or facilitated the offense.

2. Whether it is unlikely the offense would have been committed, but for the fact that the Defendant was under duress, coercion, or strong provocation. The only evidence of duress, coercion, or strong provocation is that he was upset that his wife had left him, and that he believed she had left him for another man. Defendant's emotions relating to the loss of his wife or family does not equate to duress, coercion or strong provocation. As stated above, Donnie Sweeney was grilling in the backyard when he was shot at close range by the Defendant, who was on the property without the permission of anyone who was entitled to grant him permission. Defendant then proceeded, without privilege to do so, into the residence at 5035 Pepper Drive and kicked in the bathroom door and shot his wife. There is no evidence of duress, coercion or strong provocation sufficient to mitigate the consequences of Defendant's behavior. The court gives little weight to this factor.
3. Whether, at the time of committing the offense, the offender, because of mental disease or defect, lacked substantial capacity to appreciate the criminality of the

offender's conduct or to conform the offender's conduct to the requirements of the law. There was no testimony relating to this factor, except possibly for evidence that the Defendant was upset that his wife had left him, presumably for another man. Justin Short testified that, in the week preceding the deaths of Donnie Sweeney and Rhonda Short, his father was sad, angry and upset. Bob Thomas, Short's co-worker, testified that in the days prior to July 22, 2004, Short was "down" and "wanted to die." However, following the shootings at 5035 Pepper Drive, Short was supervised while in a holding cell and then transported to the jail by Officer Brad Reaman of the Huber Heights Police Department. Reaman described Short as being calm and in command of his faculties. Short reported in the court-ordered psychological evaluations that he has been treated for some time for depression and anxiety and for sleep difficulties. He also reported having been diagnosed with Bipolar Disorder in 2002, said diagnosis having been unconfirmed in the medical records provided to the evaluating psychologist. Short reported that he went to the hospital and was treated for several hours after his wife left him, as he was despondent. The psychological evaluations made part of the record also reveal that Short's treating physicians made repeated recommendations that he seek treatment and psychological counseling, but he failed to do so. Based upon the evaluations, Short was diagnosed with a thought disorder. However, the planning and calculation that preceded the offenses belie mental disease or defect, or lack of substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The court notes that Defendant offered no other

testimony, including no expert testimony, that he suffered from a mental disease or defect, that he lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The court gives little weight to this factor.

4. The youth of the offender. The record reveals that the Defendant was 36 years old at the time of the offense. Therefore, this mitigating factor is inapplicable.
5. The offender's lack of a significant history of prior criminal convictions and delinquency adjudications. There is some conflicting evidence in the psychological evaluations, the information for which was provided by Defendant himself, that Short was charged with domestic violence in the past, relating either to his first wife or his first wife's father. That information was conflicting and confusing. There is no other evidence in the record that Defendant has any criminal history, whether as a juvenile or as an adult. However, given the multiple deaths associated with Defendant's conduct and the multiple other felonies for which the jury found the Defendant guilty, and the fact that the Defendant was the only offender, the court gives little weight to this factor.
6. If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim. Defendant, Duane Allen Short was the only offender in the offenses at issue. Therefore, the court gives no weight to this factor.
7. Any other factors that are relevant to the issue of whether the offender should be sentenced to death. The testimony offered at trial raised several factors which

could be deemed and are so offered and considered in mitigation of the offense.

- A. The impact on Justin, Tiffany and Jesse Short. The impact on Short's children has been considered. The evidence before the court is that the Defendant loved his children and that sentiment was reciprocated. It would be pure speculation for the court to consider the impact on the Short children; however, one would assume that the impact of their present circumstance is overwhelming. The court gives little weight to this factor, however, in light of the fact that Defendant's conduct resulted in the circumstances that his children now face.
- B. Support from Defendant's family and friends. There was some evidence in the record that Defendant's family members continue to love and support him, and who have visited him in the jail during his incarceration. The court assigns little weight to this factor.
- C. Assistance and cooperation with police. Short's assistance and cooperation with the police is found to be a mitigating factor. He cooperated after submitting to arrest without resistance. He did acknowledge his involvement in the offenses. However, the court assigns little weight to this mitigating factor.
- D. Employment. The evidence was undisputed that Defendant had been employed and was supporting his family. The court finds that this factor is of little weight.
- E. Remorse. Defendant made an expression of remorse in his statement to the court. However, the court gives little weight to his expression of

remorse, as it was tempered by his lengthy statement placing blame on other for his conduct, including the family of Donnie Sweeney. The court assigns very little weight, if any, to this factor.

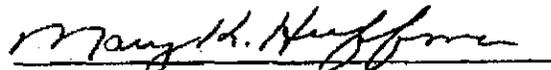
The jury in Counts 2, 4 and 5 found the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. The court, having conducted the same process, and having weighed the aggravating circumstances and the mitigating factors or evidence, agrees with the jury's verdict. The aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt and the State, therefore, has sustained its burden as to Counts 2, 4 and 5. The court finds the mitigating factors pale in significance when considering the aggravating circumstances. The court, thus, agrees with the verdict of the jury as to Counts 2, 4 and 5.

After searching and reviewing the record, this court has found beyond a reasonable doubt that the following aggravating circumstances: (1) the aggravated murders of Donnie R. Sweeney and Rhonda M. Short were part of a course of conduct involving the purposeful killing of two or more persons; and (2) Defendant committed the aggravated murders of Donnie R. Sweeney and Rhonda M. Short while committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary, and Defendant was the principal offender in the aggravated murders, outweigh the mitigating factors and evidence.

The Defendant, Duane Allen Short, having been convicted of the Aggravated Murders of Donnie R. Sweeney and Rhonda M. Short, and the jury having determined the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, as to Counts 2, 4 and 5 of the indictment, and the court having independently reviewed and weighed the evidence in the record, finds the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, and the sentence of death shall be imposed upon the Defendant.

Consistent with the court's pronouncement of sentence on May 30, 2006, the prosecutor's office is directed to prepare a Termination Entry reflecting the court's sentence for the court's review and filing.

IT IS SO ORDERED.


JUDGE MARY KATHERINE HUFFMAN

Copies of the above were sent to all parties listed below by ordinary mail this date of filing.

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Ryan Colvin, Bailiff (937) 496-7955 / Email: colvinr@montcourt.org

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff,

v.

DUANE ALLEN SHORT,

Defendant.

Date of Offense:

July 22, 2004

Trial Court Case No. 2004-CR-2635

Date of Final Judgment in Trial
Court:

June 12, 2006.

Judge Mary Katherine Huffman

Instructions to Court Reporter:

Immediately prepare a transcript of all proceedings, including but not limited to all pre-trial hearings, motion hearings, in chambers conferences, trial (including voir dire, if applicable), phase proceedings, penalty phase proceedings and sentencing proceedings, in conformance with S. Ct. Prac. R. XIX, § 3, and deliver the transcript to the clerk of the court of common pleas.

Respectfully Submitted,

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Attorneys for Duane Allen Short

Certificate of Service

I, Gary W. Crim, counsel for Duane Allen Short certify that on July 18, 2006, I served a copy of this Instructions to Court Reporter by depositing it in the United States mail, first class postage prepaid, addressed to:

Leon J. Daidone
Assistant Prosecuting Attorney
Montgomery County, Ohio
Post Office Box 972
301 West Third Street, Fifth Floor
Dayton, Ohio 45422.

I further certify that on July 18, 2006, I served a copy of this Instructions to Court Reporter by depositing it in the United States mail, first class postage prepaid, addressed to:

Amy Burkett, Judicial Assistant
Montgomery County Common Pleas
Court, Court Room 3
41 North Perry Street
Dayton, Ohio 45422

Megen Elswick
4015 Atha Court
Dayton, Ohio 45424

GARY W. CRIM

FILED
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2006 JUN -7 PM 2: 32

DAN FOLEY
CLERK OF COURTS
MONTGOMERY CO., OHIO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO,

CASE NO. 2004 CR 02635

Plaintiff,

JUDGE MARY KATHERINE HUFFMAN

v.

DUANE SHORT,

OPINION OF TRIAL JUDGE
(O.R.C. §2929.03)

Defendant.

This matter came on to be heard pursuant to Ohio Revised Code Section 2929.03(F). On September 20, 2004, the Grand Jury of Montgomery County, Ohio returned an Indictment charging the Defendant, Duane Allen Short with, among other crimes, the Aggravated Murders of Donnie R. Sweeney and Rhonda M. Short. The Grand Jury also charged two aggravating circumstances for each of the three charges of aggravated murder.

The Defendant entered a plea of not guilty and the matter proceeded to trial commencing on April 17, 2006. On May 5, 2006 the jury returned unanimous verdicts of guilty as to Counts Two, Four and Five of the Indictment for the Aggravated Murder involving the deaths of Donnie R. Sweeney and Rhonda M. Short. In addition, the jury convicted the Defendant of the two aggravating circumstances which were attached to Counts Two, Four and Five of the Indictment.

The two aggravating circumstances, or death specifications, which were appended to Counts Two, Four and Five are: (1) that the offenses were part of a course of conduct involving the purposeful killing of two or more persons, and (2) the offenses were committed while the Defendant was committing, attempting to commit, or fleeing immediately after committing or

attempting to commit the offense of aggravated burglary, and the Defendant was the principal offender in the commission of the aggravated murder.

Each of the aggravating circumstances must be considered with the count to which it is appended, and each count must be considered separately. Pursuant thereto, the court makes the following findings regarding the aggravating circumstances:

1. The testimony at trial was that the Defendant, Duane Allen Short, purposefully killed Donnie R. Sweeney and Rhonda M. Short on July 22, 2004. Short's wife, Rhonda M. Short had separated from him on approximately July 15, 2004. She had left a note for Duane Short with their son, Justin Short, who gave the note to his father the same day that his mother left. Rhonda Short took the two younger Short children, Tiffany and Jesse, with her when she left the home of the parties located in Middletown, Ohio. Short searched for his wife over the course of several days, going to several different churches, looking for his wife as well as praying.

On July 22, 2004, Short contacted DP&L and learned through subterfuge where his wife was residing. Short then traveled with his son, Justin, to Huber Heights, to locate the property address he had been provided by DP&L, the property being located at 5035 Pepper Drive, Huber Heights, Ohio. Short stopped at a local real estate office and was given directions to the home. Short and Justin then returned to their home in Middletown where Short attempted to buy a gun from a friend, Brandon Fletcher. Fletcher knew that Short and his wife had recently separated. He refused to sell Short the gun. Short also called his employer, Robert McGee, and asked if he could borrow McGee's truck to move some furniture to Miamisburg. McGee consented and Short exchanged his own truck for that owned by McGee. Later that evening Short and his son traveled in McGee's truck to Miamisburg, Ohio, where Short purchased a shotgun at Dick's Sporting Goods. Prior to leaving his residence in Middletown, Short took hats, a long black coat,

gloves, a towel and shotgun shells and put them in McGee's truck. Short told his son that he wanted to go hunting and he was buying a gun to hunt. After purchasing the gun Short and his son, Justin, traveled approximately two miles to a Meijer store and purchased a hacksaw. They then traveled to Huber Heights and drove past the home located at 5035 Pepper Drive where Short and Justin observed Rhonda Short walking outside the home and also observed Donnie Sweeney's automobile at the residence. Prior to driving past the home at 5035 Pepper Drive, Short told Justin to put on a hat so that his mother would not recognize them. Short and Justin then checked into a motel in Huber Heights where Short, after turning the television on loud and putting a "do not disturb" sign on the door, proceeded to have his son sit on the butt of the gun while he sawed off the barrel.

The evidence further indicates that Defendant entered the property located at 5035 Pepper Drive, Huber Heights, Ohio, at about 10:30PM on July 22, 2004, and went around the home to the back yard, where he entered the yard and shot Donnie R. Sweeney one time in the chest from a relatively close range. Some noise in the backyard attracted two of Defendant's children, Tiffany and Jesse, who had been in the home at 5035 Pepper Drive, watching television in the living room. When Tiffany and Jesse heard the noise they went to the back window of the home, but could see nothing outside. Jesse then began opening the door to see what was going on outside, when both Tiffany and Jesse observed their father, Duane Allen Short, enter into the home, without permission, with a gun in his hand. Tiffany and/or Jesse called out to their father, but he did not respond to them. Instead, Defendant proceeded into the home at 5035 Pepper Drive. Tiffany and Jesse then ran out of the home.

Defendant then proceeded to kick open the door to the bathroom located in the hallway of the residence at 5035 Pepper Drive and shoot his wife, Rhonda M. Short. Shortly thereafter

Defendant was apprehended on the back porch of the residence at 5035 Pepper Drive by officers from the Huber Heights Police Department. Rhonda Short was still alive when paramedics arrived. She stated to Adam Blake and David Develbiss, both firefighter/paramedics with the Huber Heights Fire Department, words to the effect that "he shot me." Rhonda Short was also shot at relatively close range. At the scene, David Develbiss removed shotgun wadding from the wound that had been inflicted to Rhonda Short's upper right chest. Rhonda M. Short died at approximately 4:38AM the following morning, approximately six hours after the shooting as a result of a shotgun wound to the right chest. Donnie Sweeney was dead at the scene. His cause of death was a shotgun wound to the left chest.

In the weeks prior to her mother's death, Tiffany Short heard her parents arguing and heard her father, Duane Short, tell her mother, Rhonda Short, more than one time, "if you ever leave I'll kill you." Approximately one to two months before Rhonda Short's death, Amy Spurlock, a friend of Rhonda Short, and a relative of her mother's boyfriend, heard Duane Short ask Rhonda to read a newspaper article about a man who had killed his wife. Rhonda did not want to do so, but Duane was described by Amy as being "angry, upset and mad." Duane then said to Rhonda, "if you ever leave me or cheat on me I'll kill you, the kids and myself." Bob Thomas, a co-worker with the Defendant in the meat department at McGee's IGA, also heard Short make a similar statement. A few months prior to the shooting, Short told Thomas "if my wife ever leaves me for another man, I'll kill both of them and myself." On July 21, 2004, the day prior to the shootings, Duane Short approached a relative of his father, Loren Taylor, at the Abundant Life Tabernacle. Loren was on the pulpit directing a music practice when he was approached by Short, who stated that he was looking for his parents. Short told Loren that Rhonda had left him and stated "I think she left me for another man, I just thought about going

over there and killing him.” The court finds the aforementioned testimony is sufficient to find that said killings were purposeful and involved the killing of two persons.

2. The evidence disclosed that the Defendant and Rhonda M. Short had separated on approximately July 15, 2004, at the will of Rhonda Short. Rhonda and the children, Tiffany and Jesse, moved from hotel to hotel for several nights. Rhonda and her friend, Brenda Barrion, who was Donnie Sweeney’s mother, rented the home located at 5035 Pepper Drive for Rhonda and her children on July 17, 2004. Rhonda and the children moved into the home on July 20, 2004. Brenda Barrion had attempted to rent furniture for Rhonda’s use in the home but because she was afraid of leaving a paper trail, she and Rhonda chose not to rent the furniture. Rhonda had put the utilities at the residence in her maiden name. Brenda Barrion testified that she was the person who had rented the home located at 5035 Pepper Drive, Huber Heights, Montgomery County, Ohio, and that at no time had she given Duane Short permission to enter the premises. Tiffany Short testified that no one gave her father permission to enter the residence. Jesse Short also testified that his father shoved open the door to the house and entered. There is no evidence that Rhonda Short, nor anyone authorized to do so, gave Duane Short permission to enter upon the premises located at 5035 Pepper Drive, Huber Heights, Ohio, on July 22, 2004.

The court finds that no open permission was granted for Defendant to enter upon the premises at 5035 Pepper Drive. Rhonda Short was clearly attempting to hide her whereabouts from Defendant. The court further finds the entrance upon the property at 5035 Pepper Drive by Defendant was unwarranted and a trespass, and he lacked privilege or permission to enter upon the land. Further, the Defendant, after gaining entrance committed a violent felony against the person of Rhonda M. Short, who had authority to grant or revoke any privilege to enter upon the land. The court finds that the evidence was legally sufficient to establish that Duane M. Short

committed the aggravated murders of Donnie R. Sweeney and Rhonda M. Short while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary. The court further finds that the evidence was legally sufficient to establish that Defendant was the sole perpetrator of the killings of Donnie R. Sweeney and Rhonda M. Short.

During the trial phase of these proceedings, there was some evidence submitted by the Defendant which was mitigating in nature, such as Defendant was employed, was the father of three children, and that he attended church. There was also some evidence that Defendant was dependable when it came to his employment and he was a hard-worker.

The sentencing phase of the case began on May 8, 2006. Prior to proceeding in the presence of the jury, Defendant's counsel advised the court that Defendant did not intend to present any additional mitigation evidence, other than that which was presented during the trial phase. The court then conducted a detailed inquiry of the Defendant, pursuant to *State of Ohio v. Ashworth*, 85 Ohio St. 3d 56 (1999). Defendant specifically stated, on the record, outside of the presence of the jury, after being advised of his rights pursuant to *Ashworth*, that he was well aware of his right to present mitigation evidence, that he knew the purpose of mitigation evidence, that he had given the matter considerable thought, that he had discussed the matter with his counsel and any other person that he considered to be important to his decision, that it was his choice not to present any additional mitigation evidence and, further, that he understood that by failing to present any additional mitigation evidence that the jury, more than likely, may impose the death penalty. The court then found Defendant competent to waive any additional mitigation evidence. The court also advised Defendant of his right to make either a sworn or unsworn statement, and the Defendant acknowledged to the court that he understood his right

and he was waiving his right to make a statement in the presence of the jury.

The court then proceeded to instruct the jury on the law and procedures to be followed in the sentencing phase of the case. Counsel for the State and the Defendant both waived opening statements. The State proffered all the evidence it had produced in the trial phase, as did the Defendant. The State relied upon the jury's three verdicts of Aggravated Murder along with the second and third specifications, or aggravating circumstances, attached to each count of Aggravated Murder. The Defendant did not present any additional evidence in mitigation.

At the conclusion of the evidence, counsel argued their positions to the jury and the court instructed the jury on the law. Part of those instructions set forth the aggravating circumstances that the jury should weigh and some of the mitigating factors they could consider. The jury was informed that each count was to be considered separately.

The jury deliberated on May 8 and May 9, 2006. On May 9, 2006, the jury announced its verdicts and found beyond a reasonable doubt that the aggravating circumstances which the Defendant was found guilty of committing in the aggravated murders as set forth in Counts 2, 4 and 5 outweighed the mitigating factors in this case and they, therefore, recommended the Defendant be sentenced to death as to Counts 2, 4 and 5.

The Defendant was given a further opportunity to allocute on May 30, 2006, at which time Defendant made a length statement, which the court has considered.

The court must now conduct its own independent review of the evidence and determination of whether the aggravating circumstances outweigh the mitigating evidence beyond a reasonable doubt, pursuant to O.R.C. §2929.03. The court is required to weigh the two aggravating circumstances for which the Defendant was found guilty against any mitigating factors the court may find in its independent search of the entire record.

The court notes that the nature and circumstances of the offense are only to be considered as a mitigating factor, and never as an aggravating circumstance. In fact, the court is confined to considering the aggravating circumstances attached to each count, as detailed above. As a result of Defendant's waiver of the presentation of any additional mitigation evidence, this court is required to search the record for evidence in favor of mitigation. The court is cognizant of the fact that the absence of a mitigating factor does not add to existing aggravating circumstances.

The court also acknowledges its duty to assess the penalty for each individual count when a defendant is convicted of more than one count of aggravated murder with aggravating circumstances. The court further acknowledges that only the aggravating circumstances related to a given count may be considered in assessing the penalty for that count.

The court has reviewed the entire record for evidence of mitigation.

The court now shall consider the mitigating factors as they relate to Counts 2, 4, and 5. O.R.C. §2929.04(B) lists seven specific mitigating factors, all of which will be addressed by the court. The court must determine whether the State has proved beyond a reasonable doubt that the aggravating circumstances, for which Defendant was found guilty, outweigh the mitigating factors. If the State has met this burden of proof, the death penalty shall be imposed. The court must also consider, as set forth in O.R.C. §2929.04(B), the nature and circumstances of the offense and the history, character and background of the offender.

When considering the nature and circumstances of the offense, and the history, character and background of the Defendant, the court has search the entire record for evidence. There is very little evidence in the record regarding the history, character and background of the Defendant. Defendant was married and had three children, for whom he provided. The evidence, including a letter from Justin Short to his father, reveals that Defendant's children love

him, despite the events of July 22, 2004. Defendant was employed at the time of the offense. The court has also reviewed the psychological evaluations made part of the record herein. Specifically, the court has reviewed and considered the Competency to Stand Trial Report prepared by Dr. Scott Kidd, and dated January 6, 2005, and the Competency Evaluation Report prepared by Dr. Kim Stookey, and dated February 21, 2005. The defendant reported that he had a good relationship with his family, he frequently attended church and that he is a high school graduate. He reported having some social adjustment issues and that his mother was very strict while he was growing up. Short did not report any incidents of abuse during his childhood. He reported a head injury resulting from a motorcycle accident in 1997. As a result of injuries sustained in that accident, Short reported that he developed a dependency to prescription drugs. He also reported a history of drug and alcohol abuse. The statements contained in the psychological evaluations were somewhat conflicting, as the information reveals that Defendant last abused prescription drugs in 1999 and in 2002. The court gives little weight to these issues.

The court will now address the seven statutorily delineated mitigating factors.

1. Whether the victim of the offense induced or facilitated it. Defense counsel argued that the details of the crime evidenced a man who was upset or despondent over the loss of his wife and his perception that she had left him for another man. The court finds that there is no evidence that the victims of the offense, Donnie R. Sweeney or Rhonda M. Short, facilitated the offense. While Defendant argued that his wife leaving him and another man, Donnie Sweeney, being at her home, facilitated the offense and induced him to commit the aggravated murders, there is nothing about the conduct of the victims that induced or facilitated Defendant's actions. Donnie Sweeney was in the backyard of the home at 5035 Pepper Drive

when he was set upon and shot at close range by Defendant. Rhonda Short was in the bathroom, apparently just having showered, when Defendant kicked in the door and shot her at close range. There is no evidence to indicate that either victim committed any act toward Defendant. While the defendant clearly was upset that his wife had left him, the fact that his wife was at a home that she had rented while another man was in the backyard grilling dinner, is not sufficient to give any weight to the mitigating factor that the victims of the offense induced or facilitated the offense.

2. Whether it is unlikely the offense would have been committed, but for the fact that the Defendant was under duress, coercion, or strong provocation. The only evidence of duress, coercion, or strong provocation is that he was upset that his wife had left him, and that he believed she had left him for another man. Defendant's emotions relating to the loss of his wife or family does not equate to duress, coercion or strong provocation. As stated above, Donnie Sweeney was grilling in the backyard when he was shot at close range by the Defendant, who was on the property without the permission of anyone who was entitled to grant him permission. Defendant then proceeded, without privilege to do so, into the residence at 5035 Pepper Drive and kicked in the bathroom door and shot his wife. There is no evidence of duress, coercion or strong provocation sufficient to mitigate the consequences of Defendant's behavior. The court gives little weight to this factor.

3. Whether, at the time of committing the offense, the offender, because of mental disease or defect, lacked substantial capacity to appreciate the criminality of the

offender's conduct or to conform the offender's conduct to the requirements of the law. There was no testimony relating to this factor, except possibly for evidence that the Defendant was upset that his wife had left him, presumably for another man. Justin Short testified that, in the week preceding the deaths of Donnie Sweeney and Rhonda Short, his father was sad, angry and upset. Bob Thomas, Short's co-worker, testified that in the days prior to July 22, 2004, Short was "down" and "wanted to die." However, following the shootings at 5035 Pepper Drive, Short was supervised while in a holding cell and then transported to the jail by Officer Brad Reaman of the Huber Heights Police Department. Reaman described Short as being calm and in command of his faculties. Short reported in the court-ordered psychological evaluations that he has been treated for some time for depression and anxiety and for sleep difficulties. He also reported having been diagnosed with Bipolar Disorder in 2002, said diagnosis having been unconfirmed in the medical records provided to the evaluating psychologist. Short reported that he went to the hospital and was treated for several hours after his wife left him, as he was despondent. The psychological evaluations made part of the record also reveal that Short's treating physicians made repeated recommendations that he seek treatment and psychological counseling, but he failed to do so. Based upon the evaluations, Short was diagnosed with a thought disorder. However, the planning and calculation that preceded the offenses belie mental disease or defect, or lack of substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The court notes that Defendant offered no other

testimony, including no expert testimony, that he suffered from a mental disease or defect, that he lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The court gives little weight to this factor.

4. The youth of the offender. The record reveals that the Defendant was 36 years old at the time of the offense. Therefore, this mitigating factor is inapplicable.
5. The offender's lack of a significant history of prior criminal convictions and delinquency adjudications. There is some conflicting evidence in the psychological evaluations, the information for which was provided by Defendant himself, that Short was charged with domestic violence in the past, relating either to his first wife or his first wife's father. That information was conflicting and confusing. There is no other evidence in the record that Defendant has any criminal history, whether as a juvenile or as an adult. However, given the multiple deaths associated with Defendant's conduct and the multiple other felonies for which the jury found the Defendant guilty, and the fact that the Defendant was the only offender, the court gives little weight to this factor.
6. If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim. Defendant, Duane Allen Short was the only offender in the offenses at issue. Therefore, the court gives no weight to this factor.
7. Any other factors that are relevant to the issue of whether the offender should be sentenced to death. The testimony offered at trial raised several factors which

could be deemed and are so offered and considered in mitigation of the offense.

- A. The impact on Justin, Tiffany and Jesse Short. The impact on Short's children has been considered. The evidence before the court is that the Defendant loved his children and that sentiment was reciprocated. It would be pure speculation for the court to consider the impact on the Short children; however, one would assume that the impact of their present circumstance is overwhelming. The court gives little weight to this factor, however, in light of the fact that Defendant's conduct resulted in the circumstances that his children now face.
- B. Support from Defendant's family and friends. There was some evidence in the record that Defendant's family members continue to love and support him, and who have visited him in the jail during his incarceration. The court assigns little weight to this factor.
- C. Assistance and cooperation with police. Short's assistance and cooperation with the police is found to be a mitigating factor. He cooperated after submitting to arrest without resistance. He did acknowledge his involvement in the offenses. However, the court assigns little weight to this mitigating factor.
- D. Employment. The evidence was undisputed that Defendant had been employed and was supporting his family. The court finds that this factor is of little weight.
- E. Remorse. Defendant made an expression of remorse in his statement to the court. However, the court gives little weight to his expression of

remorse, as it was tempered by his lengthy statement placing blame on other for his conduct, including the family of Donnie Sweeney. The court assigns very little weight, if any, to this factor.

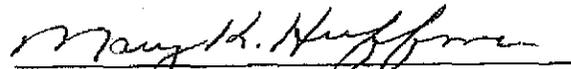
The jury in Counts 2, 4 and 5 found the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt. The court, having conducted the same process, and having weighed the aggravating circumstances and the mitigating factors or evidence, agrees with the jury's verdict. The aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt and the State, therefore, has sustained its burden as to Counts 2, 4 and 5. The court finds the mitigating factors pale in significance when considering the aggravating circumstances. The court, thus, agrees with the verdict of the jury as to Counts 2, 4 and 5.

After searching and reviewing the record, this court has found beyond a reasonable doubt that the following aggravating circumstances: (1) the aggravated murders of Donnie R. Sweeney and Rhonda M. Short were part of a course of conduct involving the purposeful killing of two or more persons; and (2) Defendant committed the aggravated murders of Donnie R. Sweeney and Rhonda M. Short while committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated burglary, and Defendant was the principal offender in the aggravated murders, outweigh the mitigating factors and evidence.

The Defendant, Duane Allen Short, having been convicted of the Aggravated Murders of Donnie R. Sweeney and Rhonda M. Short, and the jury having determined the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, as to Counts 2, 4 and 5 of the indictment, and the court having independently reviewed and weighed the evidence in the record, finds the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, and the sentence of death shall be imposed upon the Defendant.

Consistent with the court's pronouncement of sentence on May 30, 2006, the prosecutor's office is directed to prepare a Termination Entry reflecting the court's sentence for the court's review and filing.

IT IS SO ORDERED.


JUDGE MARY KATHERINE HUFFMAN

Copies of the above were sent to all parties listed below by ordinary mail this date of filing.

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MONTGOMERY COUNTY, OHIO

**IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CRIMINAL DIVISION**

STATE OF OHIO

CASE NO. 2004 CR 02635

Plaintiff

JUDGE MARY KATHERINE HUFFMAN

vs.

**DUANE ALLEN SHORT
DOB: 12/16/1967 SSN: 272-78-8966**

TERMINATION ENTRY

Defendant

The defendant herein having been convicted of the offenses and specifications of:

- COUNT 1: BREAKING AND ENTERING (land/premises) 2911.13(B) F5
Three (3) Year Firearm Specification 2929.14/2941.145**
- COUNT 2: AGGRAVATED MURDER (prior calculation/design) 2903.01(A)
Unclassified Felony
Three (3) Year Firearm Specification 2929.14/2941.145
Aggravating Circumstance Specification 2929.04(A)(5)/2941.14
Aggravating Circumstance Specification 2929.04(A)(7)/2941.14**
- COUNT 3: AGGRAVATED BURGLARY (deadly weapon) 2911.11(A)(2) F1
Three (3) Year Firearm Specification 2929.14/2941.145**
- COUNT 4: AGGRAVATED MURDER (prior calculation/design) 2903.01(A)
Unclassified Felony
Three (3) Year Firearm Specification 2929.14/2941.145
Aggravating Circumstance Specification 2929.04(A)(5)/2941.14
Aggravating Circumstance Specification 2929.04(A)(7)/2941.14**
- COUNT 5: AGGRAVATED MURDER (while committing Aggravated Burglary)
2903.01(B) Unclassified Felony
Three (3) Year Firearm Specification 2929.14/2941.145
Aggravating Circumstance Specification 2929.04(A)(5)/2941.14
Aggravating Circumstance Specification 2929.04(A)(7)/2941.14**

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COUNT 6: UNLAWFUL POSSESSION OF DANGEROUS ORDNANCE 2923.17(A)
F5
Three (3) Year Firearm Specification 2929.14/2941.145

was on **May 30, 2006**, brought before the Court;

WHEREFORE, it is the **JUDGMENT** and **SENTENCE** of the Court that the defendant herein be delivered to the **CORRECTIONS RECEPTION CENTER** there to be imprisoned, confined and sentenced as follows:

COUNT 1: TWELVE (12) MONTHS;

COUNT 2: DEATH;

COUNT 3: TEN (10) YEARS;

COUNT 4: DEATH;

COUNT 5: DEATH;

COUNT 6: TWELVE (12) MONTHS;

The sentences on **COUNTS 1, 3 and 6** are to be served **CONSECUTIVELY** to each other. **COUNT 4** is hereby merged into **COUNT 5**;

The Court hereby merges the **Firearm Specification** in **Counts 1, 2, 3, 4, 5 and 6** into **ONE (1) Firearm Specification** and imposes an additional term of **THREE (3) years ACTUAL INCARCERATION** on the **Firearm Specification**, which shall be served **CONSECUTIVELY** to and prior to the definite term of imprisonment; **FOR A TOTAL SENTENCE OF DEATH ON COUNT 2, DEATH ON COUNT 5, PLUS FIFTEEN (15) YEARS.**

Further, it is the **JUDGMENT** and **SENTENCE** of the Court that on **Counts 2 and 5** of **AGGRAVATED MURDER**, the defendant is sentenced to the **Corrections Reception Center** to be delivered to the **Warden of the Southern Ohio Correctional Facility, Lucasville, Ohio**, where the defendant shall be kept until the day designated for his execution and where he shall be executed pursuant to **O.R.C. 2949.22** by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death. The application of the drug or combination of drugs shall be continued until the person is dead. The warden of the correctional institution in

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which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed, said punishment to be inflicted within the walls of the Southern Ohio Correctional Facility on the 12th day of October, 2006; and

The defendant is to submit to a DNA specimen collection procedure pursuant to Section 2901.07 of the Ohio Revised Code.

Court costs to be paid in full in the amount determined by the Montgomery County Clerk of Courts.

The defendant is to receive credit for _____ days spent in confinement; Further the defendant shall receive _____ days credit from the Sheriff from the day of sentencing _____ to the day of transport _____.

The Court finds the defendant **IS NOT** eligible for placement in a program of shock incarceration under Section 5120.031 of the Revised Code and **IS NOT** eligible for placement in an intensive program prison under Section 5120.032 of the Revised Code.

The Court notifies the defendant that, as a part of this sentence, as to Counts 1, 3 and 6 only, the defendant will be supervised by the Parole Board for a period of FIVE years Post-Release Control after the defendant's release from imprisonment.

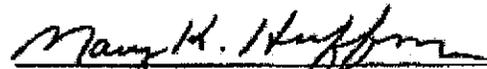
Should the defendant violate any post-release control sanction or any law, the adult parole board may impose a more restrictive sanction. The parole board may increase the length of the post-release control. The parole board could impose an additional nine (9) months prison term for each violation for a total of up to fifty percent (50%) of the original sentence imposed by the court. If the violation of the sanction is a felony, in addition to being prosecuted and sentenced for the new felony, the defendant may receive from the court a prison term for the violation of the post-release control itself.

Pursuant to R.C. 2929.19(B)(3)(f), the defendant is ordered not to ingest or be injected with a drug of abuse. The defendant is ordered to submit to random drug testing as provided in section 341.26, 753.33, or 5120.63 of the Revised Code. The results of the drug test administered shall indicate that the defendant did not ingest and was not injected with a drug of abuse.

The Court did fully explain to the defendant his appellate rights and the defendant informed the Court that said rights were understood.

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The defendant is sentenced under Sections 2911.13(B), 2911.11(A)(2), 2903.01(A), 2903.01(B), 2923.17(A), 2929.14/2941.145, 2929.04(A)(5)/2941.14 and 2929.04(A)(7)/2941.14 of the Ohio Revised Code. **BOND IS RELEASED.**


JUDGE MARY KATHERINE HUFFMAN

MATHIAS H. HECK, JR.
Prosecuting Attorney
Montgomery County, Ohio

By: 
LEON J. DAIDONE, #0017354

By: 
ROBERT C. DESCHLER, #0059445

Assistant Prosecuting Attorney: **LEON J. DAIDONE, #0017354, ROBERT C. DESCHLER, #0059445**

Defense Counsel: **L PATRICK MULLIGAN, 28 N WILKINSON ST, PO BOX 10838, DAYTON, OH 45402,**

And

GEORGE A. KATCHMER, JR., 17 S. ST CLAIR ST., STE 320, DAYTON, OH 45401

Adult Probation Department
Montgomery County Sheriff's Office, Attn: Jail Records
Montgomery County Clerk of Courts - Bookkeeping Dept.
Caseflow Services

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U.S. Const. amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Const. art. I, § 1

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life

and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety

Ohio Const. art. I, § 2

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

Ohio Const. art. I, § 5

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

Ohio Const. art. I, § 9

All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

The general assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(B) of the Constitution of the state of Ohio.

Ohio Const. art. I, § 10

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a

capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

Ohio Const. art. I, § 16

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Ohio Const. art. I, § 20

This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people

Ohio Rev. Code § 2903.01 Aggravated Murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to

commit, kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

(1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.

(2) It is the offender's specific purpose to kill a law enforcement officer.

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(G) As used in this section:

(1) "Detention" has the same meaning as in section 2921.01 of the Revised Code.

(2) "Law enforcement officer" has the same meaning as in section 2911.01 of the Revised Code.

(2002 S 184, eff. 5-15-02; 1998 S 193, eff. 12-29-98; 1998 H 5, eff. 6-30-98; 1997 S 32, eff. 8-6-97; 1996 S 239, eff. 9-6-96; 1981 S 1, eff. 10-19-81; 1972 H 511)

Ohio Rev. Code § 2911.11 Aggravated burglary

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

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

(C) As used in this section:

(1) "Occupied structure" has the same meaning as in section 2909.01 of the Revised Code.

(2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1983 S 210, eff. 7-1-83; 1982 H 269, § 4, S 199; 1972 H 511)

Ohio Rev. Code § 2911.13 Breaking and entering

(A) No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony.

(B) No person shall trespass on the land or premises of another, with purpose to commit a felony.

(C) Whoever violates this section is guilty of breaking and entering, a felony of the fifth degree.

(1995 S 2, eff. 7-1-96; 1972 H 511, eff. 1-1-74)

Ohio Rev. Code § 2923.17 Unlawful possession of dangerous ordnance; illegally manufacturing or processing explosives

(A) No person shall knowingly acquire, have, carry, or use any dangerous ordnance.

(B) No person shall manufacture or process an explosive at any location in this state unless the person first has been issued a license, certificate of registration, or permit to do so from a fire official of a political subdivision of this state or from the office of the fire marshal.

(C) Division (A) of this section does not apply to:

(1) Officers, agents, or employees of this or any other state or the United States, members of the armed forces of the United States or the organized militia of this or any other state, and law enforcement officers, to the extent that any such person is authorized to acquire, have, carry, or use dangerous ordnance and is acting within the scope of the person's duties;

(2) Importers, manufacturers, dealers, and users of explosives, having a license or user permit issued and in effect pursuant to the "Organized Crime Control Act of 1970," 84 Stat. 952, 18 U.S.C. 843, and any amendments or additions thereto or reenactments thereof, with respect to explosives and explosive devices lawfully acquired, possessed, carried, or used under the laws of this state and applicable federal law;

(3) Importers, manufacturers, and dealers having a license to deal in destructive devices or their ammunition, issued and in effect pursuant to the "Gun Control Act of 1968," 82 Stat. 1213, 18 U.S.C. 923, and any amendments or additions thereto or reenactments thereof, with respect to dangerous ordnance lawfully acquired, possessed, carried, or used under the laws of this state and applicable federal law;

(4) Persons to whom surplus ordnance has been sold, loaned, or given by the secretary of the army pursuant to 70A Stat. 262 and 263, 10 U.S.C. 4684, 4685, and 4686, and any amendments or additions thereto or reenactments thereof, with respect to dangerous ordnance when lawfully possessed and used for the purposes specified in such section;

- (5) Owners of dangerous ordnance registered in the national firearms registration and transfer record pursuant to the act of October 22, 1968, 82 Stat. 1229, 26 U.S.C. 5841, and any amendments or additions thereto or reenactments thereof, and regulations issued thereunder.
- (6) Carriers, warehousemen, and others engaged in the business of transporting or storing goods for hire, with respect to dangerous ordnance lawfully transported or stored in the usual course of their business and in compliance with the laws of this state and applicable federal law;
- (7) The holders of a license or temporary permit issued and in effect pursuant to section 2923.18 of the Revised Code, with respect to dangerous ordnance lawfully acquired, possessed, carried, or used for the purposes and in the manner specified in such license or permit.
- (D) Whoever violates division (A) of this section is guilty of unlawful possession of dangerous ordnance, a felony of the fifth degree.
- (E) Whoever violates division (B) of this section is guilty of illegally manufacturing or processing explosives, a felony of the second degree. (1995 S 2, eff. 7-1-96; 1978 H 728, eff. 8-22-78; 1972 H 511)

Ohio Rev. Code § 2929.02 Penalties for murder

- (A) Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022, 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.
- (B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life, except that, if the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information that charged the murder, the court shall impose upon the offender a term of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.
- (C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to the

offender or to the dependents of the offender, or will prevent the offender from making reparation for the victim's wrongful death.
(1998 S 107, eff. 7-29-98; 1996 H 180, eff. 1-1-97; 1981 S 1, eff. 10-19-81; 1972 H 511)

Ohio Rev. Code § 2929.021 Specifications of aggravating circumstance; clerk to notify supreme court of certain facts

(A) If an indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the clerk of the court in which the indictment is filed, within fifteen days after the day on which it is filed, shall file a notice with the supreme court indicating that the indictment was filed. The notice shall be in the form prescribed by the clerk of the supreme court and shall contain, for each charge of aggravated murder with a specification, at least the following information pertaining to the charge:

- (1) The name of the person charged in the indictment or count in the indictment with aggravated murder with a specification;
- (2) The docket number or numbers of the case or cases arising out of the charge, if available;
- (3) The court in which the case or cases will be heard;
- (4) The date on which the indictment was filed.

(B) If an indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the defendant pleads guilty or no contest to any offense in the case or if the indictment or any count in the indictment is dismissed, the clerk of the court in which the plea is entered or the indictment or count is dismissed shall file a notice with the supreme court indicating what action was taken in the case. The notice shall be filed within fifteen days after the plea is entered or the indictment or count is dismissed, shall be in the form prescribed by the clerk of the supreme court, and shall contain at least the following information:

- (1) The name of the person who entered the guilty or no contest plea or who is named in the indictment or count that is dismissed;
- (2) The docket numbers of the cases in which the guilty or no contest plea is entered or in which the indictment or count is dismissed;
- (3) The sentence imposed on the offender in each case.

(1981 S 1, eff. 10-19-81)

Ohio Rev. Code § 2929.03 Imposing sentence for a capital offense; procedures; proof of relevant factors; alternative sentences

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:

(1) Except as provided in division (A)(2) of this section, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 of the Revised Code, the trial court shall impose sentence on the offender as follows:

(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information

that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(2)(a) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be one of the following:

(i) Except as provided in division (C)(2)(a)(ii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(ii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(b) A penalty imposed pursuant to division (C)(2)(a)(i) or (ii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:

(i) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(ii) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report

prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation. The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following:

- (a) Except as provided in division (D)(2)(b) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;
 - (b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.
- If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment

with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is a sentence of life imprisonment without parole imposed under division (D)(2)(b) of this section, the sentence shall be served pursuant to section 2971.03 of the Revised Code. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Except as provided in division (D)(3)(b) of this section, one of the following:

- (i) Life imprisonment without parole;
- (ii) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;
- (iii) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Except as provided in division (E)(2) of this section, one of the following:

- (a) Life imprisonment without parole;
- (b) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G)(1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

(1996 H 180, EFF. 1-1-97; 1996 S 269, EFF. 7-1-96; 1995 S 2, EFF. 7-1-96; 1995 S 4, EFF. 9-21-95; 1981 S 1, EFF. 10-19-81; 1972 H 511)

Ohio Rev. Code § 2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section 2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

(a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.

(b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.

(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

- (1) Whether the victim of the offense induced or facilitated it;
- (2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
- (3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;
- (4) The youth of the offender;
- (5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;
- (6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death. The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

(2002 S 184, EFF. 5-15-02; 1998 S 193, EFF. 12-29-98; 1997 H 151, EFF. 9-16-97; 1997 S 32, EFF. 8-6-97; 1981 S 1, EFF. 10-19-81; 1972 H 511)

Ohio Rev. Code § 2929.05 Appeals; procedures

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall review upon appeal the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They also shall review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating

factors present in the case and that the sentence of death is the appropriate sentence in the case.

A court of appeals that reviews a case in which the sentence of death is imposed for an offense committed before January 1, 1995, shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

(B) The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed and, except as otherwise provided in this section, shall conduct the review in accordance with the Rules of Appellate Procedure.

(C) At any time after a sentence of death is imposed pursuant to section 2929.022 or 2929.03 of the Revised Code, the court of common pleas that sentenced the offender shall vacate the sentence if the offender did not present evidence at trial that the offender was not eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced and if the offender shows by a preponderance of the evidence that the offender was less than eighteen years of age at the time of the commission of the aggravated murder for which the offender was sentenced. The court is not required to hold a hearing on a motion filed pursuant to this division unless the court finds, based on the motion and any supporting information submitted by the defendant, any information submitted by the prosecuting attorney, and the record in the case, including any previous hearings and orders, probable cause to believe that the defendant was not eighteen years of age or older at the time of the commission of the aggravated murder for which the defendant was sentenced to death.

(1998 S 107, EFF. 7-29-98; 1995 S 4, EFF. 9-21-95; 1981 S 1, EFF. 10-19-81)