

IN THE SUPREME COURT OF OHIO
2007

STATE OF OHIO,

Case No. 07-394

Plaintiff-Appellee,

-vs-

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

MARQUIS HAIRSTON,

Court of Appeals
Case No. 06AP-420

Defendant-Appellant

MERIT BRIEF OF PLAINTIFF-APPELLEE STATE OF OHIO

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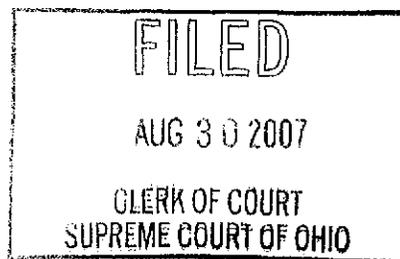


TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	1
ARGUMENT	13
Proposition of Law: Multiple proportionate punishments for multiple crimes do not constitute cruel and unusual punishment.	13
A. An Improvident Case	14
B. Standard of Proof	15
C. Cruel and Unusual Punishment	17
D. Cruel and Unusual Punishment Standard is Offense-Specific	19
E. Challenge to 134-Year Aggregate Sentence Fails	23
F. Life Expectancy Not Controlling	28
G. Press Coverage	30
H. Surveying Punishments in Other Cases	31
I. Allied-Offenses Issue Not Before this Court	35
J. Offense-Specific Challenges Also Fail	38
CONCLUSION	40
CERTIFICATE OF SERVICE	41
APPENDIX	
R.C. 2929.02	A-1
R.C. 2929.03	A-2
R.C. 2929.04	A-8
R.C. 2929.11	A-11

TABLE OF AUTHORITIES

CASES

<i>Belden v. Union Cent. Life Ins. Co.</i> (1944), 143 Ohio St. 329.....	16
<i>Commonwealth v. Dunn</i> (1997), 43 Mass. App. Ct. 58, 680 N.E.2d 1178.....	38
<i>Ewing v. California</i> (2003), 538 U.S. 11.....	19, 35
<i>Getsy v. Mitchell</i> (C.A. 6, 2007), ___ F.3d ___.....	32
<i>Harmelin v. Michigan</i> (1991), 501 U.S. 957.....	passim
<i>Henderson v. James</i> (1895), 52 Ohio St. 242.....	22
<i>Hilton v. Toledo</i> (1980), 62 Ohio St.2d 394.....	17
<i>Lockyer v. Andrade</i> (2003), 538 U.S. 63.....	18, 28, 34
<i>McCleskey v. Kemp</i> (1987), 481 U.S. 279.....	31, 32
<i>McDougle v. Maxwell</i> (1964), 1 Ohio St.2d 68.....	18
<i>Miller Chevrolet v. Willoughby Hills</i> (1974), 38 Ohio St.2d 298.....	40
<i>Patterson v. State</i> (Ala.Crim.App. 1993), 628 So.2d 1045.....	29
<i>Pearson v. Ramos</i> (C.A. 7, 2001), 237 F.3d 881.....	21
<i>Pulley v. Harris</i> (1984), 465 U.S. 37.....	32
<i>Rummel v. Estelle</i> (1980), 445 U.S. 263.....	24, 26, 35
<i>Solem v. Helm</i> (1983), 463 U.S. 277.....	18, 19, 23, 24
<i>State ex rel. Dickman, v. Defenbacher</i> (1955), 164 Ohio St. 142.....	16
<i>State ex rel. Ohio Congress of Parents and Teachers v. State Bd. of Educ.</i> , 111 Ohio St.3d 568, 2006-Ohio-5512.....	16
<i>State ex rel. Stratton v. Maxwell</i> (1963), 175 Ohio St. 65.....	22

<i>State ex rel. Swetland, v. Kinney</i> (1982), 69 Ohio St.2d 567	16
<i>State v. 1981 Dodge Ram Van</i> (1988), 36 Ohio St.3d 168.....	40
<i>State v. August</i> (Ia. 1999), 589 N.W.2d 740.....	21
<i>State v. Austin</i> (1976), 8 th Dist. No. 34793	39
<i>State v. Beal</i> (2001), 10 th Dist. No. 01AP-170.....	23
<i>State v. Berger</i> (Az. 2006), 134 P.3d 378	20, 28
<i>State v. Buchhold</i> (S.D. 2007), 727 N.W.2d 816	20
<i>State v. Chaffin</i> (1972), 30 Ohio St.2d 13.....	18
<i>State v. Foster</i> , 109 Ohio St.3d 1, 2006-Ohio-856.....	15
<i>State v. Gill</i> (1992), 63 Ohio St.3d 53.....	16
<i>State v. Gore</i> (1999), 131 Ohio App.3d 197	36
<i>State v. Hairston</i> , 4 th Dist. No. 06CA3081, 2007-Ohio-3880.....	14
<i>State v. Jones</i> (1985), 18 Ohio St.3d 116.....	37
<i>State v. Jones</i> (2001), 344 S.C. 48, 543 S.E.2d 541.....	30
<i>State v. Logan</i> (1979), 60 Ohio St.2d 126.....	36
<i>State v. Madaris</i> , 156 Ohio App.3d 211, 2004-Ohio-653	37
<i>State v. Monroe</i> , 105 Ohio St.3d 384, 2005-Ohio-2282	36
<i>State v. Morris</i> (1978), 55 Ohio St.2d 101	17
<i>State v. Moss</i> (1982), 69 Ohio St.2d 515.....	35
<i>State v. Renalist Inc.</i> (1978), 56 Ohio St.2d 276.....	17
<i>State v. Reynolds</i> (1998), 80 Ohio St.3d 670	36
<i>State v. Roe</i> (1989), 41 Ohio St.3d 18.....	39

<i>State v. Saxon</i> , 109 Ohio St.3d 176, 2006-Ohio-1245	20, 21
<i>State v. Seiber</i> (1990), 56 Ohio St.3d 4.....	36
<i>State v. Smith</i> (1991), 61 Ohio St.3d 284.....	32
<i>State v. Weitbrecht</i> (1999), 86 Ohio St.3d 368	16, 18, 20, 31
<i>State v. White</i> (2002), 349 S.C. 33, 562 S.E.2d 305	30
<i>State v. Wilkinson</i> (1969), 17 Ohio St.2d 9	20
<i>State v. Woodall</i> (1989), 182 W.Va. 15, 385 S.E.2d 253.....	30
<i>Stewart v. Maxwell</i> (1963), 174 Ohio St. 180.....	22
<i>United States v. Aiello</i> (C.A. 2, 1988), 864 F.2d 257.....	13, 20
<i>United States v. Arrington</i> (C.A. 7, 1998), 159 F.3d 1069	29
<i>United States v. Beverly</i> (C.A. 6, 2004), 369 F.3d 516.....	28
<i>United States v. Gourley</i> (C.A. 10, 1987), 835 F.2d 249.....	27, 29
<i>United States v. O'Driscoll</i> (C.A. 10, 1985), 761 F.2d 589.....	28
<i>United States v. Schell</i> (C.A. 10, 1982), 692 F.2d 672	22
<i>United States v. Yousef</i> (C.A. 2, 2003), 327 F.3d 56	28
<i>Yajnik v. Akron Dept. of Health</i> , 101 Ohio St.3d 106, 2004-Ohio-357.....	17

STATUTES

R.C. 2929.02(B)	33
R.C. 2929.03(A)(1)	33
R.C. 2929.03(C)(2)(a)(i)	33, 34
R.C. 2929.04(A)(5)	34
R.C. 2929.11(A).....	26, 27

CONSTITUTIONAL PROVISIONS

Eighth Amendment passim

STATEMENT OF FACTS

Having been imprisoned twice for robbery and burglary respectively, defendant Marquis Hairston had been out of prison for just seven days when he began a home-invasion crime spree that included home invasions occurring in the German Village area of Franklin County on September 27, 2005, October 10, 2005, and October 25, 2005.

A. The September 27, 2005 Home Invasion

Cynthia Green testified that she was living at 862 South Fifth Street in September 2005. (T. 93-94) On September 27, 2005, Green was anticipating her daughter's upcoming wedding the next weekend. (T. 97, 98) As a result, Green had a considerable amount of cash and wedding jewelry in her home. (T. 97, 98)

Green was about to take a shower around 7:00 a.m. when she saw three men outside her bedroom in the upstairs hallway. (T. 94) One of them had a gun. (T. 94, 95) They ordered her to take off her sleepwear, they took her into her bedroom, and they had her kneel in the bedroom naked while they ransacked her home. (T. 94, 98) The intruders told her that, if she did what they asked, she would not be hurt. (T. 97)

The intruders repeatedly asked where valuables were located, and Green told them. (T. 95) They used Green's luggage to load up stolen items. (T. 95)

Several times the small black gun was held to Green's head, and Green was taunted with comments "safety on, safety off." (T. 95, 103) When the intruders were demanding to know about the existence of a safe, the gunman held the gun to her head and said, "now think about it." (T. 98) The gunman remained in her bedroom and instructed the others to make sure they got everything. (T. 99) At one point they led her

around, making her open drawers to be sure they had everything. (T. 99)

They tied Green to a chair and put a pair of socks in her mouth. (T. 95) But they came back several times to ask more questions because they did not want any alarm to go off on Green's car, a 2005 Mercedes 230, which they were stealing. (T. 95, 96) The intruders left her there tied up, and they took off with her car and valuables, including the wedding jewelry and the cash. (T. 95, 97) The valuables also included Green's jewelry, stereo system, laptop computer, digital camera, and luggage. (T. 104-105)

Green described the three intruders as black males in their early 20's. (T. 96) The gunman was clean shaven, wearing a black t-shirt, jeans, shoes, and gloves. (T. 102, 103) The second intruder was also clean shaven but had baggier-style clothes. (T. 102) The two clean-shaven intruders looked very much alike. (T. 120) The third intruder had a real distinctive beard all around his face and was wearing a sweatshirt. (T. 102, 103)

Green described the emotional and physical trauma she endured. Green was "mildly hysterical." (T. 97) She thought they were going to kill her. (T. 105) Green testified, "you do think a lot when someone's got a gun to your head." (T. 98)

Green has a bleeding disorder and suffered extensive bruising: "I was trussed literally to a chair," and her hands were tied in front of her, and her chest and legs were tied to the chair. (T. 97, 100) "[E]very place that my body made contact with the chair was bruised." (T. 97) Green had been "[v]ery shaken" by the incident. (T. 276-77)

The home invasion lasted approximately 45 minutes. (T. 99)

When the intruders fled, Green was able to scoot the chair over to a nightstand, where Green used scissors to cut herself free. (T. 100-101) Because the intruders had

taken all of the land-line and cell phones, Green found it necessary to retrieve an old land-line phone from a closet and call the police. (T. 101)

Green identified defendant as one of the clean-shaven robbers. (T. 119-20, 129)

B. The October 10, 2005 Home Invasion

Gary Michael Reames testified that he and his fiancée Melanie Pinkerton were living at 312 Siebert Street on October 10, 2005. (T. 137) Reames was awakened around 6:00 a.m. by the sound of barking by his dogs, and he got up to let them out. (T. 137) Walking down the hallway, Reames was confronted by two men, one of whom was armed with a knife, and the other was armed with a gun. (T. 138)

Reames identified defendant as the gunman. (T. 165, 186) Defendant pointed the gun at Reames, started screaming obscenities, and told Reames to get his wife out of the bedroom. (T. 138) Reames said there was no need for that and that the intruders could have everything, but defendant insisted on getting her out of the bedroom. (T. 138) Pinkerton came out of the bedroom on her own. (T. 139)

Defendant forced them to get down on their knees in the hallway. (T. 139) He pointed the gun at them the whole time and demanded to know the location of the cash. (T. 139) When Reames said there was money (\$600) on the dining room table, defendant said that he already had that. (T. 139) The intruders had already searched the basement and first floor. (T. 139)

Defendant stayed with Reames and Pinkerton while the other intruder searched the upstairs. (T. 140) Defendant was the “ringleader” and was “running the show” and making all of the comments. (T. 138, 142, 149) He issued repeated instructions to the

other intruder on how to search the residence. (T. 144) Defendant was about 5'6" and was shorter than the other intruder. (T. 142)

The intruders obtained the victims' wallets and demanded their PIN numbers. (T. 140) Defendant "shout[ed] obscenities with the gun pointed right at our head to get the PIN numbers. Kept reinforcing that, is that the correct PIN number, don't lie to me, don't lie to me." (T. 140) Defendant also asked about whether there was a safe. (T. 145)

Reames described the gun as a small black gun like a .380 or 9 mm. (T. 146)

After the intruders apparently thought they had everything, they made Reames and Pinkerton strip down, tied them up, and then took off in Pinkerton's car (a BMW) with the jewelry and the cash. (T. 140) The intruders were concerned about making sure the alarm did not go off on the car. (T. 142) Defendant told Reames that he was making them strip down in order to give him more time to escape. (T. 145)

The tying-up involved defendant instructing the other intruder to retrieve two chairs from the dining room. (T. 144) The intruders tied Reames and Pinkerton to the chairs using Reames' neckties. (T. 144) Eventually, Reames and Pinkerton got free and called the police. (T. 144)

It was at least ten minutes from the time the intruders confronted Reames until the time they left. (T. 141, 167) Pinkerton worked herself free first and then untied Reames, who had been tied up "really, really good" to the point that his feet were turning blue from lack of circulation. (T. 149) An additional six or seven minutes elapsed after defendant left before Reames was free. (T. 149)

Reames testified that "it was a long ordeal." (T. 141) It was "really traumatic. I

haven't been able to sleep right since." (T. 141)

Melanie Pinkerton testified that she ran down the hallway and saw that the man was pointing a gun at them, a man she identified as defendant. (T. 192, 209, 223) She dropped to her knees because of defendant's gun-pointing presence. (T. 192) A second intruder was holding a knife. (T. 193) Both intruders were wearing gloves. (T. 209)

Defendant asked where everything was, and he cautioned them that things would move more smoothly if they cooperated. (T. 193) Defendant said that the safety was "on." (T. 194) Defendant asked about cash, jewelry, appliances, *etc.* (T. 193)

Reames and Pinkerton cooperated. (T. 194) Reames told them about cash on the dining room table, and defendant said they already had that. (T. 194) Defendant asked about jewelry, and Reames said there was jewelry in the kitchen, and defendant said they had that too. (T. 194) They also said that they had credit cards, and defendant demanded the PIN number. (T. 194) Pinkerton gave hers, and defendant said "you better not be F'ing lying, you better not be F'ing lying." (T. 194)

Defendant said that he was going to strip them naked and tie them to chairs. (T. 195) Defendant had a number of questions about Pinkerton's white BMW, including whether it was an "automatic," and whether there was an alarm system. (T. 195)

Defendant made Pinkerton strip down first, including requiring the removal of her bra and underwear. (T. 195) Defendant tied up both Pinkerton and Reames. (T. 196) He gave the gun over to the second intruder while tying them up. (T. 196) Defendant told the second intruder to get some pillows because, "if he tries to move or do anything, I'll bust a cap in his motherfucking head." (T. 198)

After tying them up, defendant retrieved the gun and told the second intruder to put a sock or something in Pinkerton's mouth. (T. 197) The intruder did so, which made it hard for Pinkerton to breathe and swallow. (T. 197) The intruder took it out, saying he would put it back in before they left. (T. 197) Pinkerton asked the intruders to leave keys from her workplace and leave her briefcase because it contained information for work. (T. 198) The intruders did so. (T. 198)

At some point, the second intruder brought up baby carrots and bottled water from the refrigerator and offered these items to Reames and Pinkerton. (T. 198) Pinkerton needed the water because the sock in her mouth made it almost impossible to swallow. (T. 198) The second intruder also left the carrots out for Reames and Pinkerton. (T. 199)

When the intruders were leaving, Pinkerton began loosening the ties on her hands with her teeth. (T. 199) After they drove off in her car, she finished freeing herself and started freeing Reames, which took longer because his ties were much tighter. (T. 199) Pinkerton saw that his feet were turning blue. (T. 199) Pinkerton found her cell phone and called 911. (T. 199-200) Several items had been taken, including both of their debit cards and her 2005 BMW. (T. 200-201)

C. The October 25, 2005 Home Invasion

John Maransky testified that he was living at 1046 Jaeger on October 25, 2005. (T. 247) He woke up around 6:30 a.m. and showered. (T. 248) As he went downstairs and then into his living room, two men jumped up from behind the sofa. (T. 248-49) One of the men had a gun and told Maransky to do as he was told and nothing would happen. (T. 249) Both intruders were wearing gloves. (T. 271) As a former Marine,

Maransky recognized the gun as a black semiautomatic handgun. (T. 252)

Maransky was ordered to lay down on the floor, and he did so. (T. 249) The gunman pulled up a chair and sat down, telling Maransky to “just stay there.” (T. 249)

Maransky could hear the second man moving and rummaging through the house. (T. 249) Occasionally, the second intruder would come downstairs and place items by the back door. (T. 249) These items included pieces of luggage that were being used as containers for other items. (T. 255) The gunman was “calling the shots” and was the ringleader. (T. 253) He was also definitely shorter than the second intruder. (T. 254)

The gunman asked whether Maransky owned the green 4Runner parked outside. (T. 249) Maransky said yes, and the gunman asked for the keys. (T. 249) The gunman asked how to turn off the alarm on the car and about how to get in the garage and in the back of the house. (T. 250) The gunman handed the gun to the second intruder and told him that, “if this motherfucker moves, shoot him.” (T. 250)

The gunman left, pulled the 4Runner around to the back, and re-entered through the back of the house. (T. 250) The intruders then loaded up Maransky’s things into the car. (T. 250)

The intruders then ordered Maransky to walk down to the basement backwards. (T. 250) The gunman ordered Maransky to take off all of his clothes, and Maransky complied. (T. 250) They had Maransky lay on the hard concrete floor. (T. 250-51, 264) They told him that he would be shot if he tried anything. (T. 252-53) “[T]hey tied my arms together, feet together, and then kind of tied the feet and arms together kind of behind me kind of like hog-tied style.” (T. 251) They then stuck a glove in Maransky’s

mouth, and the intruders then left. (T. 251)

Maransky was worried that he might not be able to escape. (T. 251) It took Maransky about fifteen minutes to work himself loose. (T. 251) Still partially restrained with his hands still tied behind his back, Maransky managed to get upstairs and get some scissors to free himself completely. (T. 251, 264-65) Maransky then called 911. (T. 251)

Three laptop computers were taken, as were Maransky's stereo, speakers, DVD player, VCR player, CD player, cameras, and a new flat-screen television. (T. 256) The 4Runner was recovered three or four days later. (T. 256)

Maransky went to local pawnshops looking for his stolen items. (T. 257) He found his four JBL speakers, his stereo, and other items at the E-Z Cash pawnshop. (T. 257-58) He and the police found two of his laptops, guitar, guitar case, camera, and other items. (T. 258) Maransky's watch was also found by police. (T. 269-70)

Another witness testified that Jovaugny Hairston pawned items on September 27, 2005, and that defendant pawned items on October 11, 2005, and October 25, 2005, all at the E-Z Cash pawnshop. (T. 327-33) Defendant was accompanied by Louis Hairston on the October 25th date with several items of electronics equipment, including a stereo receiver and speakers and CD, DVD, and VCR players. (T. 330) Defendant and Louis were using a yellow duffle bag to carry some of the items, (T. 334), and that same duffle bag had been taken from Maransky earlier that same day. (T. 267, 334) The pawnshop employee, who happened to be related to defendant and Louis Hairston, testified that defendant was about 5'6" to 5'8" and was definitely shorter than Louis. (T. 338, 339)

D. Indictment, Trial, and Plea

On November 14, 2005, the grand jury indicted defendant on numerous counts arising out of the three home invasions, including four counts of aggravated robbery with firearm specifications, four counts of kidnapping with firearm specifications, three counts of aggravated burglary with firearm specifications, and three counts of weapon under disability. (Trial Ct. Rec. 1) During pretrial proceedings, it was noted that defendant was facing charges in Scioto County for “aggravated robbery, aggravated burglary * * * substantially similar to what” he was facing here in Franklin County. (T. 13, 63)

The prosecution stated that it would have been agreeable to a sentence less than maximum, consecutive sentences if defendant had cooperated with the prosecution against his co-defendants. (T. 59) But defendant declined to provide any such cooperation. (T. 59-60) Defendant “was not interested in testifying against his brother or his cousin * * *.” (T. 61)

The trial began on March 29, 2006, (T. 67), and continued through March 30, 2006. (T. 241) Several witnesses testified, including the four victims. (T. 93, 136, 190, 247) A substantial part of defendant’s videotaped police interview was also played for the jury before court recessed for the evening of March 30th. (T. 374-79)

Before the concluding part of the videotape could be played on the morning of March 31, 2006, defendant pleaded guilty to most of the counts. (T. 382 *et seq.*) In particular, defendant pleaded guilty to the four counts of aggravated robbery (with firearm specifications), the three counts of aggravated burglary (with firearm specifications), the four counts of kidnapping (with firearm specifications), and the three counts of WUD.

(Trial Ct. Rec. 85-86) The remaining counts were nolle. (Id.) The prosecutor noted, and the defense stipulated, that “in the concluding portion of the tape he did admit to his involvement in all three of the home invasions.” (T. 388; see, also, T. 21)

E. Sentencing

The court sentenced defendant on April 5, 2006. (T. 390 et seq.) The prosecutor asked for maximum, consecutive sentences totaling 134 years. (T. 390) The prosecutor noted that defendant had been incarcerated twice before. (T. 390) Defendant “did roughly six years for an aggravated robbery of a pizza man, got out, was out for a number of months before going back in on burglary charges for stealing a gun, got out, and seven days later this home-invasion spree began in the German Village area.” (T. 390)

The prosecutor stated, as follows:

Obviously rehabilitation doesn't work. As soon as he's out, he goes back and commits the same offenses again. He obviously hasn't learned from his experiences. He wore * * * gloves to protect himself from fingerprints on these cases. He is a predator in our community and we should protect our community from him by removing him for the rest of his life. He has earned the 134 years. He had a chance to do the right thing in this case. He had a chance to come in and cooperate on this case as well as the case in Portsmouth, he chose not to. He decided it was more important to protect his friends and his allies than to stand up and do the right thing for the first time in his life.

Based upon the life that this man has led, it is no surprise to the State that he did not choose to do the right thing. He's earned a maximum sentence, please give it to him.

(T. 391)

The four victims gave statements at sentencing. Cynthia Green stated that the

home invasion changed her life. (T. 392) It had been planned to be a celebratory week for her parents' 50th anniversary, for the 20th anniversary of her sister's marriage, for the birthdays of her other sister and niece, and for her daughter's wedding. (T. 392-93) All those events became overshadowed by the crimes committed against Green. (T. 393)

Physical and emotional problems continue for Green. Very obvious bruising occurred as a result of the restraints. (T. 393) Veins in her legs continue to bulge because of the restraints, and that condition may not ever go away. (T. 393) Green suffers from uncontrollably high blood pressure and suffers frequent panic attacks. (T. 393) She often cannot leave the house, and her employment has suffered. (T. 394)

Green has great difficulty sleeping. She cannot sleep in her bedroom anymore and sleeps instead on her sofa. (T. 393) She often awakens in a terrified state fearing that she will be trapped again. (T. 393) Sometimes she must go to a hotel to get a good night's rest. (T. 393)

Green also experiences extreme humiliation by the fact that much of Central Ohio knows that she was stripped and held hostage. (T. 394) The intruders made comments about her body and physical appearance that were degrading, and those comments are often replayed in her mind. (T. 394) She views it as nearly a sexual assault. (T. 394)

Green feels great remorse for having to rely so much on the support of family and friends. (T. 394) She regrets that her sister died of cancer shortly after this, and that her sister "had to participate in this event by sharing my pain as she died." (T. 394)

Gary Reames stated that he continues to have difficulty sleeping. (T. 395) He emphasized that defendant "had many, many opportunities, this is not just one mistake

this gentleman's made. * * * And he would have continued to go on after these three home invasions if he wasn't caught." (T. 396)

Melanie Pinkerton stated that defendant was a coward for having victimized defenseless people. (T. 397) Pinkerton doubted that defendant understood the gravity of the crimes he had committed. (T. 397) "As Cynthia said earlier, we have loss of sleep, panic attacks, hard to leave the house at times, sleeping next to a loaded gun." (T. 397) Such things were never a part of Pinkerton's life before. (T. 397)

John Maransky urged the court to consider the community-wide impact of defendant's crimes and to ensure that defendant would never be able to commit another home invasion. (T. 398-99)

In sentencing defendant, the court noted defendant's prior stints in prison for robbery and burglary. (T. 405-406) The court also noted the community-wide terror created by defendant's random attacks, including particularly in the German Village area. (T. 406-410) The court also noted some of the particular facts of the attacks on these four victims. (T. 406-408) The court imposed maximum, consecutive sentences on the 11 first-degree felonies totaling 110 years and on the three third-degree felonies totaling 15 years, and imposed a total of nine years for firearm specifications, for a total sentence of 134 years. (T. 410-11)

F. Appeal

Defendant's sixth assignment of error on appeal claimed that the 134-year aggregate sentence constituted cruel and unusual punishment. (Appeal Rec. 68) The State opposed that assignment error, (see Appeal Rec. 78), and the Tenth District

concluded that “Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence.” Tenth Dist. Opinion, at ¶ 38, quoting *United States v. Aiello* (C.A. 2, 1988), 864 F.2d 257, 265. “[T]he severity of the aggregate sentence was, in part, a result of the number of crimes defendant committed. However, it was not the result of the imposition of one or more grossly disproportionate sentences.” *Id.* at ¶ 39. After modifying the judgment entry to reflect three three-year firearm terms, the Tenth District affirmed the convictions and sentences as modified, with defendant still facing 134 years in prison for his many offenses. *Id.* at ¶ 41.

On May 16, 2007, in a 4-3 vote, this Court allowed defendant’s discretionary appeal solely on the issue of whether the 134-year aggregate sentence constituted cruel and unusual punishment. *5/16/2007 Case Announcements*, 2007-Ohio-2208.

ARGUMENT

Proposition of Law: Multiple proportionate punishments for multiple crimes do not constitute cruel and unusual punishment.

The narrow issue presented here is whether defendant has satisfied his burden of persuading this Court that his 134-year aggregate sentence constitutes cruel and unusual punishment. Defendant fails to meet that burden for two main reasons.

First, an otherwise proportionate sentence does not become cruel and unusual punishment because it is imposed consecutively.

Second, very long terms of imprisonment, even those that exceed the defendant’s natural life expectancy, do not constitute cruel and unusual punishment when imposed for serious felonies on a recidivist offender.

A. An Improvident Case

Defendant's convictions in Scioto County, which were recently affirmed, give this Court a good reason to dismiss this appeal as improvidently allowed.

{¶ 4} On September 29, 2005, during the early morning hours, [Ralph and Marcia Melcher] awoke to find three men standing around their bed. The men ordered the couple to kneel as they searched for valuables. After ransacking the residence, the men ordered the Melchers to the living room, ordered them to remove their clothing and then tied them to chairs. One man groped Mrs. Melcher and indicated that a sexual assault was about to occur. This action prompted the couple to fight the intruders. Startled, two of the men fired their pistols at the Melchers and quickly fled the residence.

{¶ 5} The couple managed to untie themselves and Marcia found the only working telephone in the residence to call 911. After emergency transport to the hospital, the Southern Ohio Medical Center (SOMC) staff determined that the couples' injuries were severe and that they should be stabilized and taken to Grant Medical Center in Columbus. Also, before leaving SOMC, catholic priests performed "last rites" on the couple.

State v. Hairston, 4th Dist. No. 06CA3081, 2007-Ohio-3880. Defendant was convicted of, inter alia, aggravated burglary, aggravated robbery, attempted aggravated murder, kidnapping, and gross sexual imposition. *Id.* at ¶ 1. Defendant was also convicted of a burglary of the Melchers' residence in May 2004. *Id.* at ¶¶ 3, 9. The Scioto County court imposed consecutive sentences totaling 59 years. *Id.* at ¶ 11. On July 27, 2007, the Fourth District Court of Appeals affirmed all of the convictions.

In the present appeal, defendant's chief complaint appears to be that the 134-year aggregate Franklin County sentence will mean that he must serve the rest of his life in prison. But, in light of the 59-year sentence received in Scioto County, which

has now been affirmed, it becomes apparent that even a minimal amount of consecutive time from the Franklin County crimes would result in defendant serving the rest of his life in prison. Even if defendant were to have his aggregate sentence in Franklin County reduced to 30 years, his combined sentences would still be 89 years. It makes little sense to review defendant's challenge to his 134-year Franklin County aggregate sentence when he would serve the rest of his life in prison anyway in light of the Scioto County sentence, even if his Franklin County sentences were drastically reduced.

A change in defendant's proposition of law provides another reason for dismissing the appeal as improvidently allowed. The proposition of law accepted by this Court cited only the Eighth Amendment and incorrectly contended that defendant had received 134 years "for three aggravated robberies where the injuries are non-life threatening." In fact, defendant had received the 134 years for fourteen felonies and multiple firearm specifications, including *four* aggravated robberies. Defendant's current proposition of law now cites the Ohio Constitution and contends that defendant received the 134 years "for aggravated robberies and burglaries where injuries are non-life threatening." Defendant's Brief, at 4. These changes amount to a concession that the proposition of law accepted by this Court was incomplete and inaccurate, and such changes justify dismissing this appeal as improvidently allowed.

B. Standard of Proof

After the severance of unconstitutional provisions in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the resulting statutory scheme allows trial courts to exercise "full discretion" to impose maximum and consecutive sentences. *Id.* at paragraph

seven of the syllabus. Defendant essentially claims that the application of this statutory scheme is unconstitutional in his case because the trial court exercised its full discretion to impose sentences totaling 134 years.

Defendant faces a high burden of proof in bringing this as-applied challenge.

[A]ll enactments enjoy a strong presumption of constitutionality, and before a court may declare the statute unconstitutional, it must appear beyond a reasonable doubt that the legislation and constitutional provision are clearly incapable of coexisting. *State ex rel. Dickman, v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus. Further, doubts regarding the validity of a legislative enactment are to be resolved in favor of the statute. *State, ex rel. Swetland, v. Kinney* (1982), 69 Ohio St.2d 567, 23 O.O.3d 479, 433 N.E.2d 217.

State v. Gill (1992), 63 Ohio St.3d 53, 55. This Court has applied the beyond-reasonable-doubt standard to constitutional challenges based on cruel and unusual punishment. *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 370.

A case decided last year indicates that a clear-and-convincing standard of proof is applicable to as-applied challenges, while the beyond-reasonable-doubt standard is applicable only to facial challenges. *State ex rel. Ohio Congress of Parents and Teachers v. State Bd. of Educ.*, 111 Ohio St.3d 568, 2006-Ohio-5512, at ¶ 21. The State respectfully disagrees.

In an as-applied challenge, the challenger bears the burden of proving the *facts* essential to the challenge by a clear-and-convincing standard. *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, paragraph six of the syllabus. But it still remains the challenger's overall burden under *Dickman* to show that the statute as

applied to such facts is so inconsistent with a constitutional provision as to be unconstitutional beyond a reasonable doubt. *Belden* addresses the subsidiary factual burden in an as-applied challenge, and *Dickman* addresses the overall legal burden. These dual burdens were recognized in *Yajnik v. Akron Dept. of Health*, 101 Ohio St.3d 106, 2004-Ohio-357, at ¶¶ 14, 16, 17, 19, in which both *Belden* and *Dickman* were cited favorably but in which the Court held that the overall beyond-reasonable-doubt burden applied to the plaintiffs' as-applied challenge. See, also, *Hilton v. Toledo* (1980), 62 Ohio St.2d 394, 396-97 (applying beyond-reasonable-doubt standard and citing both *Dickman* and *Belden*); *State v. Renalist Inc.* (1978), 56 Ohio St.2d 276, 278-79 (same).

The difference between facial and as-applied challenges is that a facial challenge attacks the statute in every application or a substantial number of applications, while an as-applied challenge attacks the statute in one application. The statute should be entitled to the presumption of constitutionality in an as-applied challenge just as much as in a facial challenge.

C. Cruel and Unusual Punishment

The legislature has broad, plenary discretion in prescribing crimes and fixing punishments. *State v. Morris* (1978), 55 Ohio St.2d 101, 112. Although the United States and Ohio Constitutions prohibit the infliction of "cruel and unusual punishments," these constitutional provisions still afford the legislature substantial leeway in prescribing available punishments. Reviewing courts must give substantial deference to the legislature's broad discretion. *Harmelin v. Michigan* (1991), 501 U.S. 957, 999 (controlling plurality).

“As a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment.” *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 69. The standard for finding a punishment to be “cruel and unusual” is very high. A punishment is cruel and unusual only if it is “so greatly disproportionate to the offense as to shock the sense of justice of the community.” *Weitbrecht*, 86 Ohio St.3d at 371, quoting *State v. Chaffin* (1972), 30 Ohio St.2d 13. “[C]ases in which cruel and unusual punishments have been found are limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person.” *Weitbrecht*, 86 Ohio St.3d at 371, quoting *McDougle*, 1 Ohio St.2d at 70.

In non-capital cases, successful claims of disproportionality are exceedingly rare. *Solem v. Helm* (1983), 463 U.S. 277, 289-90. “The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Harmelin*, 501 U.S. at 1001 (controlling plurality). Even “[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation’s history.” *Harmelin*, 501 U.S. at 994-95 (majority opinion). “The gross disproportionality principle reserves a constitutional violation for only the extraordinary case.” *Lockyer v. Andrade* (2003), 538 U.S. 63, 77.

Courts must keep in mind that “the Eighth Amendment does not mandate adoption of any one penological theory. *Harmelin*, 501 U.S. at 999 (controlling plurality). Legislatures and judges can accord “different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.” *Id.*

“Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.” *Solem*, 463 U.S. at 290. “In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.” *Id.* at 290 n. 16. “[T]he need for individualized sentencing decisions result[s] in a wide range of constitutional sentences.” *Id.* at 290 n. 17.

Legislatures and courts are also allowed to consider the defendant’s criminal record in setting the sentence. They are allowed to conclude that “individuals who have repeatedly engaged in serious or violent criminal behavior and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety.” *Ewing v. California* (2003), 538 U.S. 11, 24 (controlling plurality). The States “have a valid interest in deterring and segregating habitual criminals.” *Id.* at 25 (quoting another case). “Recidivism has long been recognized as a legitimate basis for increased punishment.” *Id.* “In weighing the gravity of [the offender’s] offense, we must place on the scales not only his current felony, but also his long history of felony recidivism.” *Id.* at 29. Legislatures and courts are allowed to conclude “that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated.” *Id.* at 30.

D. Cruel and Unusual Punishment Standard is Offense-Specific

Defendant errs in challenging the total 134-year sentence. “Eighth amendment

analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence.” *State v. Berger* (Az. 2006), 134 P.3d 378, 384, quoting *United States v. Aiello* (C.A. 2, 1988), 864 F.2d 257, 265. “[I]f the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate.” *Berger*, 134 P.3d at 384; *State v. Buchhold* (S.D. 2007), 727 N.W.2d 816, at ¶¶ 31-32 (collecting cases).

This Court’s case law confirms the offense-specific nature of the analysis. This Court has specifically held that “[i]t is not a cruel and unusual punishment for a defendant to be sentenced to consecutive terms for separate statutory crimes.” *State v. Wilkinson* (1969), 17 Ohio St.2d 9, paragraph three of the syllabus. Moreover, this Court has stated that the test focuses on whether the “punishment” is disproportionate to the singular “offense” or “crime.” *Weitbrecht*, 86 Ohio St.3d at 371, 372. Ohio sentencing law is in accord, as “[u]nder the Ohio sentencing statutes, the judge lacks the authority to consider the offenses as a group and to impose only an omnibus sentence for the group of offenses.” *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, at ¶ 9. “Only after the judge has imposed a separate prison term on each offense may the judge then consider in his discretion whether the offender should serve those terms concurrently or consecutively.” *Id.*

Defendant’s argument amounts to a plea for mandatory concurrent sentencing on a number of his crimes. But this Court has recognized that consecutive sentencing does not constitute cruel and unusual punishment. *Wilkinson*, *supra*. This Court has

also recognized that “[t]here is no doubt that the legislature did not intend to punish a defendant guilty of a multiple number of crimes in the same manner as one who committed only one.” *Saxon*, at ¶ 29.

Capping an aggregate sentence at normal life expectancy, or forcing a reduction in some offenses because the defendant must be punished for others, would lead to the absurd result that a defendant could obtain a *reduction* in punishment for some offenses by committing more offenses. “[I]t is wrong to treat stacked sanctions as a single sanction. To do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim.” *Pearson v. Ramos* (C.A. 7, 2001), 237 F.3d 881, 886. “The fact that [a defendant] will have to serve his sentences consecutively does not make these otherwise permissible sentences disproportionately severe. There is nothing cruel and unusual about punishing a person committing *two* crimes more severely than a person committing only one crime, which is the effect of consecutive sentencing.” *State v. August* (Ia. 1999), 589 N.W.2d 740, 744 (emphasis *sic*).

Just as the commission of more crimes should not force a reduction in sentence for other crimes, the commission of several crimes should not force concurrent sentencing on the trial court. Concurrent sentencing results in no effective punishment for the offender for one or more offenses, and the right to avoid cruel and unusual punishment does not give a defendant the right to avoid punishment altogether for a particular crime or crimes. “The Eighth Amendment does not prohibit a state from punishing defendants for the crimes they commit; the amendment prohibits a sentence

only if it is grossly disproportionate to the severity of the crime.” *United States v. Schell* (C.A. 10, 1982), 692 F.2d 672, 675.

The concept of consecutive sentencing has been deemed so important that, even absent express statutory authority, this Court has found that the authority to impose consecutive sentences is inherent:

As we have no statute authorizing cumulative sentences for crime, it would seem at first blush, that such sentences should not be permitted in this state; but this court, with the courts of most of the other states, as well as England, has sustained cumulative sentences without the aid of a statute. ***

The great weight of authority is in favor of cumulative sentences, and they should be upheld on principle. The severe punishments which induced judges to invent technicalities to aid the acquittal of those on trial, on criminal charges, no longer exist, and under our just and humane statutes, those who violate the law should be duly punished for each offense.

Henderson v. James (1895), 52 Ohio St. 242, 254-255. As further stated in *State ex rel.*

Stratton v. Maxwell (1963), 175 Ohio St. 65, 67:

It is clear that a court has the power to impose consecutive sentences. *Henderson v. James, Warden*, 52 Ohio St., 242. In fact it is well settled that in the absence of an affirmative act by the court multiple sentences run consecutively and not concurrently. A provision that sentences shall run concurrently is actually in the nature of a reward.

“[M]aking sentences for different crimes run concurrently is in the nature of a reward to the convict, relieving him of paying a part of the penalty for his crimes * * *.” *Stewart v. Maxwell* (1963), 174 Ohio St. 180, 181. As these precedents show, the ability to impose sentences consecutively is an important facet of any sentencing scheme

because, otherwise, concurrent sentencing results in the offender not being punished at all for some crimes.

Defendant was unworthy of any such concurrent-sentence reward. “[T]he imposition of concurrent sentences in this case would amount to a multiple-offense ‘discount’ that should not be countenanced when an offender initiates such a crime spree involving multiple robberies.” *State v. Beal* (2001), 10th Dist. No. 01AP-170.

In light of the offense-specific nature of the constitutional analysis, and in light of the importance of consecutive sentencing, this Court should reject defendant’s claim that his commission of a large number of crimes gives him a constitutional entitlement to reduced or concurrent sentencing on some of those crimes.

E. Challenge to 134-Year Aggregate Sentence Fails

Defendant’s arguments would fail even if defendant could pursue an as-applied challenge to his 134-year aggregate sentence.

This Court should reject defendant’s attempts to equate his aggregate sentence to the life-without-parole sentence that was overturned in *Solem v. Helm*. *Solem* is easily distinguishable, as it involved a recidivist offender whose current offense for writing a no-account check “involved neither violence nor threat of violence to any person,” and whose prior felonies were “all relatively minor.” *Harmelin*, 501 U.S. at 1002 (controlling plurality) (quoting *Solem*). *Solem* stated that “nonviolent crimes are less serious than crimes marked by violence or the threat of violence,” and *Solem*’s record “involves no instance of violence of any kind.” *Solem*, 463 U.S. at 292-93, 297 n. 22. The Court further emphasized that no one had suggested that life without parole

would be inappropriate for violent criminals. *Id.* at 299 n. 26.

In sharp contrast to the defendant in *Solem*, defendant Hairston committed several serious felonies, all of which were marked by violence or the threat of violence. Defendant's prior felonies of robbery and burglary were also serious. The invalidation of the life-without-parole sentence in *Solem* has no relevance here.

In an effort to show shocking disproportionality, defendant also cites various factors that he thinks are mitigating in his case, including: (1) defendant did not physically strike or attack the victims; (2) defendant "fed two of them baby carrots and water"; (3) defendant told his victims that they would not be hurt if everything went smoothly; and (4) the victims' "injuries are non-life threatening."

These "mitigating" factors do not show gross or shocking disproportionality. The absence of life-threatening physical injuries is not controlling, as defendant plainly intended to kill the victims if necessary, and the threat of violence or even the *risk* of violence is enough to warrant severe punishment. *Harmelin*, 501 U.S. at 1002, 1003 (controlling plurality – citing "direct nexus between illegal drugs and crimes of violence" and stating that drug crime "threatened to cause grave harm to society."); *Solem*, 463 U.S. at 292 ("harm caused or threatened to the victim or society"). "[T]he presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal." *Rummel v. Estelle* (1980), 445 U.S. 263, 275.

Defendant's statement that the victims would not be hurt if they cooperated was a threat to kill them if they dared to resist, and that threat is an aggravating factor, not a

mitigator, as defendant contends. Other statements like “I’ll bust a cap in his motherfucking head” confirm the extreme nature of defendant’s armed crimes and defendant’s extreme culpability therein.

In addition, these victims *did* suffer physical and psychological harm. The victims suffered significant psychological terror during and after these crimes. They suffered physical harm from being tightly bound up, and victim Green continues to suffer physical effects and significant psychological effects. Defendant cannot be given any credit for the lack of physical injury.

Defendant’s offenses easily justified severe sentencing treatment. The home invasions were each prolonged. Each involved threats of death with a brandished gun, including, for victim Green, defendant taunting her by saying “safety on, safety off.” Each home invasion involved stripping the victims naked. Each involved a full-scale looting of the respective residence. Each involved a tying-up of the victims that ultimately posed a significant risk to their health and safety. Therefore, in several major respects, these home invasions were heightened and exacerbated and therefore worthy of maximum and consecutive sentences.

Defendant attempts to draw mitigating value out of the fact that he gave food and water to Pinkerton and Reames. But the evidence shows that the second intruder did that, not defendant. (T. 198-99) And the only reason Pinkerton took that intruder up on the offer of water was because her mouth was extremely dry because a sock had been stuffed in her mouth to keep her from crying out for help.

Defendant also commends himself for taking responsibility by contending that

he pleaded guilty at trial even though the victims were unable to identify him.

Defendant's Brief, at 2. In fact, three of the four victims *did* identify him at trial, and the prosecution was in the process of playing his confession interview tape when he pleaded guilty. Even in confessing, defendant had been slow in taking responsibility, as he had lied to police initially. (T. 229)

While it is true that defendant did not kill any of the victims, he certainly threatened to do so, and very likely would have done so, if the victims had sought to defend themselves. Moreover, defendant was not being sentenced for homicide but rather for robbing and kidnapping four victims in three different aggravated burglaries while illegally possessing and using a firearm. Those serious crimes deserve serious sentences in their own right, even if defendant could have received an additional sentence if he had committed homicide. Defendant received the benefit of not committing homicide by not being charged with or sentenced for homicide and by thereby avoiding becoming eligible for the death penalty. Defendant is unentitled to a "I didn't kill them" discount on his non-homicide offenses.

Defendant naturally fails to address his dismal criminal record. Defendant was only 24 years of age at the time of sentencing, (T. 400), and yet he had already served two stints in prison for robbery and burglary respectively. He had only been out of prison for seven days before starting this home-invasion spree. Given this history, defendant's rehabilitative prospects were zero, as defendant had been "given an opportunity to reform, all to no avail." *Rummel*, 445 U.S. at 278. Protecting the public is one of the overriding purposes of Ohio's felony sentencing law, see R.C. 2929.11(A),

and these sentences protect the public by incapacitating this remorseless, twice-imprisoned offender for the rest of his life.

Other deterrence interests are also involved. If these kinds of home-invasion sprees are to be discouraged, consecutive sentences were a necessity. Under no circumstances could defendant be given concurrent sentences so that he could be claimed to have received a “freebie” on one or more of the home invasions. Ohio law correctly allowed the trial court to consider the deterrence of other would-be offenders, see R.C. 2929.11(A), and the trial court’s sentence here sends exactly the right message to would-be home invaders. *Harmelin*, 501 U.S. at 999 (controlling plurality -- deterrence is valid penological objective); *United States v. Gourley* (C.A. 10, 1987), 835 F.2d 249, 253 (court could justify life without parole by desire “to deter others who would commit similar crimes.”).

In the final analysis, defendant only addresses a small number of factors that he contends are favorable to him. The vast majority of sentencing factors are unfavorable to him, including: (1) the prolonged nature of these crimes; (2) the extended looting of property and cars; (3) the threats of death if the victims did not cooperate; (4) the risk of serious physical harm or death if the victims engaged in self-defense or did not escape their bindings on their own; (5) the commission of one home invasion after another after another; (6) defendant already had been imprisoned twice for serious offenses; (7) defendant was out of prison just seven days before starting his home-invasion spree; (8) lack of remorse and contrition, as shown by a refusal to cooperate with authorities when given the opportunity; and (9) defendant was the ringleader in this organized

criminal activity, giving commands to the others and wielding the gun. In light of the entire case, including defendant's dismal criminal history, the 134-year aggregate sentence does not shock the conscience. Rather, the natural response of most observers would be to welcome the safety that comes from incarcerating defendant for his life.

F. Life Expectancy Not Controlling

Defendant complains that the 134-year aggregate sentence amounts to a life sentence. But the case law recognizes that it is not cruel and unusual to impose prison terms for a total number of years extending beyond the offender's natural life expectancy. Courts "have universally upheld sentences where the term of years is greater than the defendant's expected natural life * * *." *United States v. Yousef* (C.A. 2, 2003), 327 F.3d 56, 162-63. "The Supreme Court has never held that a sentence to a specific term of years, even if it might turn out to be more than the reasonable life expectancy of the defendant, constitutes cruel and unusual punishment." *United States v. Beverly* (C.A. 6, 2004), 369 F.3d 516, 537; *Berger*, 134 P.3d at 384. A life-expectancy argument was also rejected in *Lockyer*, 538 U.S. at 74 (rejecting reliance on age of persons sentenced).

A case in point is *United States v. O'Driscoll* (C.A. 10, 1985), 761 F.2d 589. The defendant armed robber was sentenced to a total of 99 to 300 years. The court concluded that a term of years beyond life expectancy did not constitute cruel and unusual punishment. In words that could apply just as much to defendant Hairston, the Tenth Circuit stated, as follows:

In this case, given the basis in fact for the trial court's sentence, we hold that the three hundred year term of imprisonment was completely justified. The appellant

O'Driscoll is one of the worst type of offenders. We recognize that the law has long recognized that retribution is not the dominant, primary objective of the criminal justice system. Rather, reformation and rehabilitation are primary, hopeful goals. However, *a severe penalty is required where vindication of the law and the common good of society are at stake because of the callous, vicious propensities of the defendant and his lack of any semblance of good character and respect for human life.* We fully agree with the trial court's conclusion that a criminal defendant such as O'Driscoll *must be prevented from ever again inflicting on the public his heinous, cruel conduct.* The punishment imposed by the trial court is proportioned to the offense committed and the vile criminal record of O'Driscoll. *This appellant is a threat and danger to the peace and safety of the community.* The punishment imposed by the trial court in this case was properly tailored to the criminal.

Id. at 600 (emphasis added). A life sentence for a repeated armed robber is “an easy case,” especially when the robber’s “criminal record reflects a life of violent crime interrupted only by terms of imprisonment.” *United States v. Arrington* (C.A. 7, 1998), 159 F.3d 1069, 1073.

The United States Supreme Court has upheld a life-without-parole sentence for a single large-scale drug offense when the offender had no prior record. *Harmelin*, supra. Since life without parole was upheld for a singular serious offense, prison terms amounting to a life sentence are certainly allowable for a twice-imprisoned offender like defendant who committed 11 new first-degree armed felonies and three new third-degree armed felonies. See *Gourley*, 835 F.2d at 252-53 (upholding life without parole for felon in possession of firearm with eleven prior felonies) *Patterson v. State* (Ala.Crim.App. 1993), 628 So.2d 1045 (upholding such sentence for first-degree robber

with prior felony record); *State v. White* (2002), 349 S.C. 33, 562 S.E.2d 305 (upholding such sentence for first-degree burglar with two prior armed robbery convictions); *State v. Jones* (2001), 344 S.C. 48, 543 S.E.2d 541 (collecting cases and upholding such sentence for armed robber with prior serious felony conviction); *State v. Woodall* (1989), 182 W.Va. 15, 385 S.E.2d 253 (upholding such sentence for rapist/kidnapper; “life without parole, for serious crimes against the person, passes constitutional muster.”).

G. Press Coverage

Defendant attempts to show that the 134-year sentence is shocking because the case has drawn media coverage. But defendant does not cite a single specific press account or broadcast account that supports this claim. Defendant is mistaken in contending that the case is receiving media attention because of outrage over the aggregate sentence, since defendant has conceded that the case was highly publicized *before* the aggregate sentence was imposed. See Defendant’s Memorandum Supporting Jurisdiction, at 12 (citing T. 7-9, 43-44, 131, 171-72); see, also, (T. 212) & Trial Ct. Rec. 76 (defense pretrial motion – “already generated a substantial amount of publicity”). The case very likely drew the attention of the media because of the serial nature of these home invasions and the likely terror that was created in the German Village area targeted by defendant. This media attention is much more likely a barometer of the seriousness of these crimes, rather than a barometer of outrage over the supposed injustice of the sentence.

Even on the matter of the sentencing, one suspects that the reporting has been

factual and “down the middle” rather than railing against any supposed “injustice.” Of course, ever-present “critics” having personal or political agendas can be cited in any media account, but such citation does not show a community-wide consensus that a sentence is shockingly disproportionate.

In any event, courts applying the test for gross disproportionality must strive as much as possible to rely on sources of an objective nature, such as legislative enactments. *Harmelin*, 501 U.S. at 1000-1001 (controlling plurality). Defendant cites no such objective source as showing a consensus that it is shocking to impose maximum and consecutive sentences on an offender who has been imprisoned twice before and who has now committed over a dozen new armed felonies.

H. Surveying Punishments in Other Cases

To the extent defendant relies on the specific sentences imposed on offenders in other cases, defendant misreads the case law. A survey of other laws in this state and other jurisdictions is “appropriate only in the rare case in which a threshold comparison of the crime committed and sentence imposed leads to an inference of gross disproportionality.” *Weitbrecht*, 86 Ohio St.3d at 373 n. 4 (quoting *Harmelin* controlling plurality). No such inference is present here.

To the extent defendant is trying to show that similarly-situated offenders have not received the same aggregate sentence, the Eighth Amendment case law positively prohibits any such cross-case assessment of similarly-situated offenders. A defendant cannot show an Eighth Amendment violation “by demonstrating that other defendants who may be similarly situated did *not* receive” the same sentence. *McCleskey v. Kemp*

(1987), 481 U.S. 279, 306-307.

The Constitution is not offended by inconsistency in results based on the objective circumstances of the crime. Numerous legitimate factors may influence the outcome of a trial and a defendant's ultimate sentence, even though they may be irrelevant to his actual guilt. If sufficient evidence to link a suspect to a crime cannot be found, he will not be charged. The capability of the responsible law enforcement agency can vary widely. Also, the strength of the available evidence remains a variable throughout the criminal justice process and may influence a prosecutor's decision to offer a plea bargain or to go to trial. Witness availability, credibility, and memory also influence the results of prosecutions. Finally, sentencing in state courts is generally discretionary, so a defendant's ultimate sentence necessarily will vary according to the judgment of the sentencing authority. The foregoing factors necessarily exist in varying degrees throughout our criminal justice system.

McCleskey, 481 U.S. at 307 n. 28. Even in capital cases, cross-case proportionality review is not constitutionally required. *Pulley v. Harris* (1984), 465 U.S. 37; *State v. Smith* (1991), 61 Ohio St.3d 284, 297. Consistent results are not even required for co-conspirators in the same crime. *Getsy v. Mitchell* (C.A. 6, 2007), ___ F.3d ___ (en banc).

The wisdom of the rule against cross-case proportionality review is confirmed by defendant's comparison of his case to other cases. See Defendant's Brief, at 12-14. Defendant's summaries of the cases are conclusory and unhelpful to this Court. None of the cases involved a substantive challenge to the trial court's sentencing decision, and therefore it cannot be assumed that the cases present a full summary of the information that was pertinent to the sentencings in those cases. A few of the cases raised a general *Blakely* challenge to Ohio's sentencing laws, but that challenge did not

require an understanding of the facts of the particular case. Most importantly, none of the cases appeared to involve a similarly-situated offender who was twice-imprisoned before and who committed three new home invasions with a firearm, including 11 first-degree felonies, just days or weeks after being released from prison. These cases are simply inapposite to the trial court's sentencing decision below.

Defendant appears to contend that defendant's 134-year aggregate sentence is invalid because some persons committing aggravated murder or murder have not received such a sentence for their crimes. As stated before, comparisons to other crimes are not relevant absent a threshold showing of gross disproportionality, and defendant has not made that showing here.

Defendant also fails to recognize that murderers and aggravated murderers *do* receive mandatory *life* sentences for their single act of taking human life. See R.C. 2929.02(B) (murder: life with parole eligibility after 15 years); R.C. 2929.03(A)(1), (C)(2)(a)(i) (aggravated murder: death, life without parole, or life with parole eligibility after 20, 25, or 30 full years). And some aggravated murderers are potentially subject to the death penalty. To be sure, some aggravated murderers and all murderers will be eligible for parole, but there is no guarantee that they will ever receive parole.

While the single act of taking human life deserves such significant punishment, the punishment levied for that single act should not control how Ohio will deal with recidivist first-degree felony offenders like defendant. It is reasonable to treat such offenders committing multiple first-degree felonies as harshly or even more harshly than single-act murderers or aggravated murderers receiving life sentences with parole

eligibility. As the United States Supreme Court has held, life without parole does not constitute cruel and unusual punishment for a single act of large-scale drug possession. *Harmelin*, supra. The Court has also upheld a sentence of life imprisonment with parole eligibility after 50 years for a “three strikes” offender, even when the “third strike” was a non-violent felony offense. *Lockyer*, supra. Defendant Hairston committed 11 first-degree violent felony “strikes” in this very case, and he had committed prior felony strikes in robbery and burglary cases.

“[T]he question, of course, is not what a defendant who commits one murder or one sexual assault faces as a potential sentence, but rather what one who commits [eleven] such offenses faces.” *Berger*, 134 P.3d at 389 (Hurwitz, J., concurring). An aggravated murderer would potentially face the death penalty for committing eleven aggravated murders. See R.C. 2929.04(A)(5). Even if the jury recommended against death, the aggravated murderer could receive life without parole and would face at the very least a sentence of life imprisonment with parole eligibility after 25 years for each offense. R.C. 2929.03(C)(2)(a)(i). And the court could make those sentences consecutive so that the 11-time aggravated murderer would not be eligible for parole for 275 years. A murderer committing 11 murders could also receive consecutive sentences so that the murderer would not be eligible for parole for 165 years. And if the murderer used a firearm, his eligibility for parole would be delayed even further to serve sentences for firearm specifications. And if the murderer committed WUD offenses, those sentences could be made consecutive as well.

Ohio need not have a perfectly proportioned hierarchy of graduated

punishments that would never allow a aggravated robber, kidnapper, and aggravated burglar to be punished more severely than some aggravated murderers or murderers. Strict proportionality is not required, see *Harmelin*, and comparisons of different crimes implicating different societal interests are “inherently speculative.” *Rummel*, 445 U.S. at 282. Nevertheless, when recidivism is factored into the equation, as it must, see *Ewing*, 538 U.S. at 29 (controlling plurality), one can see that recidivist murderers and aggravated murderers *are* subject to more punishment than recidivist aggravated robbers, kidnappers, and aggravated burglars committing the same number of offenses.

I. Allied-Offenses Issue Not Before this Court

The Tenth District thoroughly rejected all of defendant’s claims that the offenses should have been merged under the allied-offenses statute. See Tenth Dist. Opinion, at ¶¶ 14-28. Defendant raised some allied-offenses issues in his first proposition of law here, see Memorandum Supporting Jurisdiction, at 6-9, but this Court declined review of those issues and limited its grant of review to defendant’s narrow claim of cruel and unusual punishment.

Notwithstanding this Court’s limited grant of review, defendant continues to rely on pseudo-allied-offense arguments by contending that the crimes herein are “intertwined” or involved “the exact same thing.” Defendant’s Brief, at 10-11. Those arguments were rejected in the Tenth District’s allied-offenses ruling, and that ruling is not before this Court. Since the offenses do not merge, consecutive sentencing is allowed. *State v. Moss* (1982), 69 Ohio St.2d 515, 519-20.

The Tenth District’s ruling was entirely correct. For the kidnappings, separate

sentencing was easily justified under the test set forth in *State v. Logan* (1979), 60 Ohio St.2d 126. The home invasion of Cynthia Green's residence lasted at least 45 minutes, and it thereafter took a number of minutes for Green to escape her restraints. The ten-minute home invasion of the Reames/Pinkerton residence was followed by the victims working free of their restraints, at least six or seven minutes of time for Reames. Although Maransky did not give an exact time frame on how long the home invasion itself lasted, he described events that would have taken several minutes while his residence was looted. In addition, Maransky said it took him about fifteen minutes to free himself of restraints. These prolonged time periods are sufficient to give the kidnapping counts a significance that warrants separate sentencing for the kidnappings. See, e.g., *State v. Seiber* (1990), 56 Ohio St.3d 4, 19 (20 to 40 minutes). "Were it not for their resourcefulness, the victims would have been restrained for even longer periods of time than they were." Tenth Dist. Opinion, at ¶ 25.

Adding to the significance of the kidnappings is the fact that all victims were tied up, and at least three of the victims were gagged. See, e.g., *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 67 (kidnappings had independent significance despite continuing robbery motive in tying up and torturing victims); *State v. Reynolds* (1998), 80 Ohio St.3d 670, 682 (tying up of victim cited as one of reasons kidnapping did not merge with robbery); *State v. Gore* (1999), 131 Ohio App.3d 197, 203 ("extreme restraint is unnecessary to commit robbery.").

The tying up and gagging of the victims also substantially increased the risk of harm separate and apart from the robberies. Tightened bindings create risks of harm, as

shown by Green's continuing health problems and Reames' feet turning blue. With Maransky's hands hog-tied behind him, and with Maransky having been gagged, there was a significant danger that he could have difficulty breathing if he vomited or otherwise would become ill.

Other factors supported separate sentencing. This was not just a single threat of harm that restrained the victims briefly, as might occur in a run-of-the-mill aggravated robbery. Rather, these were repeated threats of death with a gun, some of which were imparted in vulgar terms, *e.g.*, "you better not be F'ing lying." These threats imparted extreme fear and, thus, extreme restraint on these victims far beyond the usual aggravated robbery that would be subject to merger.

In addition, the invasion of these victims' bodily integrity as part of these kidnappings included the forced nudity of the victims. Such nudity necessarily increased the fears and humiliation of all of the victims above and beyond what the usual aggravated robbery would entail.

Defendant's arguments for merger similarly fail for aggravated burglary and WUD. See Tenth Dist. Opinion, at ¶ 27. Defendant's claim that the robberies of Pinkerton and Reames were the "same offense" was not raised below and is waived. That claim also lacks merit, as each victim warrants a separate sentence for the victim-oriented offense of aggravated robbery. *State v. Madaris*, 156 Ohio App.3d 211, 2004-Ohio-653, at ¶¶ 20-22, citing *State v. Jones* (1985), 18 Ohio St.3d 116, 118.

Defendant's "intertwined" argument misses a larger point. Even if the cruel-and-unusual punishment analysis would consider the "intertwined" nature of certain

crimes, the cumulative punishments available for defendant's crimes still are not shockingly disproportionate. It is far from shocking that a defendant could face 30 years for each victim and/or each burglary if these crimes were collected into a compound offense like "armed home invasion," particularly when that offense would contain elements in aggravation like those involved here, including prolonged, extreme restraints, extensive looting, brandishing of a firearm, and/or threatening of serious physical harm. See *Commonwealth v. Dunn* (1997), 43 Mass. App. Ct. 58, 680 N.E.2d 1178 (upholding home-invasion penalty, which allowed mandatory minimum sentence of 20 years up to life).

J. Offense-Specific Challenges Also Fail

Acknowledging the Tenth District's holding that the Eighth Amendment analysis is offense-specific, defendant also contends that his individual sentences for individual crimes constitute cruel and unusual punishment. However, this offense-specific argument was not part of the proposition of law accepted for review, and therefore it is not properly raised here. In addition, this new argument was not raised in the appellate court. See Tenth Dist. Opinion, at ¶ 39 ("In this appeal, defendant does not attack any particular sentence he received for any specific offense."). As a result, defendant's offense-specific argument is waived and should be disregarded. *State v. Williams* (1977), 51 Ohio St.2d 112, paragraph two of the syllabus, death penalty vacated (1978), 438 U.S. 911.

Defendant's offense-specific argument fails anyway. Except for aggravated murder and murder, these first-degree felonies are the most serious level of offenses in

the Ohio criminal code. These particular crimes of aggravated burglary, aggravated robbery, and kidnapping constitute significant intrusions and significant risks to the personal health, safety, autonomy, and security of the victims. Ten years of imprisonment is not shockingly disproportionate to these individual crimes, particularly considering defendant's criminal record and the aggravated nature of these offenses in nearly every respect. Defendant cites no case holding that 10 years is cruel and unusual punishment for such serious offenses.

Likewise, the five-year maximum for the third-degree felony WUD offenses is not shocking, given the reasons for having the WUD statute, given defendant's criminal record, and given defendant's use of the firearm in a series of serious offenses. "In weighing the maximum punishment of five years against the permissible public objective of prohibiting those previously convicted of crimes of violence from possessing firearms, we hold that the punishment is not unusually severe." *State v. Austin* (1976), 8th Dist. No. 34793.

The three-year firearm specifications also do not constitute cruel and unusual punishment. *State v. Roe* (1989), 41 Ohio St.3d 18, 27-28.

Finally, defendant makes the feckless contention that he should not have received any prison time at all because one sex offender received community control from one judge in Franklin County and because a number of Catholic priests have allegedly escaped prosecution and punishment for sex offenses. Such hyperbole again misses the mark. Defendant's conclusory references are not helpful, as defendant provides no basis for determining whether those cases are properly comparable to

defendant's many crimes and to defendant's dismal criminal history. And if one accepts the premise that the Franklin County sex offender was treated in an overly lenient manner, it still remains true that the constitutional standard for cruel and unusual punishment would not be controlled by what a single overly-lenient judge did in one case.

Defendant's proposition of law should be overruled, and the State's proposition of law should be adopted.

CONCLUSION

For the foregoing reasons, plaintiff-appellee requests that this Court affirm the judgment of the Tenth District Court of Appeals.¹

Respectfully submitted,

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(Counsel of Record)
Assistant Prosecuting Attorney

Counsel for Plaintiff-Appellee

¹ If this Court contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301 & n. 3; *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 30th day of Aug., 2007, to Toki M. Clark, Clark Law Office, 233 South High Street, 3rd Floor, Columbus, Ohio 43215, Counsel for Defendant-Appellant.


STEVEN L. TAYLOR
Assistant Prosecuting Attorney

§ 2929.02. Penalties for aggravated murder or murder.

(A) Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022 [2929.02.2], 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life, except that, if the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information that charged the murder, the court shall impose upon the offender a term of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to the offender or to the dependents of the offender, or will prevent the offender from making reparation for the victim's wrongful death.

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

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

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 146 v H 180 (Eff 1-1-97); 147 v S 107. Eff 7-29-98; 151 v H 461, § 1, eff. 4-4-07.

§ 2929.03. Imposing sentence for aggravated murder.

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

(1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:

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

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

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) (1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose sentence on the offender as follows:

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(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose one of the following sentences on the offender:

(i) Life imprisonment without parole;

(ii) Life imprisonment with parole eligibility after serving twenty years of imprisonment;

(iii) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

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

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

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

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

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

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

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

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

(D) (1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was

not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

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

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(a) Except as provided in division (D)(2)(b) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;

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

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

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

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

(i) Life imprisonment without parole;

(ii) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

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

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

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3]

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

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

(a) Life imprisonment without parole;

(b) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

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

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

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

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

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

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 146 v S 4 (Eff 9-21-95); 146 v S 2 (Eff 7-1-96); 146 v S 269 (Eff 7-1-96); 146 v H 180. Eff 1-1-97; 150 v H 184, § 1, eff. 3-23-05.

§ 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.

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

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

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

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

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

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

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

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1 (Eff 10-19-81); 147 v S 32 (Eff 8-6-97); 147 v H 151 (Eff 9-16-97); 147 v S 193 (Eff 12-29-98); 149 v S 184. Eff 5-15-2002.

§ 2929.11. Purposes of felony sentencing; discrimination prohibited.

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the race, ethnic background, gender, or religion of the offender.

HISTORY: 146 v S 2. Eff 7-1-96.