

IN THE OHIO SUPREME COURT

STATE OF OHIO, : Case No. 2003-1325  
 :  
 Plaintiff-Appellee, : On Appeal from the Decision of  
 : the Delaware County Court of  
 V. : Common Pleas,  
 : Case No. 02CRI-08-366  
 GERALD HAND, :  
 :  
 Defendant-Appellant. :

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**DEFENDANT-APPELLANT GERALD HAND'S  
MOTION TO REOPEN APPEAL ON THE BASIS OF  
INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL**

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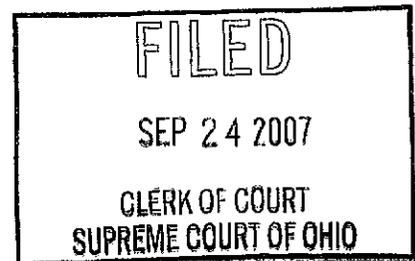
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## **I. Introduction**

Defendant-Appellant Gerald Hand respectfully requests that his appeal, captioned *State v. Hand*, Ohio Supreme Court No. 2003-1325, Delaware County Court of Common Pleas No. 02CRI-08-366, be reopened on the basis that he received ineffective assistance of appellate counsel. While this motion is being filed outside the 90-day deadline contained in Sup. Ct. R. XI(5)(A), Hand can demonstrate good cause for his late filing.

Hand alleges three important assignments of error that should have been raised by appellate counsel, but were not: 1) whether the death penalty specifications related to the murder of Hand's first wife were barred by the doctrine of collateral estoppel; 2) whether trial counsel were ineffective for failing to object to questions, testimony, and evidence regarding Hand's bankruptcy attorney on the grounds of attorney-client privilege; and 3) whether the trial court erred in denying Hand's motion to dismiss the specifications relating to the murders of Hand's first two wives under Evid. R. 404(b). Hand supports his request for reopening with the sworn affidavit of his current counsel, as well as the appellate brief filed by his previous counsel. See Affidavit of Jennifer M. Kinsley<sup>1</sup> (attached as Exhibit A); Appellant's Brief (attached as Exhibit B).

## **II. Statement of Facts**

In 2002 and 2003, Gerald Hand was charged in Delaware County with 6 felonies: 1) the aggravated murder of his wife, Jill Hand, with course of conduct and firearm specifications; 2) the aggravated murder of his friend and alleged co-conspirator, Lonnie Welch, with course of conduct, escaping apprehension, victim was a witness, and firearm specifications; 3) conspiracy to commit

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<sup>1</sup>This affidavit is intended to serve as the sworn statement required by Sup. Ct. R. XI(5)(B)(4).

the murder of Jill Hand with a firearm specification; 4) conspiracy to commit the aggravated murder of Jill Hand with a firearm specification, filed under a separate section of the Ohio Revised Code; 5) an identical consolidated count of conspiracy; and 6) escape. Several of the specifications alleged that Hand and Welch had conspired to kill Hand's first two wives in the 1970s, and that Hand subsequently killed Welch in 2002 to silence him from testifying about their deaths.

Hand was tried by a jury commencing on May 1, 2003 and was subsequently convicted of all counts and all specifications against him. Following an abbreviated sentencing hearing at which his defense counsel waived closing argument, the jury sentenced Hand to death. Hand timely challenged his convictions and sentence before this Court, alleging a variety of constitutional and evidentiary errors at his capital trial. In a lengthy opinion, the Court upheld Hand's convictions and death sentence. See *State v. Hand* (2006), 107 Ohio St.3d 378, 840 N.E.2d 151.

At trial, Hand's attorneys pursued a unique theory involving the Ohio Court of Claims and collateral estoppel. At the close of the State's case, they moved to dismiss several of the death penalty specifications on the grounds that the court of claims' finding that Hand had not been involved in the murder of his first wife precluded the government from taking a contrary position at trial. (T.p. 3294-95.) The trial court denied the motion and allowed the specifications to be presented to the jury despite the court of claims' finding. Inexplicably, however, Hand's appellate attorneys did not appeal the trial court's ruling in his direct appeal. *Hand*, 107 Ohio St.3d 378, 840 N.E.2d 151.

Hand also filed a timely petition for post-conviction relief with the trial court, raising, *inter alia*, significant *Brady* and pre-trial publicity issues. *State v. Hand* (April 21, 2006), Delaware App. No. 05CAA060040, 2006 WL 1063758, unreported. Hand's post-conviction attorneys also filed a

Motion to Reopen his appeal in this Court on the grounds that his appellate attorneys had inadequately represented him. However, on both his direct appeal and state post-conviction proceeding, Hand was represented by attorneys from the Ohio Public Defender's Office presumably conflicted from fully exploring his ineffective assistance of counsel claims. Hand's appellate attorneys failed to raise a number of meritorious issues on appeal entitling him to a new direct appeal proceeding.

### **III. Hand Can Demonstrate Good Cause For Filing This Motion Out Of Time.**

As noted above, Hand was represented by attorneys from the same office on appeal and in post-conviction. In Ohio, similarity of the defense and appellate teams can serve as good cause for failing to raise ineffective assistance of counsel and other issues. See, e.g., *State v. Carter* (1973), 36 Ohio Misc. 170, 173, 304 N.E.2d 415, 417-18; see also *Combs v. Coyle* (C.A. 6, 2000), 205 F.3d 269, 276 ("The State acknowledges that counsel cannot be expected to raise his own ineffectiveness. . ."). While it is true that merely being employed by the same public entity does not automatically impute a conflict to individual attorneys, there is ample evidence in this case that Hand's appellate and post-conviction attorneys worked in concert on his case and therefore would have been unable to recognize ineffective assistance rendered by the other. See *Kinsley Aff.*, ¶ 9; see also *State v. Lentz* (1994), 70 Ohio St.3d 527, 530-31, 639 N.E.2d 784, 786 (discussing circumstances under which parallel representation by attorneys from the Ohio Public Defender's Office constitutes a conflict of interests). Hand can therefore demonstrate good cause for his failure to file this motion within the 90-day timeline specified in Sup. Ct. R. XI(5)(A).

An additional issue must be addressed here. Despite their inability to fully recognize the ineffectiveness of their fellow public defenders, Hand's post-conviction counsel did previously file

a motion to reopen this appeal on the basis of ineffective assistance of counsel on appeal. This Court has previously denounced the filing of subsequent motions to reopen, such as this one, but under vastly different circumstances from those present here. See *State v. Cooley* (2003), 99 Ohio St.3d 345, 792 N.E.2d 720. In *Cooley*, the defendant had been represented by different attorneys at trial and on appeal and had previously raised, and lost on the merits, appellate ineffectiveness in state post-conviction and federal habeas proceedings. *Id.* at 345, 792 N.E.2d at 721. Neither of these circumstances is present here. Unlike *Cooley*, Hand was represented by attorneys from the Ohio Public Defender until the recent appointment of the undersigned as federal habeas counsel. Also unlike *Cooley*, Hand did not raise appellate ineffectiveness in his post-conviction petition and has not yet obtained a ruling on the merits of his federal habeas petition. *Cooley* is therefore inapplicable and Hand is not barred from filing a successive motion to reopen his appeal.

**IV. Hand's Appellate Counsel Were Ineffective For Failing To Raise Meritorious Issues On Appeal.**

Like all capital appellants, Hand had an appeal of right to this Court. Ohio Const. Art. IV, § 2; R.C. 2929.05(A). Under *Evitts v. Lucey* (1985), 469 U.S. 387, an appeal of right “trigger[s] the right to counsel” and the concomitant right to the effective assistance of appellate counsel. *Id.* at 402, 401 (citations omitted). Counsel must exercise reasonable professional judgment in presenting the appeal. See *Jones v. Barnes* (1983), 463 U.S. 745, 751. To that end, appellate counsel must act as an advocate and support the cause of his client to the best of his ability. See, e.g., *Penson v. Ohio* (1989), 488 U.S. 75; *Anders v. California* (1967), 386 U.S. 738. The failure to present a meritorious issue for review constitutes the ineffective assistance of appellate counsel. See, e.g.,

*Matire v. Wainwright* (C.A. 11, 1987), 811 F.2d 1430; *Peoples v. Bowen* (C.A. 11, 1986), 791 F.2d 861.

Here, Hand's appellate counsel failed to present three significant and meritorious issues in his direct appeal to this Court. Each of these issues will be briefly discussed below. In the event the Court grants Hand's motion to reopen, Hand requests the opportunity to supplement his arguments with an additional brief explaining the issues more fully.

**A. The death penalty specifications relating to the murder of Hand's first wife were barred by the doctrine of collateral estoppel.**

The doctrine of collateral estoppel precludes a party from attempting to relitigate issues of fact that were resolved against it in prior litigation. See, e.g., *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193, 443 N.E.2d 978. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law for nearly eighty years. See *Ashe v. Swenson* (1970), 397 U.S. 436, 445-446; see also *State v. Lovejoy* (1997), 79 Ohio St.3d 440, 683 N.E.2d 1112. The United States Supreme Court mandates two inquiries in determining whether the doctrine of collateral estoppel applies in criminal cases: "First, what facts were necessarily determined in the first trial?...Second, has the government in a subsequent trial tried to re-litigate facts necessarily established against it in the first trial?" *United States v. Mock* (C.A.5, 1979), 604 F.2d 341, 343, citing *Ashe*, 397 U.S. at 443. In deciding a motion to bar prosecution on the basis of collateral estoppel, a court must consider: 1) whether a final judgment had been rendered in the first proceeding; 2) whether there are issues present in both proceedings which are sufficiently similar and sufficiently material; 3) whether, after an examination of the record of the initial proceeding the issues were actually litigated in the first case; 4) whether, after an examination of the record of the

first proceeding, the issues were necessarily decided in the first case; and 5) whether there is privity between the parties in both proceedings. See *Goodson*, 2 Ohio St.3d 193, 443 N.E.2d 978; *Howell v. Richardson* (1989), 45 Ohio St.3d 365, 544 N.E.2d 878.

Application of these factors to this case indicates that the state was estopped from pursuing the theory, and the death penalty specifications predicated on the theory, that Hand was responsible for the death of his first wife. After Donna's death in 1977, Hand applied for compensation from the Ohio victim's fund. (T.p. 1320-22.) As part of its inquiry, the Ohio Court of Claims considered and rejected the notion that Hand was involved in Donna's murder. See Opinion, p. 3 (attached as Exhibit C).<sup>2/</sup> The issue of Hand's culpability in the killing – the identical issue to that raised in the death penalty specifications at Hand's trial – was therefore litigated and resolved in Hand's favor in the court of claims proceeding. Because the State was a party to both actions, collateral estoppel barred the State from retrying the factual question of whether Hand was responsible for Donna's death. See *Mock*, 604 F.2d at 343.

Hand's trial counsel recognized and raised the collateral estoppel issue at trial, arguing that the death penalty specifications should be dismissed under Crim. R. 29. (T.p. 3294-95.) Inexplicably, however, Hand's appellate counsel did not pursue this issue on appeal. See Appellant's Brief (attached as Exhibit B). Given the strong case law in support of applying collateral estoppel to criminal cases, and the fact that Hand's trial counsel had preserved the issue for appeal, Hand's attorneys were ineffective for failing to raise the issue before this Court. This failure was significant, because any error in the calculus of aggravating and mitigating factors commands a fresh reweighing

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<sup>2/</sup>The Court of Claims opinion was marked as State's Exhibit 45 and admitted at trial. (T.p. 1319.)

and therefore a new sentencing hearing. See *Clemons v. Mississippi* (1990), 494 U.S. 738. Hand's appeal should accordingly be reopened to address this issue.

**B. The trial court erred in denying Hand's motion to dismiss the specifications regarding the murders of Hand's first two wives on Evid. R. 404(B) grounds.**

Evid. R. 404(B) precludes the introduction of the defendant's prior wrongful acts in order to demonstrate that he acted similarly with respect to the crime in question. Underlying the rule is the recognition that a defendant should not be convicted based upon other criminal activity and that such evidence, when admitted to impugn the defendant's character, is inherently prejudicial. See *Old Chief v. United States* (1997), 519 U.S. 172, 181-82; *Michelson v. United States* (1948), 335 U.S. 469, 475-476 ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). While the rule contains a list of exceptions to its basic principle, allowing evidence of prior wrongful activity to be admitted to prove intent or motive, "[t]he exceptions allowing the evidence 'must be construed against admissibility, and the standard for determining admissibility of such evidence is strict.'" *State v. Conway* (2006), 109 Ohio St.3d 412, 423, 848 N.E.2d 810, 824, citing *State v. Broom* (1988), 40 Ohio St.3d 277, 533 N.E.2d 682, syllabus.

Hand's defense counsel filed a pretrial motion to dismiss the death penalty specifications alleging that he killed Welch in order to prevent him from testifying as to the conspiracy between Hand and Welch to kill Hand's first two wives. (Pretrial T.p. 36-38). As grounds for the motion, Hand's attorneys relied in large part on Evid. R. 404(B) and the prohibition against introducing prior wrongful activity to prove a defendant's character. (*Id.*). Central to the argument were two key

observations: 1) Hand was not directly charged with the murders of his first two wives, but was instead charged with killing Lonnie Welch to prohibit him from testifying that Hand was involved in the crimes; and 2) there was no evidence to support the notion that Welch killed Hand's wives or that he intended to testify about Hand's role in any pending criminal proceeding. (Pretrial T.p. 36-37). Absent evidence of a pending case against Hand in which Welch would be a witness, there was no basis for the State's theory that Hand killed Welch to prevent him from testifying, and therefore no basis to admit the prior murders other than to suggest that Hand killed Jill in 2002. (*Id.* at 39, 42-43). Stated more succinctly, because there was no evidence of motive, intent, or plan, the State could only have pursued the specifications premised on Hand's involvement in the 1977 and 1979 crimes to prejudice the jury's view of Hand's character. This was prohibited under Evid. R. 404(b) and Hand's motion to dismiss should have been granted by the trial court. The failure of Hand's appellate counsel to raise this issue therefore constitutes ineffective assistance.

**C. Trial counsel provided ineffective assistance in failing to object to privileged testimony regarding Hand's bankruptcy attorney.**

Communications between an attorney and client are privileged. Communications between an attorney and potential client also give rise to an attorney-client relationship and are privileged. *Taylor v. Sheldon* (1961), 172 Ohio St. 118, 121, 173 N.E.2d 892, 895. A prosecutor is precluded from intentionally intruding into this attorney-client relationship and his failure to respect the privilege may violate a defendant's constitutional right to a fair trial under the Ohio and U.S. Constitutions. See *Shillinger v. Hayworth* (C.A. 10, 1995), 70 F.3d 1132, 1142. Failure of defense counsel to object to the admission of evidence protected by the attorney-client privilege gives rise to a claim for ineffective assistance of counsel where the failure causes substantial prejudice to the

defendant. See *United States v. Otero* (C.A. 3, Sept. 12, 2007), 2007 WL 2610412. The admission of evidence in violation of the attorney-client privilege may serve as grounds for reversal. *United States v. Mett* (C.A. 9, 1999), 178 F.3d 1058.

The State's lead theory at trial was that Hand's sole motive for killing his fourth wife, Jill, was financial. (T.p. 951, 3585-93). The State asserted murder was Hand's only option for extinguishing his mounting debt because Hand was ineligible for bankruptcy. *Id.* In an effort to demonstrate that Hand knew he was ineligible for bankruptcy prior to the murder, the State during its cross-examination of Hand improperly admitted into evidence privileged communications between Hand and his bankruptcy attorney and improperly elicited testimony from Hand relaying communications between him his bankruptcy counsel. (T.p. 3530-3531). Defense counsel also stipulated to matters relating to scheduled meetings between Hand and his bankruptcy counsel without asserting the attorney-client privilege. (T.p. 1470). This was the sole evidence the State admitted to demonstrate Hand's purported knowledge of his ineligibility for bankruptcy. Despite this clear invasion of the attorney-client privilege, defense counsel never objected to admission of the privileged correspondence. (T.p. 3530). Nor did defense counsel object to the proposed stipulation or to the State's questioning of Hand as to whether he had been told by bankruptcy counsel that he was ineligible for bankruptcy. (T.p. 3531).

Defense counsel's failure to object to admission of the privileged communications had devastating consequences for Hand because it served to strengthen the State's case that Hand knew he was ineligible for bankruptcy prior to Jill's death and therefore had a financial motive to commit the murder. Given this prejudice, Hand's appellate attorneys should have raised this issue on direct appeal.

**V. Conclusion**

For the foregoing reasons, Defendant-Appellant Gerald Hand received ineffective assistance on his direct appeal to this Court and his appeal should therefore be reopened. In addition, if the Court grants Hand's motion and reopens the appeal, Hand requests the opportunity to present new and more detailed briefs on the issues appellate counsel failed to raise in Hand's direct appeal.

Respectfully submitted,

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Counsel for Defendant-Appellant Gerald Hand

**CERTIFICATE OF SERVICE**

I hereby certify that, on the 24<sup>th</sup> day of September, 2007, an exact copy of the foregoing document was provided via regular U.S. mail to:

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Delaware, Ohio 43015

Michael S. Warbel  
Assistant Attorney General  
Capital Crimes Unit  
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J. Kinsley, by B. Parsons, per e-mail  
JENNIFER M. KINSLEY (No. 0071629) *authority*

Counsel for Defendant-Appellant Gerald Hand

EXHIBIT A

IN THE OHIO SUPREME COURT

STATE OF OHIO,	:	Case No. 2003-1325
Plaintiff-Appellee,	:	On Appeal from the Decision of
V.	:	the Delaware County Court of
GERALD HAND,	:	Common Pleas,
Defendant-Appellant.	:	Case No. 02CRI-08-366

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**AFFIDAVIT OF JENNIFER M. KINSLEY**

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Comes now Affiant, Jennifer M. Kinsley, being duly sworn and cautioned and hereby states under oath as follows:

1. I, Jennifer M. Kinsley, am an attorney licensed to practice law in the State of Ohio. I am presently employed as an associate with the firm of Sirkin Pinales & Schwartz LLP in Cincinnati, Ohio.

2. Along with Ralph Kohnen and Jeanne Cors of Taft, Stettinius & Hollister, I presently represent Defendant-Appellant Gerald Hand with regard to his Motion to Reopen based on ineffective assistance of appellate counsel. I was appointed in that capacity by the United States District Court for the Southern District of Ohio in March 2007. I had no prior responsibilities with regard to Mr. Hand.

3. Hand was represented in his direct appeal by Stephen A. Ferrell, Pamela J. Prude-Smithers, and Wendi Dotson of the Ohio Public Defender's Office. On state post-conviction and appeal, Susan M. Roche and Veronica N. Bennu, also of the Ohio Public Defender's Office.

4. In conjunction with my representation of Mr. Hand, I have reviewed the appellate record filed with this Court in Appeal No. 2003-1325. This includes the brief filed by Mr. Hand's appellate counsel, as well as this Court's decision upholding his convictions and death sentence.

5. In reviewing the record, I discovered that Mr. Hand's appellate counsel had not challenged his convictions on three grounds I believed to be meritorious: 1) whether the death penalty specifications related to the murders of Hand's first wife were barred by the doctrine of collateral estoppel; 2) whether trial counsel were ineffective for failing to object to questions and testimony regarding Hand's bankruptcy attorney on the grounds of attorney-client privilege; and 3) the failure to challenge the trial court's ruling denying Hand's motion to dismiss the specifications relating to the murder of Hand's first two wives.

6. It is my professional opinion, after researching the issues, that the failure to raise such challenges prejudiced Mr. Hand in his appeal to this Court.

7. Had the issues identified in paragraph 5 been raised and granted on direct appeal, it is my belief that Mr. Hand's convictions and/or death sentence would have been reversed. As such, Hand can establish the prejudice necessary to sustain an ineffective assistance claim under *Strickland v. Washington* (1984), 466 U.S. 668.

8. In addition to reviewing the appellate record in this case, I have also reviewed the post-conviction files from Hand's trial, appeal to the Fifth District Court of Appeals, and subsequent appeal to this Court.

9. There are numerous documents, including letters, memoranda, notes, and email messages, contained in both the direct appeal files and the post-conviction files that indicate that Hand's direct appeal attorneys and post-conviction attorneys were working together and coordinating



EXHIBIT B

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
 :  
 Appellee, : Case No. 03-1325  
 :  
 -vs- :  
 :  
 GERALD R. HAND, :  
 :  
 Appellant. : **This is a death penalty case**

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ON APPEAL FROM THE COURT OF  
COMMON PLEAS OF DELAWARE COUNTY  
CASE NO. 02-CR-1-08-366

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MERIT BRIEF

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## STATEMENT OF THE CASE

On January 15, 2002, Jill Hand was murdered in her home in Delaware, Ohio. Subsequently, her husband, Gerald Hand was arrested and indicted on the following six counts:

Count One: O.R.C. § 2903.01(A) Aggravated Murder of Jill J. Hand; with two specifications: O.R.C. § 2929.04(A)(5) course of conduct, and O.R.C. § 2941.145 firearm.

Count Two: O.R.C. § 2903.01(A) Aggravated Murder of Walter “Lonnie” Welch; with seven specifications: O.R.C. § 2929.04(A)(5) course of conduct; O.R.C. § 2929.04(A)(3) escaping apprehension for complicity in the murder of Donna Hand; O.R.C. § 2929.04(A)(3) escaping apprehension for complicity in the murder of Lori Hand; O.R.C. § 2929.04(A)(3) escaping apprehension for the murder of Jill Hand; O.R.C. § 2929.04(A)(8) victim was witness to murder of Donna Hand; O.R.C. § 2929.04(A)(8) victim was witness to murder of Lori Hand; and an O.R.C. § 2941.145 firearm specification.

Count Three: O.R.C. § 2923.01(A)(1) Conspiracy to commit aggravated murder of Jill J. Hand; with a firearm specification.

Count Four: O.R.C. § 2923.01(A)(2) Conspiracy to commit aggravated murder of Jill J. Hand; with a firearm specification.

Count Five: O.R.C. § 2923.01(A)(2) Conspiracy to commit aggravated murder of Jill J. Hand; with a firearm specification (indicted in Case No. 03CR-I-01-014 and later consolidated).

Count Six O.R.C. § 2921.34(A)(1) Escape (indicted in Case No. 02CR-I-12-643 and later consolidated).

Jury selection began on May 1, 2003. The trial began on May 8, 2003 and on May 30, 2003 the jury found Hand guilty on all six counts and related specifications. For purposes of mitigation the specifications were merged into two aggravating circumstances: (1) course of

conduct under count one; and (2) purpose to escape detection, apprehension, trial, or punishment for Defendant's complicity in the murders of Lori Hand and Donna Hand and the murder of Jill J. Hand under count two. (Entry at Docket No. 479). The mitigation hearing took place on June 4, 2003. On that same day, the jury returned a verdict of death. (Tr. 3940).

On June 16 2003, the trial court sentenced Hand to death for counts one and two. In addition, the trial court sentenced Hand to three years on the firearm specification attached to count two, and three years for the escape charge in count six. No sentence was imposed on counts three, four, and five, pursuant to O.R.C. § 2923.01(G). (Entry at Docket No. 477).

The Office of the Ohio Public Defender (OPD) was appointed to Hand's appeal. (Entry at Docket No. 487). Hand filed motions to supplement the record and to unseal portions of the record. On April 19, 2004 this Court granted those motions and ordered the record to be supplemented with all juror questionnaires; transcripts of all pretrial hearings and conferences; state exhibits 269 and 280; and transcripts of the grand jury testimony of Kenneth Grimes, Gerald Hand, and Shannon Welch by May 10, 2004.

Hand is now before this Court on his appeal as of right.

#### **STATEMENT OF FACTS**

On March 25, 1976, Gerald Hand's first wife, Donna Hand, was found dead in the basement of her house. (Tr. 2960). The cause of death was later determined to be strangulation. (Tr. 2971). The house was ransacked, but there was no sign of forced entry. (Tr. 2138-39). No charges were filed against Hand or Welch in connection with Donna Hand. Hand received money from insurance policies and crime funds for the death of Donna Hand. (Tr. 1281, 1316).

On September 9, 1979, Hand's second wife, Lori Hand was found dead in the basement of her house. (Tr. 3662). The cause of death was later determined to be gunshot and

strangulation. (Tr. 2354). The house was ransacked, but there was no sign of forced entry. (Tr. 2064-65). The killer of Lori Hand also stole her vehicle, which police later recovered. (Tr. 2070). Police found a pair of bloody gloves near the crime scene. (Tr. 2077). The gloves were found to have Lori Hand's DNA and another source of DNA, however, this other source did not match Welch or Hand. (Tr. 3179). A long blond hair found on Lori Hand's body was never identified. (Tr. 3208). At the time of Lori's death, Hand was spending the day with Lori's brother because Lori and her mother were supposed to be preparing the house for a wedding shower for a cousin. (Tr. 2164). No charges were filed against Hand or Welch in connection with Lori Hand's death. Hand did not file an application to the victim of crimes fund to receive money, although he filed a claim on behalf of his son, which was rejected because it was filed late. Hand did receive money from a life insurance policy for the death of Lori Hand. (Tr. 1303, 3656).

Hand married and divorced his third wife Glenna in the 1980's. (Tr. 3452-53). Hand then married his fourth wife, Jill J. Hand, on October 20, 1992. (Tr. 3458). They resided in Jill's home in Delaware County. (Tr. 1867).

Since the 1970's, Hand had been involved in questionable financial practices which included his radiator business, real estate, and credit cards. (Tr. 3427). During his marriage to Jill, Hand had various life insurance policies on numerous credit cards. (Tr. 3658-9). Hand had been paying down the balances of these credit cards, at the request of his wife Jill, and had sold his real estate and had paid the money towards his outstanding balances. (Tr. 1876). At the time of the crime, Hand still had outstanding balances on various credit cards and many had recently been discontinued. Numerous witnesses testified at trial to Hand's financial practices and history. (Tr. 978, 992, 1011, 1022, 1046, 1093, 1103, 1114, 1129, 1153, 1165, 1187, 1206, 1225,

1236, 1241, 1251, 1262, 1268, 1278, 1281, 1287, 1303, 1328, 1343, 1356, 1350, 1390, 1471, 1481, 1487, 1493, 3223, 3234). At the time of the crime, Hand closed his radiator business and was working as a security guard. (Tr. 1560, 3467).

Gerald Hand and Lonnie Welch had known each other since the late 1960's. (Tr. 3652). They met at mechanics school, and Welch later worked for Hand at his radiator shop in Columbus, Ohio. (Tr. 3400, 3432). Welch worked for Hand at his radiator shop through much of the 1980's. (Tr. 2440, 2694-95). Welch and Hand had a falling out due to Welch's drug addictions and theft of items from Hand's business. (Tr. 3472-73). Hand fired Welch in the early 1990's. (Tr. 2408). Welch was never known to possess large amounts of money, and was known to have a drug abuse problem. (Tr. 3651).

In December, 2001, Welch was incarcerated on unrelated charges of theft. (Tr. 3654). After his incarceration, Welch's niece, Stacy Edwards, approached Hand at his job asking Hand to give the family money for Welch's bail. (Tr. 2784). Hand refused. (Tr. 2785). No bond was posted, but Welch was later released from jail on January 3, 2003. (Tr. 2703).

On January 15, 2002, Welch traveled to Hand's house. Welch arrived sometime between 6:45 p.m., when Hand arrived home from work, and 7:15 p.m., the time of the 911 phone call placed by Hand. (Tr. 1406, 1579). In that 911 call, Hand stated someone had broken into his home and he needed assistance. (Tr. 1401; Exh. 74). When police arrived, they found Welch's body in the driveway of the home next to Hand's. (Tr. 1411, 1415). A mask was found next to Welch's head. (Tr. 1423). Welch had been shot several times and was pronounced dead at the scene. (Tr. 1415). It was later determined Welch had been shot with a .38 caliber handgun. (Tr. 1768). Testing revealed Welch had used cocaine the night of this death. (Tr. 1777). Gunshot residue was present on the fingers of gloves found on Welch. (Tr. 1424, 1701-2).

Police also found the body of Jill J. Hand in the doorway between the living room and the kitchen, not far from the front door. (Tr. 1434). There was no sign of forced entry. (Tr. 1432). Jill Hand was pronounced dead at the scene, and later it was determined she had been shot with a .32 caliber handgun. (Tr. 1583, 1763) Both the .32 and the .38 handguns were recovered from the scene, but neither contained fingerprints. (Tr. 1437). No fingerprints were found at the scene. (Tr. 1634). Paramedics testified that Hand was distraught, hyperventilating and incoherent when they treated him that night, Hand indicated that he thought the intruder may have been someone who used to work for him. (Tr. 1587-89).

After Welch's death, the police questioned several of his family members including Shannon Welch, Lonnie Welch's brother. At the time of his questioning Shannon indicated that he knew nothing about what Welch was involved in (Tr. 2661). The next day, Shannon made a threatening telephone call to Hand's mother. (Tr.2662). Later, various family members and friends began to come forward to say that Lonnie had said he had worked for Hand to kill his three wives. His cousin, Pete Adams testified that on either a Saturday or Sunday in 1979 approximately two weeks after Lori Hand was murdered, Welch came to Mr. Adams house and told him that he had killed Donna and Lori Hand for Bob. (Tr. 2392-2396). Adams testified that although Welch was crying, Adams did not respond. After Mr. Welch provided this compelling information, Welch left. (Tr. 2417).

Teresa Fountain testified that she overheard Welch make certain admissions to her friend Isaac Bell in her apartment sometime between 1968 and 1977. (Tr. 3113). According to Fountain, Welch was talking to Bell about knocking off his boss's wife for insurance money. (Tr. 3116). Shannon Welch, Lonnie Welch's brother, testified that Lonnie had told him he had killed Hand's first wife and that he was going to kill the present one. (Tr. 2652). Lonnie

allegedly asked Shannon on repeated occasions to procure a gun for him so that he could take care of business for Hand. (Tr. 2653). Shannon said that when Lonnie left the party at their sister Betty's house, he said he was going to see Hand and was taking care of business that night. (Tr. 2650). Despite the fact that these witnesses had allegedly known about these confessions for many years, none had come forward to tell authorities or to warn Jill Hand.

This hearsay evidence was admitted at trial over defense objection. (Tr. 2384, 2436, 2637, 2690, 2745, 2768, 2868, 2889, 3111). Additional hearsay evidence was presented, over defense objection, by two former inmates regarding inculpatory statements made by Welch and Hand. (Tr. 2902, 3007).

In addition to evidence of the aggravated murder, the jury was presented with evidence regarding the escape charge against Hand. While incarcerated awaiting trial on these charges, three inmates, housed in the same jail unit as Hand, developed an escape plan involving cutting through a lock and leaving through a back door. (Tr. 2987). Hand was not involved in developing this plan. (Tr. 3349, 3375). Hand did not assist in obtaining and hiding the blades, nor did he assist in the cutting of the lock. (Tr. 2999). Guards quickly learned of the attempt, and the three inmates, along with Hand, were charged with escape.

After hearing all of the evidence presented against Hand, the jury convicted Hand on all counts and specifications. The trial proceeded to the mitigation phase.

Very little was revealed about Hand's background during the mitigation phase. Gerald Hand had a difficult childhood. His father was an alcoholic who did not get along with Gerald's mother and who may have abused her. (Tr. 3871) They divorced when Gerald was a child. (Id.) Gerald was eventually placed with Franklin County Children's Services after there was an allegation that his mother was openly cohabitating with men in front of the children. (Id.)

Gerald Hand was 54 years old at the time of trial (Tr. 3393) and had no previous criminal record. Evidence was presented that Hand has held a job and has acquired useful vocational skills. He is reasonably intelligent and has no history of drinking or substance abuse. (Tr. 3874-75). Evidence was also presented regarding Hand's military service. Hand was drafted when he was only twenty years old and spent a year and saw combat in Vietnam. (Tr. 3397-98) He was honorably discharged. (Tr. 3399)

Gerald and Lori Hand's son, Robert, presented testimony that his father would continue to be a positive influence on him and his children even if he were to spend the rest of his life in prison. (Tr. 3890). Gerald Hand volunteered as a scout master for his son and did charity work through the scouting organization. (Tr. 3883, 3890). Robbie Hand has already suffered the loss of his mother, Lori Hand, and asked the jury to spare his father's life. (Tr. 3891). For Robbie, Gerald Hand has "really been the only close family member I've ever had, the only one I've had to look up to, and to take care of me, provide for me." (Tr. 3888).

After only one morning of mitigation presentation, the jury returned a verdict of death. (Tr. 3940). The trial court followed the jury's recommendation. (Tr. 3950).

### **Proposition Of Law No. 1**

Where the State fails to prove by clear and convincing evidence that a witness is unavailable due to a criminal defendant's wrongdoing, and the proposed evidence does not meet standards of reliability, it is constitutional error to admit this evidence against the defendant.

Gerald Hand was charged with committing the aggravated murder of his wife Jill Hand. Attached to the aggravated murder charge were several death penalty specifications. The State's position throughout the case was that Hand engaged in a conspiracy with Lonnie Welch to commit Jill Hand's murder. It was also the State's theory that this was not the first time that Hand had conspired with Welch to kill a wife. In fact, the State argued that Hand and Welch had conspired to kill two of Hand's former wives, Donna and Lori. The State alleged that on the night of January 15, 2002, Hand killed both Jill and Lonnie in an attempt to prevent Lonnie from testifying against him in the deaths of his wives Donna and Lori.

The weakness in the State's case was that there was no direct evidence to support this theory that Hand had hired Welch to commit any of his wives' murders. Therefore, for purposes of proving its case, the State had to rely exclusively on the out-of-court statements allegedly made by Welch to various family members and friends. Because these statements were not made under oath and were never subject to cross-examination, the State offered these statements as evidence under Ohio Rules of Evidence 804(B)(6), the rule for forfeiture due to wrongdoing.

The State of Ohio is unable to meet the standards required under Ohio R. Evid. 804(B)(6). Furthermore, the statements as offered from Welch's family and friends, do not meet due process requirements of reliability. Therefore, they should not have been admitted at Hand's capital trial. The fact that the jury was able to consider them and that, in fact, the State's entire case depended on them shows that Hand was prejudiced by their admission. This error violated Hand's constitutional rights under the Confrontation Clause of the Sixth Amendment to the

United States Constitution as well as his rights to due process and a fair trial guaranteed by the Fourteenth Amendment. This Court must reverse.

**1. Evidence Rule 804(B)(6).**

Evidence Rule 804(B)(6) is an exception to Ohio's prohibition against hearsay evidence.

Ohio R. Evid. 804(B)(6) provides:

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

This rule is a relatively new one in the rules of evidence, having been adopted in 2001 and its analysis presents questions of first impression to this Court. Pursuant to this rule, the State gave notice of its intention to introduce the statements against Hand. (T.d. 116). The defense responded, opposing the admission of these statements. (T.d. 122). The trial court ruled that the State could lay the foundation for the admission of these statements at trial and also ruled that the statements must exhibit guarantees of reliability and trustworthiness in order to be admitted before the jury. (T.d. 130).

The State had to demonstrate that: 1) Welch's unavailability was due to the wrongdoing of Hand, 2) for the purpose of preventing the witness from attending or testifying, and 3) the statements exhibited guarantees of reliability and trustworthiness. The trial court found that these burdens had been met and admitted the testimony. (Tr. 2333). This was error.

**2. The State of Ohio failed to meet the wrongdoing requirement of the rule.**

The Court held hearings and took the testimony of several witnesses outside of the hearing of the jury in order to determine whether each of the requirements of the hearsay exception was met. After hearing a few of the witnesses, the Court ruled that based on the

physical evidence and on the fact that Hand knew Welch was there, that Hand shot Welch wrongfully. (Tr. 2333). As support for the ruling the Court pointed to evidence that Kenneth Grimes testified that Hand knew Welch well and shot him at a close range in the mouth and in the back. (Tr. 2332-33). In making this ruling the Court utilized the preponderance of the evidence rule despite the fact that defense counsel urged the court to review the case under a clear and convincing standard.

The court failed to consider all relevant evidence in reaching this determination. Specifically, the court failed to consider Hand's affirmative defenses of self-defense and voluntary manslaughter. By failing to consider all of the relevant evidence for this inquiry, the trial court made the determination of whether Hand wrongfully caused Welch's death an uncontested finding.

From the very beginning, Hand conceded that he had killed Welch. Nevertheless, Hand has consistently argued that it was necessary for him to cause Welch's death because Welch entered Hand's home and killed his wife, Jill Hand. Thus, the essential inquiry that the court was required to undertake was not whether Hand killed Welch as that issue was uncontested. Instead, the relevant inquiry was whether Hand's actions toward Welch were justified, or in other words whether Hand was acting in self-defense when he killed Welch. There is no evidence from the record that the trial court took into consideration any evidence that was presented in support of Hand's self-defense claim. In fact, the trial court's decision on the matter took place before defense counsel put forth the evidence to support the self-defense theory.

Moreover, the trial court used the incorrect standard in deciding whether wrongdoing had taken place. The court determined that the State had met this burden by a preponderance of the evidence. (Tr. 2332). Because the issue of wrongdoing in this case is essentially the issue of

Hand's guilt or innocence, this Court should hold the State to a clear and convincing standard of proof. This is the standard the court adopted in United States v. Thevis, 665 F.2d 616, 629-30 (5<sup>th</sup> Cir. 1982). Where the issue of wrongdoing is the central issue of the trial and where, as here, the alleged wrongdoing can only be proved with the untested hearsay evidence, a more rigid standard of proof than mere preponderance of the evidence is warranted.

The failure of the trial court to consider Hand's affirmative defense claim in reaching the decision regarding whether Hand wrongfully caused Welch's death was error. The trial court's finding that Hand wrongfully caused the death was not supported by clear and convincing evidence or by a preponderance of the evidence. The State should not have been permitted to utilize Welch's statements against Hand in his capital trial.

**3. The State failed to show that Hand's purpose in killing Welch was to make him unavailable as a witness.**

At the time Lonnie Welch was killed, there were no charges pending against Hand and no trial was contemplated. Although Welch allegedly could have come forward to authorities with evidence of Hand's crimes as early as 1976, he never did so. He was not talking to police about the crimes and had never sought to turn Hand in. By its plain terms, Rule 804 (b)(6) requires a finding that the defendant acted with the intention of making the declarant unavailable as a witness. United States v. Dhinsa, 243 F.3d 635, 653 (2<sup>nd</sup> Cir. 2001) (analyzing similar federal rule) Simply put, there was no evidence that Welch ever intended to testify against Hand. This is because such testimony from Welch would have put himself in danger of facing the same charges.

While it is true that the cases interpreting Fed. R. Evid. 806(b)(4) do not require that the witness have been called as a trial witness, they involved cases where the defendant was under investigation and the person killed had shown some cooperation with authorities. In Dhinsa, the

defendant had a witness killed who had threatened to go to the police about the disappearance of his brother. Another witness killed was indeed cooperating with the police. Id. at 657. In United States v. Houlihan, the defendants killed an informant that they suspected of cooperating with the police. 92 F.3d 1271, 1280-81 (1<sup>st</sup> Cir. 1996). The victim was in fact cooperating with the police. Id.

In order to invoke the rule, the State must demonstrate that Hand's motivation to kill Welch was to silence him as a witness. Id. at 1279. If the witnesses for the State are to be believed, that silence had been maintained for nearly 30 years. Although many witnesses testified for the State that Welch had claimed to be Hand's hired killer, these same witnesses' testimony did not provide the element that Hand was motivated to kill Welch to keep him from testifying. None said that Welch feared Hand or that Welch was trying to avoid him. On the contrary, witnesses testified to continuing contact. The sole support offered by the State for that key element of the rule came from jailhouse informant Kenneth Grimes. (Tr. 2310). This testimony is not sufficient to meet the preponderance of the evidence standard used below to say nothing of clear and convincing evidence. It is totally insufficient.

The State cannot establish that Hand wrongfully killed Lonnie Welch in order to prevent him from testifying at his trial. The State failed to meet the requirements of Ohio Evid. R. 806 (B)(6) and this Court must reverse.

**4. The statements lack sufficient reliability.**

Although a determination that the hearsay statements were reliable may not be required by the Confrontation Clause, there is a Due Process requirement that the trial court not only find that Hand wrongfully caused the death of Welch, but also that the statements the State sought to introduce were reliable statements. See, 2001 Staff Notes to 804(B)(6) ("The trial court retains

authority under Evid. R. 403 to exclude unreliable statements. This is probably also a due process requirement.”) At the very least, the rules of evidence require that the State demonstrate that the potential for unfair prejudice does not outweigh the statements’ probative value. Ohio Evid. R. 403(A). Recognizing this, the trial court, in determining whether the hearsay statements were admissible, reviewed the witness statements for reliability determinations. (Tr. 2313).

When viewing the witness statements as a whole it is clear that they do not possess the reliability necessary for admission in a capital trial. All of the witnesses who the State sought to introduce at Hand’s trial were either friends or family members of the victim Lonnie Welch. Moreover, the testimony of the witnesses was hardly credible. Many of the witnesses testified that at some point Welch admitted to them that he murdered Hand’s wives, Donna and Lori. Nevertheless, not one of these witnesses advised the authorities of this information, nor did the witnesses, according their testimony, discuss this information with anyone other than Lonnie Welch.

Friends and family of Lonnie Welch had a motive for coming forward with their testimony at the time of trial. They were angry with Hand because of the fact that he caused Lonnie’s death. (Tr. 2662). The stories that these witnesses devised for purposes of Hand’s trial simply lacked the reliability that is required in a capital trial.

The first witness to provide testimony for review to the court on the 804(B)(6) issue was Pete Adams, Welch’s cousin. Adams testified that in 1979 approximately two weeks after Lori Hand was murder, on either a Saturday or Sunday, Welch came to Adams’ house and told him that he had killed Donna and Lori Hand for Bob. (Tr. 2392-2396). Adams testified that although Welch was crying, Adams did not respond. After Welch provided this compelling information, Welch left. (Tr. 2417). When asked whether Adams disclosed this information to anyone,

Adams testified that he did not because he feared that Welch would get into trouble. (Tr. 2395).

Adams testified that he only told someone, his sister, after Lonnie was dead. (Tr. 2497).

Betty Evans, Welch's sister also provided information regarding statements Welch made. Evans testified that she saw that Welch had a wad of money in the 1980s and that Welch said was the shop's money. (Tr. 2771). She also testified that just before Welch was killed, he had left a party at her house saying that he was going out to pick up some money and that he would be back. (Tr. 2772).

Teresa Fountain testified that she overheard Welch make certain admissions to her friend Isaac Bell in her apartment sometime between 1968 and 1977. (Tr. 3113). According to Fountain, Welch was talking to Bell about knocking off his boss's wife for insurance money. (Tr. 3116).

Anna Hughes testified that one evening about five years before the trial, Welch had told her he was going out to Hand's home in Delaware to get some money because he needed a hit. (Tr. 2873).

David Jordan claimed he had met Lonnie Welch in jail in December 2001, just a few weeks before Welch was killed. (Tr. 2905). According to Jordan, Welch told him that he might need someone to drive for him because his eyes were messed up and offered to pay him between five and ten thousand dollars. (Tr. 2908). Welch supposedly told him that he was going to "take somebody out" for someone named Bob and that he had done this type of work for him before. (Tr. 2908-09). This job was supposed to take place sometime in January. (Tr. 2910).

Barbara McKinney, Welch's common-law wife, testified that Welch used to meet a friend two or three times a week to get money. (Tr. 2697). Welch later told her that this friend was Gerald Hand and that he did not want her to say his name during a monitored telephone

conversation. (Tr. 2705). She also testified that Welch had said that Hand had showed him his house in Delaware. (Tr. 2702).

Tezona McKinney, Barbara's daughter, recited the same account about a friend that used to give Welch money. (Tr. 2751). On the day before he died, Welch promised her that he would buy her mother a car if he got "this money tomorrow." (Tr. 2756). She also testified that Welch had told her that Hand had killed his first two wives and that she had heard this from "many, many, many people." (Tr. 2758).

Shannon Welch, Lonnie Welch's brother, testified that Lonnie had told him he had killed Hand's first wife and that he was going to kill the present one. (Tr. 2652). Lonnie allegedly asked Shannon on repeated occasions to procure a gun for him so that he could take care of business for Hand. (Tr. 2653). Shannon said that when Lonnie left the party at their sister Betty's house, he said he was going to see Hand and was taking care of business that night. (Tr. 2650).

These witnesses who testified as to statements allegedly made by Lonnie Welch were all members of his family or friends. The one exception was David Jordan who was a friend of Shannon Welch when they had served time together in Lucasville. (Tr. 2818). Jordan admitted to trying to use this information to get a deal on his sentence. (Tr. 2826). He also admitted that he had lied to a judge for the purpose of getting into a drug rehabilitation program in order to escape confinement. (Tr. 2836-37).

Despite the alleged knowledge that all of the above people possessed, that Welch was murdering Hand's wives, not one of them ever went to the police. Shannon Welch never tried to stop a murder he allegedly knew was taking place. Pete Adams claimed that Lonnie Welch confessed to him, but also claimed that he never asked a single follow-up question and expressed

no reaction. After this allegedly tearful and dramatic confession, Welch simply went home. This scenario defies any believability.

Furthermore, there is evidence that these witnesses were angry at Hand for shooting Welch. Shannon Welch, an admitted drug addict with a long criminal history, called Hand's mother and made threats the day after the shooting. (Tr. 2662). Police suspected Barbara McKinney of having large sums of money. (Tr. 2717).

None of these statements alleged to have been made by Lonnie Welch possess the reliability required for hearsay statements to come in to prove a capital crime. The probative value of these statements was substantially outweighed by the danger of unfair prejudice and should therefore not have been admitted. Ohio R. Evid. 403(A). Because these statements are the crux of the State's case against Gerald Hand, this Court must reverse.

## **5. Conclusion**

The trial court erred when it allowed hearsay statements attributed to Lonnie Welch to be presented before the jury. The trial court did not properly find the requirements of Ohio R. Evid. 804 (B)(6) because it concluded that Hand had committed wrongdoing without considering his affirmative defense of self-defense. Furthermore, the State failed to show that Hand was motivated to kill Welch to prevent him from testifying against him. No such credible evidence was presented and that requirement cannot simply be presumed.

The United States Supreme Court has recently reaffirmed the essential role of the Confrontation Clause's requirement of cross-examination to test the truthfulness of evidence used to convict a criminal defendant. Crawford v. Washington, \_\_\_ U.S. \_\_\_, 124 S. Ct. 1354 (2004). Lonnie Welch's alleged admissions were never subject to cross-examination and have never been tested for their reliability. Yet, they form the basis for the State's case that Gerald

Hand hired Lonnie Welch to kill his first two wives and had asked him to kill his fourth. The Confrontation Clause demands more. A capital conviction cannot stand on such untested evidence and this Court must reverse Gerald Hand's convictions and death sentence.

## **Proposition Of Law No. 2**

The introduction and admission of prejudicial and improper character and other acts evidence and the failure of the trial court to properly limit the use of the other acts evidence denied Gerald Hand his rights to a fair trial, due process and a reliable determination of his guilt and sentence as guaranteed by the United States Constitution, Amends. V, VI, VIII and XIV; Ohio Const. Art. I, §§ 10 and 16.

### **1. Introduction.**

During the course of Gerald Hand's trial, the State of Ohio introduced and the trial court admitted considerable evidence concerning Hand's bad character and bad acts. The admission of much of this testimony was erroneous and clearly prejudicial to Hand.

Throughout the early part of the trial, the State laid the foundation for how the jury should view evidence of Hand's financial practices, as evidence to demonstrate that Hand had propensity to commit crimes, and thus was guilty of the murder of his wife, Jill Hand. Although the trial court provided a limiting instruction that the jury was to consider corporate tax returns only for showing a motive (Tr. 1470), it never provided guidance of the majority of the State's efforts to paint Hand as a dishonest and reprehensible person. It is obvious that the jury would be inclined to use evidence of other bad acts to infer Hand's guilt on the charges to kill three wives.

### **2. Law on admissibility of other acts and bad character evidence.**

A bedrock principle of Anglo-American jurisprudence is that a defendant can only be convicted on evidence that he committed the act charged, not on his reputation as a criminal. State v. Jamison, 49 Ohio St. 3d 182, 184, 552 N.E.2d 180 (1990). Since observance of this axiom is essential to a fundamentally fair trial, this Court has long held that, as a general rule, evidence of acts independent of the crime for which the accused is on trial are not admissible to show that the defendant acted in conformity therewith. State v. Mann, 19 Ohio St. 3d 34, 36.

482 N.E.2d 592, 595 (1985); State v. Curry, 43 Ohio St. 2d 66-68-69, 330 N.E.2d 720, 723 (1975); State v. Burson, 38 Ohio St. 2d 157, 311 N.E.2d 526 (1974); State v. Hector, 19 Ohio St. 2d 167, 249 N.E.2d 912 (1969).

The rule prohibiting the admission of other acts evidence to show conduct is set forth in Ohio R. Evid. 404(A) which provides that "evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion". Nevertheless, there are exceptions to the rule which provide that evidence of other crimes may be admissible for other limited purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Ohio R. Evid. 404(B). Ohio Revised Code Section § 2945.59 (Anderson 1996) codifies this rule. Although the Revised Code does not specifically list identity as a proper purpose, the Ohio Supreme Court has held that identity is "included within the concept of scheme, plan, or system." State v. Shedrick, 61 Ohio St. 3d 331, 337, 574 N.E.2d 1065, 1069 (1991) (citations omitted).

Therefore, to be admissible under Evidence Rule 404(B) and O.R.C. § 2945.59, the proponent of the other acts evidence must offer "substantial proof" that the other act happened. State v. Broom, 40 Ohio St. 3d 277, 282, 533 N.E.2d 682, 690 (1988). The proponent's evidence must also tend to show a proper purpose. Id. Nevertheless, Rule 404(B) is to be a rule of exclusion, not inclusion, which incorporates a strict standard for admissibility of other acts evidence. Id. at syl. 1.

### **3. Evidence of fraudulent business practices and tax avoidance.**

Although the State of Ohio introduced evidence of Gerald Hand's financial state of affairs in an attempt to prove a motive for murder, it then used that same evidence to argue that Hand did not hesitate to violate the law in general. Evidence was introduced that Hand's

business practices were not always in compliance with the tax laws and improperly used that evidence in closing arguments to show his propensity to commit crimes:

And did you catch his statement of Tuesday about he and his father like to save on their taxes by paying employees under the table in cash? We all know that tax avoidance is common in this country, but what he calls saving on taxes is actually fraud. The fact that he so breezily engaged in that kind of behavior when he ran his business tells us much about his respect for the law and his willingness to lie and deceive. This wasn't just a rinky-dink, every once in a while practice, that the defendant engaged in during the slow season of his business. Exhibit 275, prepared by detective Otto, indicates that the defendant billed more than one hundred thousand dollars fraudulently to his own business on his own credit cards. This was fraud on a massive scale, and it exemplifies the way this man operates.

(Tr. 3587). The State of Ohio introduced evidence of Hand's financial situation in order to prove motive. This may have been proper. However, to use that same evidence to bolster the argument that Hand is simply a dishonest person who does not respect the law is the precise type of argument that other bad acts law disallows.

The trial court had ruled earlier in the trial that the State could introduce evidence including Hand's tax records, but that the State had to be careful about how this evidence was used. (1461-62). The State was prohibited from making any inferences about any "bad acts." (Tr. 1462). The above-cited argument shows that the State used evidence that Hand was not in compliance with tax laws to argue to the jury that Hand had no "respect for the law" and to argue that dishonest business practices exemplified for the jury "the way this man operates." This type of argument was wholly improper.

#### **4. Other evidence of Hand's bad character.**

The State engaged in the practice of painting Gerald Hand as a bad person who is likely to commit crimes. The State improperly posed leading questions that asked for lay opinion testimony about whether Hand "acted sad" about Jill's death. (Tr. 1901). The State presented

testimony that instead of crying when Lori died, he was “stomping and saying he was demanding to go in the house.” (Tr. 2119). Prosecutors were able to introduce evidence that Hand kicked his father out of his business, was obsessed with money and that he enjoyed reading “true crime” stories. (Tr. 2440, 2443). They elicited testimony that Hand was a “horny old man” that constantly wanted sex with his wife Lori. (Tr. 2126). Further testimony came out that he had an infatuation with Barbara McKinney’s daughter. (Tr. 2696).

None of this information was relevant to proving the essential elements of the crimes Hand was charged with. Reading “true crime” stories is not relevant to whether a person has committed a crime. In the same way, a person’s sexual habits and interests have nothing to do with murder where no sex crime is alleged. Finally, lay witnesses are not qualified to offer opinions on how anyone should react to finding out their wife has been murdered. All of this testimony was completely irrelevant and highly inflammatory. This is exactly the type of evidence that is excluded under Rule 404(A). Moreover, the evidence did not go to demonstrate one of the proper purposes under 404(B).

#### **5. Failure to provide limiting instruction.**

This Court has held that where evidence of other acts is admitted, it is the duty of the trial court at the time such evidence is offered to instruct the jury regarding the purpose for which it is admitted. Baxter v. State, 91 Ohio St. 167, 110 N.E. 456, syl. at 3 (1914). The jury should be instructed that such evidence must not be considered by them as any proof whatsoever that the accused did any act alleged in the indictment. State v. Flonnory, 31 Ohio St. 2d 124, 129, 285 N.E.2d 726, 730-31 (1972). “To be effective, a limiting instruction on ‘other acts’ testimony should specifically say that this evidence is not to be used as substantive evidence that the defendant committed the crime charged.” State v. Lewis, 66 Ohio App. 3d 37, 43, 583 N.E.2d

404, 408 (Ohio App. 2 Dist. 1990) (citing State v. Pigott, 1 Ohio App. 2d 22, 197 N.E.2d 911 (Ohio App. 8 Dist. 1964)).

Assuming arguendo that the other acts evidence admitted against Hand did demonstrate one of the proper purposes under 404(B), the Court was still required to provide a limiting instruction to the jury instructing the jury that the evidence could not be utilized to demonstrate Hand's guilt, but could only go to demonstrate his motive in the crime. In the present case, the court failed to do so. The trial court's failure to instruct the jury properly invited the jury to take the State's advise and draw its own conclusion as to how to utilize this evidence.

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

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

The trial court's failure to advise the jury as to the proper use of the prejudicial other acts evidence was improper. It was the trial court's duty to ensure that the jury did not consider the

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

**6. Harmless error.**

The State cannot demonstrate that the admission of this evidence and consideration of their improper argument were harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 26 (1967). The admittance of the other acts testimony was not harmless in the present case. Due to the prejudicial nature of the other acts evidence, an argument that there is no reasonable probability that the evidence affected Hand's conviction fails. State v. Lyle, 48 Ohio St. 2d 391, 358 N.E. 2d 623 (1976). The evidence against Hand was circumstantial evidence and heavily relied on unreliable hearsay. What assisted the State in tying Hand to the crime was presenting evidence that he was the kind of person who would commit such a crime. Thus, there is a reasonable probability that the other acts evidence affected Hand's conviction. The same prejudice also affected the outcome of the penalty phase.

**7. Conclusion.**

Other acts evidence is never properly admitted when its sole purpose is to establish that the defendant committed the act alleged of him in the indictment. State v. Thompson, 66 Ohio St. 2d 496, 497-98, 422 N.E.2d 855, 857 (1981). In the present case, the sole purpose of much of the other acts evidence introduced in Hand's case was to prove that he was the type of person who could have committed the act alleged of him in the indictment. This was improper.

Moreover, the trial court's failure to fully advise the jury as to the proper use of the prejudicial other acts evidence was improper. In light of the fact that the jury in the present case was not provided with adequate guidance as to how to consider the prejudicial and improper other acts evidence in this case, this Court should reverse Hand's conviction and remand his case for a new trial.

The improper admission of "other acts" evidence in the present case destroyed the presumption of innocence that should have been accorded to Hand and denied him his right to a fair trial in violation of the Due Process Clause of the Fourteenth Amendment. Hand's convictions should be reversed, and this matter remanded for a new trial free from such improper evidence.

### Proposition Of Law No. 3

It is prejudicial error for a trial court to join the unrelated charge of escape with charges of aggravated murder and conspiracy in violation of O.R.C. § 2941.04, thus prejudicing Appellant in violation of his constitutional protections.

On December 6, 2002, Gerald Hand was charged with one count of escape under O.R.C. § 2921.34(A)(1) for his alleged participation in an unsuccessful attempt by inmates to escape from the Delaware County Jail. At the time of the alleged plot, Hand was being held in the county jail awaiting trial of Case Nos. 02CR-I-08-366 and 03CR-I-01-014 on charges of aggravated murder and conspiracy. Hand had been indicted on August 9, 2002 and January 10, 2003 respectively for Case Nos. 02CR-I-08-366 and 03CR-I-01-014.<sup>1</sup>

Prior to trial, the prosecution filed a motion to consolidate the escape charge with the aggravated murder charges in Case No. 02CR-I-08-366. Defense counsel filed a motion in limine and memorandum in opposition to the consolidation motion. Oral arguments were held on Feb. 7, 2003. The trial court granted the prosecution's motion pursuant to Ohio R. Crim. P. 13 on February 20, 2003. This was prejudicial error.

#### **1. Improper Joinder**

Under Ohio R. Crim. P. 13, two cases may only be joined if they "could have been joined in a single indictment." O.R.C. § 2941.04 regulates whether two charges may be included in the same indictment, and limits this occurrence to three instances: (1) when the charges are connected together in their commission; (2) when the charges are different statements of the same offense (3) or when the charges are two or more different offenses of the same class of crimes or offenses. See also Ohio R. Crim. P. 8(A). The escape charges consolidated in Hand's case do not meet the requirements of O.R.C. § 2941.04.

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<sup>1</sup> Case Nos. 02CR-I-08-366 (aggravated murder) and 03CR-I-01-014 (conspiracy) were also consolidated on February 20, 2002.

The escape attempt was alleged to have been committed between October 30 to November 26, 2002. The murders of Jill Hand and Lonnie Welch took place on January 15, 2002. Therefore this case does not fall under the first factor as they were not connected together in their commission.

The escape charge is not a different statement of the offense of aggravated murder. Therefore, this case does not fall under the second factor.

Finally, the escape charge is not of the same class or offense as aggravated murder. While both are felonies, the similarities end there. Aggravated murder is a felony of the first degree punishable by death. O.R.C. §§ 2903.01, 2929.02. Escape, defined as an offense against justice and public administration, is a felony of the second degree in this case. O.R.C. § 2921.34(C)(2)(a). Therefore, this case does not fall under the third factor, and cannot be joined under O.R.C. § 2941.04.

The trial court, in granting the motion to consolidate, cited Ohio R. Crim P. 13 and six appellate cases in support of its ruling. (2/7/03 Tr. 9-11). Four of these cases do not involve the issue of joinder or the charge of escape, and instead address the issue of flight as “other-acts” evidence. State v. Eaton, 19 Ohio St. 2d 145, 249 N.E.2d 897 (1969); State v. Host, 1996 Ohio App. LEXIS 3757, No. CA00169 (Ohio App. 5 Dist. Aug. 12, 1996), unreported; Dull v. State, 36 Ohio App. 195, 172 N.E. 26 (1930); United States v. Blue Thunder, 604 F.2d 550 (8th Cir. 1979).

The remaining two cases provide little guidance to the Court in this case. State v. Johnson, 1989 Ohio App. LEXIS 1389, Case No. 2-87-13 (Ohio App. 3 Dist. April 17, 1989), unreported; State v. Stevens, 1998 Ohio App. LEXIS 1382, Case No. 16509 (Ohio App. 2 Dist. April 3, 1998). In Johnson, which did not involve an aggravated murder charge, the defendant

attempted to escape on the very same day of indictment for other charges. Further, the case does not address the specific issue of joinder, but instead discusses proper jury instructions. Johnson, 1989 Ohio App. at 8-12. Stevens was a non-death penalty aggravated murder case where the facts are distinguishable from Hand's case in that defendant Stevens successfully escaped from jail by assuming another prisoner's identity. He was later caught while in the possession of a firearm. Stevens, 1998 Ohio App. at 16-22. In contrast, Hand was not the ringleader in the unsuccessful escape attempt, and his participation was minimal if he participated at all. This differs from Stevens in that Hand had no plan to actually escape should the other inmates plan have been successful. (Tr. 3019, 3349, 3375, 3496-7). Hand's alleged participation in the attempted escape was not based on a "consciousness of guilt" but merely the need to get along with other inmates, as pointed out by defense counsel in their motion.

The need for judicial economy cannot overwrite the constitutional protections of due process and the requirements for a reliable and fair sentence. Furthermore, it would not have been a great hardship to either party or to witnesses to try the escape charges separately.

Six witnesses testified to the escape charges, four for the state and three for the defense, and sixteen exhibits were admitted. (Exh. 220-227; 271-274; 289). Two of the witnesses, Michael Beverly (Tr. 2975) and Kenneth Grimes (Tr. 3007), were incarcerated in Ohio at the time of trial. The remaining four witnesses lived in Delaware Co: Lt. Randy Pohl from the Delaware Co. Sheriff's Department (Tr. 3326); Terry Neal, a former Ohio inmate (Tr. 3346); Dennis Boster, a former Ohio inmate (Tr. 3371); and Henry Shaw, a retired Delaware Co. judge. (Tr. 3072). To hold a separate trial would not have been hardship to the witnesses or the parties involved.

In comparison to the approximately 80 witnesses, many flown in from out-of-state, and 290 exhibits relevant to the aggravated murder and conspiracy charges, the prosecution's case for escape was a very small part of Hand's proceedings. To hold a separate trial on the escape charge would not have strained the judicial system. Furthermore, the results of separate trials would not have been incongruous as an acquittal on one charge would not have affected the outcome of the other charges had they been tried separately.

## 2. **Prejudicial Error.**

Even if the escape charge was proper for joinder under O.R.C. § 2941.04 and Ohio R. Crim. P. 8(A), it is still prevented from joinder under Ohio R. Crim. P. 14 and Ohio R. Evid. 404(B) because of the prejudice to Hand. Ohio R. Crim. P. 14 states, in part:

"If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires..."

Ohio R. Evid. 404(B) provides further instruction:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Therefore, joinder may not be allowed in cases where it would be prejudicial to the defendant.

In State v. Roberts, 62 Ohio St. 2d 170, 405 N.E.2d 247 (1980), this Court outlined three factors to be considered in determining whether prejudice exists respecting joinder of offenses: (1) Where the evidence is clear the defendant is guilty of one offense, the evidence might be used to convict him of another offense in which there is little evidence of guilt; (2) Prejudice may arise where the defendant wishes to testify in his own defense on one charge, but not the other;

and (3) A jury may consider a person charged with one or more crimes a bad person and the evidence of multiple crimes may accumulate to his detriment. 62 Ohio St. 2d at 175-177.

The prosecutor may counter the claim of prejudice in two ways: (1) the 'other acts' test, where the state can argue that it could have introduced evidence of one offense in the trial of the other, severed offense under the 'other acts' portion of Ohio R. Evid. 404(B); and (2) the 'joinder' test, where the state is merely required to show that evidence of each of the crimes joined at trial is simple and direct. State v. Johnson, 88 Ohio St. 3d 95, 109-110, 723 N.E.2d 1054 (2000)(citations omitted). If the state can meet the 'joinder' test, it need not meet the stricter 'other acts' test. Id.

#### **2.a 'Joinder' Test.**

Hand has already demonstrated that the escape evidence fails the 'joinder' test. As set forth above, the aggravated murder evidence was far from simple and direct. Burdening the jury with additional confusing inmate testimony regarding unrelated charges is not simple and direct. Other than the fact that Hand was in jail awaiting trial on aggravated murder at the time of the escape charge, the escape charge was not based on the same act or transaction as the aggravated murders and conspiracy, was not based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, and was not part of a course of criminal conduct. See Ohio R. Crim. P. 8(A). This is further proven by the fact that all evidence relating to the escape charge was properly excluded from the mitigation phase as it was not relevant to the to the death-eligible specifications. (Tr. 3830-1).

#### **2.b 'Other Acts' Test**

The escape evidence fails the 'other acts' test of Ohio R. Evid. 404(B) as the escape evidence can be used only by the jury as evidence "to show that he acted in conformity therewith

[Hand's character]." See State v. Curry, 43 Ohio St. 2d 66, 330 N.E.2d 720 (1975)(conviction reversed due to improper admittance of other act evidence). Evidence is admissible only when the probative value outweighs the prejudicial effect. Ohio R. Evid. 403(A). Specifically, other acts evidence is admissible only when it shows "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ohio R. Evid. 404(B).

The standard for admissibility of other acts evidence is strict. State v. Lowe, 69 Ohio St. 3d 527, 533, 634 N.E.2d 616 (1994); State v. Broom, 40 Ohio St. 3d 277, 282, 533 N.E.2d 682 (1988). To be admissible in this case, the escape evidence must have been so "blended or connected to the one at trial as that proof of one incident involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged." State v. Wilkinson, 64 Ohio St. 2d 308, 317, 415 N.E.2d 261(1980)(citations omitted). As explained above, the charges of escape were completely unrelated to the charges of aggravated murder. The only connection is that Hand was incarcerated for the aggravated murder charges at the time of the escape plot on his jail unit. Beyond this minimal connection, the charges do not explain the circumstances of the other, or prove any element of the other charges. The escape charges are not relevant to the motive of the aggravated murder charge, nor to the *modus operandi* of the aggravated murder charges, nor does the evidence prove the identity of the aggravated murder perpetrator, nor does it show an absence of mistake or accident. See Lowe, supra (other-acts evidence properly ruled inadmissible).

Therefore, this case is distinguishable from other aggravated murder cases where joinder and other-acts evidence was ruled to be proper by this Court. See e.g. State v. LaMar, 95 Ohio St. 3d 181, 193-4, 767 N.E.2d 166 (2002)(five murders taking place during prison riot properly

joined); State v. Coley, 93 Ohio St. 3d 253, 260, 754 N.E.2d 1129 (2001)(car-jacking of 2 individuals occurred two weeks apart in the same manner properly joined); State v. Green, 90 Ohio St. 3d 352, 369, 738 N.E.2d 1208, 1228 (2000) (same facts as Coley, Green was Coley's accomplice); State v. Bey, 85 Ohio St. 3d 487, 490, 709 N.E.2d 484, 491 (1999)(two businessmen stabbed in chest with shoes and trousers removed showed a 'behavioral fingerprint' and were properly admitted); State v. Woodard, 68 Ohio St. 3d 70, 73, 623 N.E.2d 75-77-78 (1993)(car-jacking attempt to prove identity as to later car-jacking and murder was properly admitted); State v. Jamison, 49 Ohio St. 3d 182, 183-187, 552 N.E.2d 180, 182-185 (1990) (similar strong-arm robberies of stores were properly admitted); State v. Martin, 19 Ohio St. 3d 122, 127, 483 N.E.2d 1157, 1162 (1985)(proof of theft of victim's weapon allowed to prove possession of murder weapon); State v. Watson, 28 Ohio St. 2d 15, 19-22, 275 N.E.2d 153, 156-157 (1971) (proof of other criminal acts allowed to prove possession of murder weapon). The above-cited aggravated murder cases demonstrate that joinder of related offenses may be allowed, but not where there is no nexus between the two alleged crimes. Since that is the situation here, Hand's convictions and death sentences must be reversed.

### **3. Conclusion**

It was highly prejudicial for the trial court to permit Hand's escape charges with the aggravated murder charges. In their motion, defense counsel precisely explained the prejudicial effect: "It is highly prejudicial because a jury may use the allegation of defendant's passive role in the Escape as evidence of guilt in the Capital Murder case..." (Defense Memorandum in Opposition to Consolidate at 4). In fact, that the jury could find the escape attempt to be evidence of guilt was included in the instructions given to the jury at the trial phase. (Tr. 3754-

55). This created a situation where the jury was more likely to convict Hand for aggravated murder due to its belief that he participated in the escape plot.

Hand's rights were prejudiced by the joinder of the unrelated escape charge. Defense counsel's motion contained sufficient information outlining the potential prejudice to Appellant's right to a fair trial and the court abused its discretion in denying the motion. See State v. LaMar, 95 Ohio St. 3d 181, 193-4, 767 N.E.2d 166 (2002), citing, State v. Lott, 51 Ohio St. 3d 160, 555 N.E.2d 293 (1990).

There is an unacceptable risk that the jury convicted Hand solely because he had a propensity to commit crimes and deserved punishment. (See also, Proposition of Law No. 2). The trial court acted in direct violation of Hand's statutory and constitutional rights when it allowed joinder for unrelated charges. Therefore, joinder was unconstitutional and the convictions and sentences for all charges must be reversed. U.S. Const. amends. V, VI, VIII, IX, XIV; Ohio Const. art. I §§ 1, 2, 5, 9, 10, 16, 20.

#### **Proposition Of Law No. 4**

Where the State has failed to present any evidence that a criminal defendant planned to break his detention, a conviction on the charge of escape is constitutionally infirm due to the insufficiency of the evidence to prove each element of the offense.

A conviction for an alleged criminal offense cannot be based on mere suspicion, but must be predicated on probative evidence of every material element that is necessary to constitute the crime. The burden rests upon the State of Ohio to prove beyond a reasonable doubt every essential element of the offense charged. If even one essential element is not proven beyond a reasonable doubt, the conviction must be reversed as being unsupported by sufficient evidence. In re Winship, 397 U.S. 358, 364 (1970); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979).

In the present case, Hand was charged with one count of escape in violation of O.R.C. § 2921.34(A)(1), which provides in relevant part:

“No person, knowing the person is under detention or being reckless in that regard, shall purposely break or attempt to break the detention...”

Pursuant to this statute, the State of Ohio was required to prove, beyond a reasonable doubt, that Hand purposely attempted to break his detention. O.R.C. § 2929.21(A)(1).

“Attempt” is defined in O.R.C. § 2923.02(A) as:

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

“An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” State v. Jenks, 61 Ohio St. 3d 259, 574 N.E.2d 492, p.2 of syllabus; Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979). A review of the individual facts in this case shows that the element of “attempt” was not proven by the prosecution in this case.

**1. The prosecution’s case.**

The state presented three witnesses in support of the escape charges, Michael Beverly, Kenneth Grimes and Judge Henry Shaw.

Beverly was the leader of an escape attempt that consisted of a plan to cut through a lock on a back door and escape through that door. (Tr. 2987). During his testimony, Beverly could not remember what cell Hand had been in on E-Unit. (Tr. 2980). It was revealed on cross-examination that Beverly did not mention Hand’s name in his first statement with the police on November 26, 2002. (Tr. 3002, Def. Exh. M). It was only after police suggestion that Beverly suddenly recalled Hand’s involvement, which was merely limited to sitting at a table and “sometimes” relaying information that a guard was near. (Tr. 2985, 3002). Although Beverly also testified that Hand discussed the escape plan with him, Beverly admitted on cross-examination that all of the inmates on E-Unit talked about the plan. (Tr. 2998). Furthermore, Beverly testified that Hand never assisted with the cutting of the bars or locks, that Hand was never involved in hiding the blades, and that Hand never brought any blades into the jail. (Tr. 2999).

It is important to note that Beverly testified that Hand was not involved in hiding any blades. (Tr. 2999). Nonetheless, prosecution argued that the strings found in Hand’s cell were

used for the purpose of hiding blades. (Tr. 3266-67; Exh. 221). The strings were admitted into evidence over defense counsel's objection. (Tr. 3266-7).

Kenneth Grimes testified next.<sup>2</sup> (Tr. 3007). Grimes was Hand's cellmate during the time frame of the escape plot on E-Unit. (Tr. 30110). Grimes was served with a search warrant during the investigation of the escape attempt, but was not charged with escape. (Tr. 3039, 3050). Grimes gave two statements to the authorities regarding the escape and did not mention Hand in either statement as participating in the attempt, but instead named Beverly as the leader of the plot, in association with inmates Boster and Hines. (Tr. 3012; 3042-3045; 3055; Def. Exhs. O, P). At trial Grimes' story changed, for he then testified that Hand had been a lookout. (Tr. 3018). Grimes acknowledged that Hand never planned to leave through the back door. (Tr. 3019). Grimes testified about an alleged further plot between Hand and Beverly involving apprehending guards to leave through the front door. (Tr. 3013). However, no other witness, including Beverly who was already convicted of this escape charge, stated there was an additional plan if the back door plan failed. (Tr. 3073).

Judge Henry Shaw is a retired judge from Delaware Co. (Tr. 3072). Shaw had no direct knowledge of the escape charges in this case, and spoke only to issues relating to his participation in witness Grimes' case on unrelated charges, and witness Boster's case on related escape charges. (Tr. 3072-3102).

## **2. The defense rebuttal.**

Defense countered with three witnesses.

Lt. Randy Pohl, a deputy with the Delaware County Sheriff Department, testified to the fact that search warrants were administered to all nine inmates on E-Unit. (Tr. 3329, 3334).

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<sup>2</sup> Grimes also testified to conversations between Hand and himself which are not relevant to the issue in this claim and will not be discussed here. (Tr. 3022-3034).

Terry Neal, a former inmate of the jail at the time of the escape attempt, testified that Hand was not involved in any way with the plot to escape. (Tr. 3349).

Dennis Boster, one the three admitted leaders of the escape attempt, testified. (Tr. 3371). Boster stated that Hand was not involved in any way with the escape attempt. (Tr. 3375). This testimony was consistent with previous statements he made in court when entering a plea of guilty to his escape charge. (Tr. 3377-78). Boster stated there were no alternative plans if the back door plot failed. (Tr. 3382). Furthermore, Boster admitted to having strings in his cell to help hide the blades. (Tr. 3383-4). Boster stated Hand did not assist in hiding blades. (Tr. 3375).

Finally, Hand took the stand in his own defense. Hand testified that he was not involved in the escape plot and had told Beverly he was not interested in the attempt to escape. (Tr. 3496-7). Hand testified that the strings found in his cell were used to tie his belongings. (Tr. 3498-9). Defense counsel moved for dismissal pursuant to Crim. R. 29 at the close of the prosecution and defense cases at trial. (Tr. 3293-3295, 3582). The trial court overruled the motions. (Tr. 3313, 3582) This was error.

### **3. Application of law to fact**

There is insufficient evidence that Hand purposely attempted to break his detention. No evidence exists that Hand planned the unsuccessful escape attempt, or even that he directly assisted with the cutting of the locks or hid the tools. In fact, the evidence demonstrates otherwise. No inmate testified Hand planned to leave with those inmates who were trying to escape. The incidents of Hand acting as a lookout, if true, were merely evidence of a prisoner trying not to anger and disrupt his fellow inmates. While this is not a desirable scenario, it is certainly less than what is constitutionally sufficient to demonstrate escape. Taken as a whole,

reasonable doubt exists as to whether Hand participated at all, and further, no evidence was presented that he actually planned to escape.

Because breaking detention is an essential element of the offense the prosecution had the burden of presenting evidence to support its finding. Since no such evidence was presented, the guilty verdict cannot be upheld. Even when viewing the evidence in a light most favorable to the prosecution, a conviction of escape in the present case is irrational. It cannot be said that a rational trier of fact could have reached near certitude of Hand's guilt as to the "attempt" element of the escape charge. The trial court should have granted Hand's Rule 29 motion.

#### **4. Conclusion**

Because the prosecution failed to produce sufficient evidence to prove the elements of escape, Hand's conviction and sentence violate the Due Process Clause of the Fourteenth Amendment. In re Winship, 397 U.S. 358 (1970). Therefore, this Court must reverse Hand's conviction and sentence.

### Proposition Of Law No. 5

When the State proceeds on a theory that the defendant is the principal offender of an aggravated murder, it is error for the trial court to instruct the jury on complicity. U.S. Const. VI, XIV.

In Counts One and Two of his indictment, Appellant Gerald Hand was charged with aggravated murder with prior calculation and design. (T.d. 1). Specifically, Count One charged him with the aggravated murder of Jill Hand and Count Two charged him with the aggravated murder of Lonnie Welch. Throughout the State's case-in-chief, the theory of prosecution was that Gerald Hand had been the principal offender, or actual killer, of his wife Jill.

After the close of all evidence in the trial phase, the State provided the defense with an "Amended Response to the Defendant's Motion for a Bill of Particulars." (T.d. 439) For the first time, in that amended bill of particulars, the State now alleged that "the Defendant did, purposely and with prior calculation and design, cause the death of Jill J. by means of a firearm. He did so by firing that weapon himself, or by soliciting or procuring Walter "Lonnie" Welch to commit the offense, and in either case, the defendant acted purposely and with prior calculation and design." (T.d. 439) Thus, the State altered its theory at the last minute to say that maybe Gerald Hand was not the shooter and instead it could have been Lonnie Welch.

It was error for the trial court to instruct the jury on this alternative theory of guilt when the defense had no notice that such a change was coming. The defense objected to this instruction, pointing out that their first notice of the State's intention came when they received the amended bill of particulars after the evidence was closed. (T.d. 440) This sudden change in theory of the case deprived Hand of a fair trial and due process of law under both the federal and the Ohio constitutions.

This Court, as well as the United States Court of Appeals for the Sixth Circuit, has held that a defendant charged as the principal offender in an indictment, can be subsequently convicted of aiding and abetting its commission although not named in the indictment as an aider and abettor. State v. Perryman, 49 Ohio St. 2d 14, 28, 358 N.E.2d 1040, 1049 (1976); Hill v. Perini, 788 F.2d 406, 407 (6th Cir. 1986). The Sixth Circuit has concluded that the ability to convict a principal offender as an aider and abettor does not violate due process because the variance between the indictment and the proof offered at trial is not material. Stone v. Wingo, 416 F.2d 857, 864 (6th Cir. 1969). "A variance is not material unless it misleads the accused to his prejudice in making his defense." Id.

The Hill court reviewed Ohio law including this Court's holding in Perryman to find that, while it is not customary, it is not improper for a defendant to be indicted for the commission of a substantive crime as a principal offender and convicted of aiding and abetting its commission although not named in the indictment as an aider and abettor. Hill, 788 F.2d at 407.

The situation in Perryman was similar to Hand's present case. In Perryman, the defendant filed a motion for a bill of particulars. In response to the motion, the State said that the defendant shot and killed the victim while committing aggravated robbery. The defendant argued to this Court that once the State particularized that the defendant himself had shot and killed the victim, it could not shift its theory of criminal responsibility. Perryman, 49 Ohio St. 2d at 28, 358 N.E.2d at 1049. This Court found Perryman's argument to be without merit:

Upon an examination of the record, it is evident that the state consistently argued that the appellant was the triggerman. It was only on direct examination of defense witnesses that any evidence of aiding and abetting came before the jury. Since **appellant** presented evidence from which reasonable men could find him guilty as an aider and abettor, the court's instruction was, therefore, proper.

Id. (Emphasis added).

While on its face, Hand's case seems similar to Perryman's, there is one essential difference: Hand did not present any evidence to demonstrate that he was an aider and abettor in the commission of the aggravated murder of Jill Hand. In fact, Hand stressed continuously throughout the trial was that he was not involved in his wife's murder. This distinguishing factor is important in this case for it makes the "variance" between the indictment and the final charge material. Stone, 416 F.2d at 864. In fact, it changes the entire scenario of events at the Hand home on January 15, 2002.

The State argued strenuously that Gerald Hand was the person who actually shot his wife, Jill. The State argued that Hand spoke of his gun misfiring, and that the only misfiring gun was the weapon that killed Jill. (Tr. 3594) The State emphasized that Lonnie Welch had barely gotten past the front door of the Hand home before Gerald shot him. (Tr. 3599) Under this scenario, Welch could not have shot Jill Hand who was shot at close range in the doorway between the living room and the kitchen.

Gerald Hand consistently maintained that he was in the back bathroom at the time his wife was shot, that he grabbed two guns in the bedroom and that he came out shooting at a masked intruder. (Tr. 3484) The State consistently argued that Hand was not there because he had personally shot his wife in the front part of the house. (Tr. 3617) Hand did not introduce evidence that he paid Welch to come kill his wife. This was the State's theory even though it was also the State's theory that Hand had taken care of the job before Welch could get there. By asking that the jury be instructed at the last minute that it could find Hand guilty as an aider and abettor in the plot to kill his wife, the State introduced an entirely new theory of the case when it was too late for Gerald Hand to defend against it. Unlike in Perryman, it was not the defense that introduced a possible alternative theory.

A criminal defendant must have a “meaningful opportunity to present a complete defense.” Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citing California v. Trombetta, 467 U.S. 479, 485 (1984)). This includes a “fair opportunity to defend against the State’s accusations.” Chambers v. Mississippi, 410 U.S. 284, 294 (1973). That cannot happen when the State gives notice of a change in theory just before the jury is instructed.

There was no notice to defense counsel that Hand could be charged in the Jill Hand murder as an aider and abettor. Hand defended vigorously against the specific charge that he was the principal offender in the murder of Jill Hand. This is not to say that the State could not have charged Hand with complicity or proceeded on the theory of complicity while at the same time charging him with the principal offense. The problem presented in the present case is that the State did not pursue that theory until after the trial was over. Thus, Hand, at no time, had notice that he could be convicted as an aider and abettor. Because of this, the variance was prejudicial to Hand's defense. Stone, 416 F.2d at 864.

Because the trial against Hand proceeded on the theory that Gerald Hand was the actual shooter of Jill Hand, the trial court's instruction on complicity for Count One denied Hand of his opportunity to adequately defend himself against the charges upon which he was convicted. Hand's conviction on count one should be reversed as it is in violation of Hand's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

This Court has provided little guidance for determining whether two or more murders occurred as part of a course of conduct. State v. Scott, 101 Ohio St. 3d 31, 51, 800 N.E.2d 1133 (2004)(J.Pfeiffer, dissenting). This is evidenced by the fact that when the trial court in this case asked the attorneys for a definition of course-of-conduct in this case, neither had an answer. (Tr. 3308).

What is vague in Hand's case is precisely what circumstances the jury was to consider under this specification. For example, was it the allegations that Jill Hand and Lonnie Welch were killed in the same evening that made up the "course-of-conduct?" Or, was it whether Lonnie Welch was killed to cover up the killing of the prior three wives, or was it the allegation that three of Hand's wives had been killed? For guidance, we look to what the jury was told. However, the trial court failed to specifically define "course-of-conduct" in the trial phase instructions. (Tr. 3760, 3772). Instead the court instructed:

"Before you can find the defendant guilty of specification one, under the first count of the indictment, you must find beyond a reasonable doubt that the aggravated murder of Jill H. Hand was part of a course of conduct involving the purposeful killing of two or more persons by the defendant." (Tr. 3760)

\* \* \*

"Before you can find the defendant guilty of specification one, under the first count of the indictment, you must find beyond a reasonable doubt that the aggravated murder of Walter Lonnie Welch was part of a course of conduct involving the purposeful killing of two or more persons by the defendant." (Tr. 3772).

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It is impossible to tell from the record which allegations were considered by the jury in convicting on this specification. Again, "course of conduct" modifies the "purposeful killing of ...two or more persons..." O.R.C. § 2929.04(A). The General Assembly requires more than just taking two lives as a predicate for death eligibility under the (A)(5) specification.

### Proposition Of Law No. 6

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

Because of the uniqueness of the death penalty, the constitution requires that it not be imposed under sentencing procedures that create a substantial risk the death penalty would be inflicted in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153, 188 (1976). As applied in this case, the "course-of-conduct" specification was not narrowly defined, and instead used an unconstitutionally vague interpretation. O.R.C. § 2929.04(A)(5).

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). Therefore, "to avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983).

The "course-of-conduct" specification is one of nine aggravating circumstances that may result in a death sentence. O.R.C. § 2929.04(A)(1)-(9). Under O.R.C. § 2929.04(A)(5), one who commits aggravated murder is eligible for the death penalty where:

"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.*" (emphasis added).

Hand was charged with this specification under both aggravated murder charges for Jill Hand and Lonnie Welch. The course-of-conduct specification as applied here failed to adequately achieve the genuine narrowing function for death eligibility factors that is mandated

This error is further exacerbated by the fact that the court, at the mitigation phase, specifically instructed the jury that the “course-of-conduct” referred to the purposeful killings of only Jill Hand and Lonnie Welch:

“...the aggravating circumstance in count one is that the aggravated murder of Jill J. Hand was part of a course of conduct involving the purposeful killing of Jill J. Hand and Walter Lonnie Welch by the defendant, Gerald R. Hand.” (Tr. 3842).

This instruction was repeated at the end of the mitigation phase. (Tr. 3907). Had the court given this instruction at the trial phase, the jury would have had clear instruction as to what allegations to consider under this specification.

There is an unacceptable risk that the jury considered improper evidence in convicting Hand of the “course-of-conduct” specifications. If a sentencer in a capital case considers improper factors, the Eighth Amendment has been violated and reversal of that death sentence is required. Espinosa v. Florida, 505 U.S. 1079, 1081 (1992). Thus, this verdict must be reversed.

## Proposition Of Law No. 7

Where trial counsel's performance at voir dire and in the trial phase in a capital case falls below professional standards for reasonableness, counsel has rendered ineffective assistance, thereby prejudicing the defendant in violation of his constitutional rights.

Gerald Hand had the constitutional right to effective assistance of counsel during his trial. Strickland v. Washington, 466 U.S. 668 (1984). The Sixth Amendment to the United States Constitution not only guarantees effective assistance of counsel, but also guarantees a criminal defendant the right to a trial by an impartial jury. Hand was denied these rights through his attorneys' substandard performance that prejudiced the outcome of his capital trial.

### 1. Voir Dire

Ineffectiveness of Hand's defense counsel during voir dire tainted the entire proceeding by allowing a biased juror to remain on the case, thereby prejudicing Hand. This Court must reverse.

Ohio R. Crim. P. 24(B), lists the reasons a potential juror can be removed for cause, and provides, in pertinent part:

"(B) Challenge for cause. A person called as a juror may be challenged for the following causes:

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

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

A biased juror, Juror Lombardo, sat on Hand's jury. (Tr. 3818, 3943). The prejudicial effect of having this particular juror sit on Hand's jury is clear from the voir dire. Juror Lombardo admitted her husband had previously worked with the victim, Jill Hand. (Tr. 697). In

addition, Juror Lombardo's daughter was a crime victim and Lombardo herself had been witness to a workplace shooting. (Tr. 698, 712, 726-7). This last event was included in her questionnaire. (Tr. 726).

These events were brought to the attention of defense counsel, not only on her questionnaire, but also in response to defense counsel's question regarding pretrial publicity. (Tr. 697). Defense counsel then asked if her husband, an investigator for the Ohio Attorney General, knew Mrs. Hand personally or only briefly, to which Lombardo replied "Well, he had worked with her on and off for about 12 years." After this answer, defense counsel failed to ask if this relationship would bias Juror Lombardo, and instead merely asked if she could refrain from discussing the case with her husband, to which she replied in the affirmative. (Tr. 697-688).

Juror Lombardo had been an eyewitness to workplace violence when her employer shot an intruder, and testified in court as a witness to that event. (Tr. 712, 726-7). Although she stated that experience would not make it difficult to serve as a juror in Hand's case, this direct experience with a violent work-invasion murder would leave anyone with an impression hard to set aside when sitting on a home-invasion murder case. (Tr. 712, 726-7).

Counsel also failed to inquire further about the loss of Juror Lombardo's daughter. When asked how she felt about past comments she heard regarding Hand's case, Lombardo replied: "Well, I lost a daughter in the past and I pretty much went through a lot of stuff. I felt very sad, but I really didn't pursue it. I just really have a yearning to know more about it. Of course, I had feelings about it, sadness. I would still need to know more about what happened." (Tr. 698). Inexplicably however, defense counsel failed to explore these issues of potential bias from the mother of a victim. Defense counsel merely continued to question Juror Lombardo on the general issues of fairness and burden of proof.

Defense counsel was under the duty to demonstrate, through questioning, that Juror Lombardo lacked impartiality. State v. Stojetz, 84 Ohio St. 3d 452, 457, 705 N.E.2d 329 (1999), citing Morgan v. Illinois, 504 U.S. at 719, 733, (1992). After learning about these numerous sources of bias, defense counsel not only failed to explore these sources of bias, but also failed to challenge Juror Lombardo for cause. (Tr. 702, 741). See Ohio R. Crim. P. 24(B)(9). As the United States Supreme Court has observed:

“Determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in a manner of a chatecism. What common sense has realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made ‘unmistakably clear.’”

Wainwright v. Witt, 469 U.S. 412, 425 (1985). Whether or not the juror conscientiously believes that he or she can act impartially it is still up to defense counsel to challenge for cause if the juror cannot realistically be considered impartial and indifferent. State v. Zerla, 1992 Ohio App. LEXIS 1280 at 6-7, Case No. 91AP-562 (10th Dist. Ct. App. Mar. 17, 1992)(Juror who had been raped was to be considered biased under Ohio R. Crim. P. 24(B)(9) at rape trial). Therefore, defense counsel was ineffective for not thoroughly questioning Juror Lombardo as to bias, and for not challenging her for cause.

A challenge for cause was needed here, regardless of Juror Lombardo’s automatic responses to questions of her ability to follow the law. Because of her experiences, those responses that she could be fair and unbiased must be suspect. The court and the attorneys are not to take at face value a juror’s statement they can follow the law: “Because the circumstances from which bias may be implied are so dependent on the nature of each case, there can be no fixed rule...but where there is substantial emotional involvement with the facts or nature of the case which would adversely affect impartiality in the average person, there may be sufficient cause to excuse such a juror for bias.” Zerla, supra; See also State v. Clink, 2000 Ohio App.

LEXIS 733, Case No. OT-99-037 (6th Dist. Ct. App. Mar. 3, 2000)(Juror who was a police office and knew arresting officers was to be considered biased under Ohio R. Crim. P. 24(B)(9)). See also, Morgan v. Illinois, 504 U.S. 719, 734-35 (1992).

Failing to challenge for cause, defense counsel should have then used a peremptory challenge to remove Juror Lombardo from the jury pool. Each side was allowed six peremptory challenges. Ohio R. Crim. P. 24(C). Defense counsel used only five of these six challenges. (Tr. 630-636, 844-847). Due to her numerous experiences with violent crime and her close family connection to the victim of the case, there was no reasonable strategy for allowing Juror Lombardo to remain on the jury. Therefore, defense counsel was ineffective for not removing Juror Lombardo with their final peremptory challenge.

Due to defense counsel's ineffective assistance at voir dire, Hand's convictions and sentences must be reversed and the case remanded for new trial as he was denied both his right to effective assistance of counsel and the right to a fair and impartial jury. Strickland v. Washington, 466 U.S. 668 (1984); U.S. Const. amends V, VI, XIV, Ohio Const. art I. §§ 1, 5, 10.

## **2. Trial Phase**

Ineffectiveness of Hand's defense counsel during the trial phase tainted the entire proceeding, thereby prejudicing Hand and warranting reversal.

### **2.a. Failure to object to admissibility of co-conspirator statements.**

During trial, the prosecution offered hearsay testimony from multiple witnesses as to alleged co-conspirator Lonnie Welch's statements to Hand over the years. (See Proposition of Law No. 1). Although the prosecution argued primarily that these statements were admissible under Ohio R. Evid. 804(B)(6), they also asserted that the statements were admissible as statements from a co-conspirator. (Tr. 2854). However, the prosecution first failed to establish a

prima facie case of conspiracy necessary for the introduction of co-conspirator statements under Ohio R. Evid. 801(D)(2)(e). Defense counsel failed to point out this requirement and its omission to the Court, thereby prejudicing Hand by (1) violating Hand's rights under the Confrontation Clause by depriving him the opportunity to confront and cross examine the declarant; and (2) violating his due process rights to a fundamentally fair trial. U.S. Const. amends V, VI, and XIV.

Hand's case involves a Confrontation Clause issue "because hearsay evidence was admitted as substantive evidence against the defendant." Tennessee v. Street, 471 U.S. 409, 13 (1985). The Confrontation Clause of the Sixth Amendment mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Clause is not read literally to prohibit the admissibility of all hearsay statements, but allows the admission of certain hearsay statements under hearsay exceptions. Idaho v. Wright, 497 U.S. 805, 813 (1990). The co-conspirator exception to the hearsay rule is considered a firmly-rooted hearsay exception. Bourjaily v. United States, 483 U.S. 171, 183 (1987).

The statements at issue in this case did not fall within Ohio's hearsay exception for statements of co-conspirators. Ohio allows the admission of a hearsay statement "by a co-conspirator of a party during the course and in furtherance of the conspiracy upon *independent proof* of the conspiracy." Ohio R. Evid. 801(D)(2)(e) (emphasis added). Similarly, O.R.C. § 2923.01(H)(1) does not permit the testimony of a co-conspirator absent other supporting evidence. The party offering the hearsay must make a prima facie showing of the existence of a conspiracy, with independent proof, prior to the admission of the statement. State v. Carter, 72 Ohio St. 3d 545, 550, 651 N.E.2d 965 (1995). The statement itself cannot be used to support the

prima facie showing. *Id.* at 550. However, in this case the only proof offered of a conspiracy between Hand and Welch were the hearsay statements themselves. (Tr. 168-187, 620-641).

Since the prosecution never provided sufficient independent proof of a conspiracy, Welch's statements were not admissible under the co-conspirator exception to the hearsay rule. Therefore, the admission of the alleged co-conspirator's statements through hearsay prejudiced Hand and defense counsel were ineffective in not objecting to the admission of this evidence under this theory.

#### **2.b. Failure to object to other-acts evidence and argument**

Defense counsel failed to object to the prosecution's arguments on other-acts evidence in this case relating to escape and the prior murders of Donna and Lori Hand. (See Proposition of Law No. 2). While defense counsel filed a generic motion prior to trial to exclude any evidence relating to other crimes, wrongs or acts, they failed to raise some specific objections during the trial. (T.d. 41). The motion was denied as generic and non specific. (T.d. 82).

A bedrock principle of Anglo-American jurisprudence is that a defendant can only be convicted on evidence that he committed the act charged, not on his reputation as a criminal. *State v. Jamison*, 49 Ohio St. 3d 182, 184, 552 N.E.2d 180 (1990). Since observance of this axiom is essential to a fundamentally fair trial, this Court has long held that, as a general rule, evidence of acts independent of the crime for which the accused is on trial are not admissible to show that the defendant acted in conformity therewith. *State v. Mann*, 19 Ohio St. 3d 34, 36, 482 N.E.2d 592, 595 (1985); *State v. Curry*, 43 Ohio St. 2d 66-68-69, 330 N.E.2d 720, 723 (1975); *State v. Burson*, 38 Ohio St. 2d 157, 311 N.E.2d 526 (1974); *State v. Hector*, 19 Ohio St. 2d 167, 249 N.E.2d 912 (1969).

The rule prohibiting the admission of other acts evidence to show conduct is set forth in Ohio R. Evid. 404(A) which provides that “evidence of a person’s character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion.” Nevertheless, there are exceptions to the rule which provide that evidence of other crimes may be admissible for other limited purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Ohio R. Evid. 404(B). O.R.C. § 2945.59 codifies this rule. Although the Revised Code does not specifically list identity as a proper purpose, the Ohio Supreme Court has held that identity is “included within the concept of scheme, plan, or system.” State v. Shedrick, 61 Ohio St. 3d 331, 337, 574 N.E.2d 1065, 1069 (1991) (citations omitted).

Therefore, to be admissible under Ohio R. Evid. 404(B) and O.R.C. § 2945.59, the proponent of the other acts evidence must offer “substantial proof” that the other act happened. State v. Broom, 40 Ohio St. 3d 277, 282, 533 N.E.2d 682, 690 (1988). The proponent’s evidence must also tend to show a proper purpose. Id. Rule 404(B) is to be a rule of exclusion, not inclusion, which incorporates a strict standard for admissibility of other acts evidence. Id. at syl. 1.

Without objection, the State engaged in the practice of painting Gerald Hand as a bad person who is likely to commit crimes. The State asked for lay opinion testimony about whether Hand “acted sad” about Jill’s death. (Tr. 1901) Prosecutors were able to introduce evidence that Hand kicked his father out of his business, was obsessed with money and that he enjoyed reading “true crime” stories. (Tr. 2440, 2443) They elicited testimony that Hand had an infatuation with Barbara McKinney’s daughter. (Tr. 2696) None of this information was relevant to proving the essential elements of the crimes Hand was charged with. Yet, none of this was objected to.

Other acts evidence is never properly admitted when its sole purpose is to establish that the defendant committed the act alleged of him in the indictment. State v. Thompson, 66 Ohio St. 2d 496, 497-98, 422 N.E.2d 855, 857 (1981). In the present case, the State presented such evidence and also argued that the other acts evidence proved that he was the type of person who could have committed the act alleged of him in the indictment. (Tr. 3587) This was improper. Moreover, the defense counsel's failure to object to argument about "other-acts" evidence was prejudicial. In light of the fact that the jury in the present case was not provided with adequate guidance as to how to consider the prejudicial and improper other-acts evidence in this case, this Court should reverse Hand's conviction and remand his case for a new trial.

**2.c. Failure to present evidence of affirmative defense at hearsay hearings.**

Three hearings were held during trial to examine whether evidence would be allowed in under Ohio R. Evid. 804(B)(6). (Tr. 2214, 2474, 2794). A central issue at the core of the battle over hearsay statements, was whether Gerald Hand wrongfully caused the death of Lonnie Welch, and thus Welch's unavailability was due to a wrongful act of Hand. Ohio R. Evid. 804(B)(6). Defense counsel was ineffective for not using the affirmative defense of self-defense in response to these arguments.

Defense counsel argued the affirmative defense of self-defense in response to the charges against Hand. (4/24/03 Tr. 9-10; Trial Tr. 3763-67). However, defense counsel failed to use this defense at the hearsay hearings. The prosecution was required to prove that Welch's unavailability was caused by Hand before the hearsay testimony would be further considered for admission. (Tr. 2309). See Ohio R. Evid. 804(B)(6); Steele v. Taylor, 684 F.2d 1193, 1202 (6th Cir. 1982). To meet this requirement, the prosecution argued that one purpose of Hand's act of killing Welch was to prevent Welch, a witness, from being available at trial and thus Hand

should not benefit from his unavailability. (Tr. 2312, 2317). Defense counsel failed to raise the issue of self-defense in rebuttal to this argument, and instead merely stated that the wrongdoing by Hand had not been shown by the required burden of proof. (Tr. 2318, 2329-30). This issue was not discussed at the second or third hearsay hearings. (Tr. 2617-2624, 2850-2856).

Defense counsel was ineffective for not putting forth evidence of self-defense in rebuttal to the prosecution's arguments for the admittance of multiple hearsay statements. This failure resulted in the admission of multiple hearsay statements regarding Lonnie Welch statements, which thereby prejudiced Hand. Therefore, his conviction and sentences must be reversed. Strickland, supra. U.S. Const. V, VI, XIV; Ohio Const. art. I. §§ 1, 5, 10.

**2.d. Failure to call Philip Anthony as a defense witness.**

Philip Anthony, Lonnie Welch's cousin, testified at the first hearsay hearing. (Tr. 2269-2308). The court ruled his testimony was admissible under Ohio R. Evid. 804(B)(6). (Tr. 2335-2336). The prosecution did not call Mr. Anthony as a witness. Defense counsel requested the court, pursuant to Ohio R. Evid. 614, call Mr. Anthony as a court's witness, which was denied. (Tr. 3254-55).

Mr. Anthony admitted he was a felon but was not currently facing any criminal charges. (Tr. 2270). He was also a cousin of witness Pete Adams (Tr. 2270-71). Mr. Anthony testified that Welch had confessed to him he killed two of Hand's wives and used a dry cleaning bag to do so. (Tr. 2274-75). Mr. Anthony also testified regarding an arrangement between Hand and Welch for the murder of his current wife Jill. (Tr. 2281). Most importantly, Mr. Anthony testified Welch stated that he snuck into a basement window, and that all the doors and windows in the house were sealed and locked. (Tr. 2275, 2295). Defense counsel developed this fact with other witnesses, procuring testimony that either the windows were not examined and no one

noticed any open basement windows or disturbed earth outside of the basement windows to show sign of entry. (Tr. 2321).

It was for this testimony of Welch stating he went through the basement windows that defense counsel should have called Mr. Anthony to the stand. As defense counsel stated in their requests to the court, they spent the time to develop this fact and Mr. Anthony's testimony then goes to discrediting Welch's stories about the previous incidents. (Tr. 2321, 3254-55).

Defense counsel did not call Mr. Anthony as a witness. This was unreasonable and prejudicial. Defense counsel stated the prejudicial effect of not having this testimony when they proffered the information they wished to obtain from Mr. Anthony as a witness:

"The specific purpose is that Phillip Anthony claims that Lonnie Welch told him that he had killed both Donna and Lori Hand at 191 South Eureka, and that he said he killed both women in the same way, that he entered the premises through the basement window and left each time through the basement window...physically, it could not have happened the way that Lonnie Welch told Phillip Anthony the way it happened...and we're just impeaching a specific method of entry and exit as a barometer by which Lonnie Welch—did he really commit these offenses or not." (Tr. 3256-57).

The failure to call Mr. Anthony was prejudicial as the jury was not aware of previous statements of Welch that were inconsistent with the forensic evidence at the crime scenes, and therefore that Mr. Welch's statements were not credible. Therefore, his conviction and sentences must be reversed. Strickland, supra. U.S. Const. V, VI, XIV, Ohio Const. art. I. §§ 1, 5, 10.

**2.c. Failure to request jury instructions.**

Defense counsel filed a motion in opposition to proposed jury instruction on May 29, 2003, and attached proposed jury instructions. (Motion at Docket No. 440). Counsel failed to request two instructions in this motion.

First, counsel failed to request a limiting instruction regarding "other acts" evidence. (Sec Proposition of Law No. 2). This evidence was addressed above.

This Court has held that where evidence of other acts is admitted, it is necessary at the time such evidence is offered to instruct the jury regarding the purpose for which it is admitted. Baxter v. State, 91 Ohio St. 167, 110 N.E. 456, syl. at 3 (1914). The jury should be instructed that such evidence must not be considered by them as any proof whatsoever that the accused did any act alleged in the indictment. State v. Flonnory, 31 Ohio St. 2d 124, 129, 285 N.E.2d 726, 730-31 (1972). “To be effective, a limiting instruction on ‘other acts’ testimony should specifically say that this evidence is not to be used as substantive evidence that the defendant committed the crime charged.” State v. Lewis, 66 Ohio App. 3d 37, 43, 583 N.E.2d 404, 408 (Ohio App. 2 Dist. 1990) (citing State v. Pigott, 1 Ohio App. 2d 22, 197 N.E.2d 911 (Ohio App. 8 Dist. 1964)). Therefore, counsel was under the duty to request this limiting instruction.

Assuming arguendo that this other acts evidence did demonstrate one of the proper purposes under 404(B), counsel was still under the duty to ask for a limiting instruction to the jury instructing the jury that the evidence could not be utilized to demonstrate Hands guilt. The failure to instruct the jury properly invited the jury to draw its own conclusion as to how to utilize this evidence.

Therefore, Hand was prejudiced by the fact his jury did not have proper guidance during their deliberations as to the “other acts” evidence.

Second, counsel failed to request a jury instruction defining course-of-conduct. Defense counsel was on notice that the court lacked a definition of course-of-conduct. The court, in overruling defense counsel’s Ohio R. Crim. P. 29 motion, stated it was still looking for a precise definition of course-of-conduct. (Tr. 3308). Defense counsel failed to provide this definition. (Tr. 3308). As a result, the trial court failed to provide the jury with a properly narrowing instruction as to the course-of-conduct specification. (Tr. 3772). Any application of the course-of-conduct

specification to a particular case must guide the jury in a manner that is neither vague nor over-inclusive, so that genuine narrowing of the death penalty is achieved. See e.g. McCleskey v. Kemp, 481 U.S. 279, 305 (1987); Godfrey, 446 U.S. at 428. (Sec Proposition of Law No. 6.)

### **3. Conclusion**

Due to defense counsel's ineffective assistance at the trial phase, Hand's convictions and sentences must be reversed and the case remanded for new trial as he was denied both his right to effective assistance of counsel and the right to a fair and impartial jury. Strickland v. Washington, 466 U.S. 668 (1984); U.S. Const. amends V, VI, XIV, Ohio Const. art I. §§ 1, 5, 10.

### Proposition Of Law No. 8

Where trial counsel put on a very brief and skeletal presentation at the penalty phase, fail to argue residual doubt and fail to make any closing argument to the jury, counsel's performance is substandard and a capital defendant is prejudiced thereby. U.S. Const. amends. VI, VIII and XIV.

The mitigation portion of Gerald Hand's capital trial is incredibly short. After a lengthy trial where their client was convicted of the most serious of offenses, trial counsel offered only a sketchy outline of their client and his life. Almost no effort was made to humanize this man that the jury had concluded killed his wives for profit and a friend who was in the way. Trial counsel's failure to investigate and present available, relevant, and compelling exculpatory and mitigating evidence prejudiced Gerald Hand, resulting in a death sentence that is unconstitutional. Wiggins v. Smith, 539 U.S. 510 (2003); Strickland v. Washington, 466 U.S. 668 (1984). This Court must therefore reverse and order that a new penalty phase be held.

A full and complete mitigation investigation and presentation is a bedrock of principal in Eighth Amendment jurisprudence. This Court has held that a defendant is entitled to have trial counsel present accurate mitigating evidence that is based on a full and adequate investigation into defendant's background. State v. Johnson, 24 Ohio St. 3d 87, 494 N.E.2d 1061 (1986). The U.S. Supreme Court has held time and again that it will reverse capital cases where the defendant's lifelong experiences and background was not fully investigated and presented to the jury. Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000). Numerous Ohio sentences have been reversed due to ineffectiveness of counsel at mitigation. Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003); Frazier v. Huffman, 343 F.3d 780 (6th Cir. 2003); Powell v. Collins 332 F.3d 376 (6th Cir. 2003); Combs v. Coyle 205 F.3d 269 (6th Cir. 2000); Glenn v. Tate 71 F.3d 1204 (6th Cir. 1995); Morales v. Coyle 98 F. Supp.2d 849 (N.D.

Ohio 2000); Poindexter v. Anderson No. C-1-94-178 (S.D. Ohio Dec. 15, 2000); State v. Saxton, No. 9-03-43, 2004 Ohio App. LEXIS 747 (3rd Dist. Ct. App. Feb. 23, 2004).

Mitigation is the phase of the trial where defense counsel must humanize the defendant and persuade the jury that he is more than a member “of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.” Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The jury must be given “an understanding of which might place the barbaric act within the realm of the tragic but nonetheless human.” Boyd v. North Carolina, 471 U.S. 1030, 1036 (1985) (Marshall, J., dissenting). When the capital defendant ceases to be a human being in the jury’s eyes, the vote for death becomes less difficult. To that end, it is undisputed that a capital defendant has a constitutionally protected right to the presentation of mitigating evidence. This simply did not happen in Gerald Hand’s case.

The mitigation phase of Gerald Hand’s trial was completed in one morning before 11:30 a.m., and covers just eighty-four pages of transcript, including jury instructions. (Tr. 3842-3925). During the sentencing phase of Hand’s trial, counsel presented only three mitigation witnesses: (1) Dr. Daniel Davis, a psychologist; (2) Frank Haberfield, an acquaintance of Hand; and (3) Robert Hand, Hand’s son. (Tr. 3857-3895). The Hand then gave a brief unsworn statement. (Tr. 3896-3896). Three pieces of evidence were admitted (Tr. 2897): (1) Dr. Davis’ curriculum vitae (Tr. 3858); (2) a picture of Hand with his grandson (Tr. 3889); and (3) a picture of Hand with his son and grandson (Tr. 3889). Defense counsel gave no closing argument. (Tr. 3896).

This sparse presentation was a total abdication of counsel’s duty to humanize their client. The evidence not presented to the jury “might well have influenced the jury’s appraisal of his moral culpability.” Williams, 529 U.S. at 398, citing Boyd v. California, 494 U.S. 370, 387

(1990). Trial counsel had no credible reason for not presenting all of the mitigating evidence it possessed.

**1. Failure to reasonably investigate and prepare for mitigation.**

Under Wiggins, there is a two-prong analysis to determining ineffective assistance of counsel at mitigation. First, it must be determined if there was a reasonable investigation by counsel. The court emphasized that any mitigation “strategy” cannot be found to be sound if they were based on a lack of or an unreasonable investigation into potential mitigating evidence. Wiggins, 539 U.S. at 485-6.

In this case, defense counsel hired Debra Gorrell, an attorney, for mitigation purposes and the court approved \$5000 in funding. (T.d. 482). Ms. Gorrell’s billing, included in this record, shows that she obtained numerous records and interviewed friends and family. (T.d. 482). This was an important first step in preparing for mitigation.

However, the attorneys must then properly act on this information and review it thoroughly prior to the trial itself. Counsel for death-indicted defendants must adequately prepare for the possibility the client may proceed to the mitigation phase. It is unacceptable to wait until after conviction to begin serious preparation for the mitigation phase.

As evidenced by defense counsel’s billing sheets to the court, included in this record, they spent less than thirty hours preparing for mitigation. (T.d. 482). This is simply not enough time to thoroughly review the evidence available and develop a reasonable strategy. Furthermore, the bulk of their limited preparation took place in the few days after conviction between the trial and mitigation phase. (T.d. 482). Family interviews by the attorneys were not done until the day before the mitigation phase (T.d. 482). The lack of pre-trial motions relative

to the mitigation phase is further evidence of an unreasonable investigation and preparation for the mitigation phase.

Therefore, while a mitigation specialist was utilized by defense counsel, they failed to investigate and prepare for mitigation in order to develop a reasonable mitigation strategy.

**2. Failure to form a reasonable mitigation strategy.**

Defense counsel made clear in their opening statements at the mitigation phase their “strategy” for not presenting complete mitigating evidence:

“The mitigation evidence that we’re about to present to you won’t be very long. We’ll be done in a couple of hours. **I don’t want to delay this case** more than it needs to be, so I’ve elected to tell you the things that I think you ought to think about now, rather than waiting until closing arguments.” (Tr. 3849)(emphasis added).

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“Now, I’ve been a lawyer for 30 years. Yes, I have been involved in a number of mitigation hearings. In some of those hearings, I presented evidence how the defendant was raised; if he was abused and neglected, if drugs were involved. **But I’m not going to insult you by telling you the events of Bobby’s childhood** led him to commit these offenses; that would be intellectually dishonest. I’m not doing that.” (Tr. 3854)(emphasis added).

This was not a strategy that should be recognized as effective. Hand’s voir dire and trial spanned over one month, involved approximately 90 witnesses and 300 exhibits. Just as the prosecution was under the duty to meet its burden of proof at trial, so was the defense under a duty to meet its burden at mitigation, regardless of the amount of time it takes to do it properly. The burden of proof involves taking the time to present *all* of the available mitigating factors that the jury is statutorily required to weigh against the aggravating circumstances. O.R.C. § 2929.04. The jury is committed to hearing and analyzing all aspects of the case, no matter the length and complexity.

Furthermore, it cannot be “insulting” to present the jury with statutorily and constitutionally required evidence to weigh under law. If defense counsel believed this information was truly irrelevant, they would not have called Dr. Davis to testify as to Hand’s psychological diagnosis, which also included extremely limited testimony as to Hand’s background. Thus, defense counsel negated their own “strategy” with its first witness. There is simply no reasonable explanation for defense counsel’s failures at mitigation.

What the defense attempted to focus on at mitigation was Hand’s value as an inmate: “The primary point of our mitigation is going to be that Bobby Hand has a future value behind bars.” (Tr. 3852). However, this was unreasonable in this case. Evidence of good behavior during incarceration is a mitigating factor in Ohio. Skipper v. South Carolina, 476 U.S. 1 (1986); State v. Simko, 71 Ohio St. 3d 483, 644 N.E.2d 345 (1994). However, in this particular case, Hand had just been convicted of the charge of escape. Therefore, the claim in their opening that “...Bobby can conform to prison life...he will not cause harm or disruption...” was in direct contrast to the conviction the jury had reached the week before. (Tr. 3855-56). The argument that he was a good inmate should not have been the primary basis simply because it was not a credible theory with this jury.

The remaining strategy of defense counsel was to plea for mercy from the jury. (Tr. 3856-7). While this strategy was sound, it was not adequately presented and developed by defense counsel, as addressed below.

### **3. Failure to adequately present mitigating evidence.**

Evident in the record are family witnesses that were not called to the stand and records that were not admitted. Dr. Davis testified he had reviewed United States Army records, Columbus Public School records, medical records, and Franklin County children’s services

records. (Tr. 3869). Furthermore, Dr. Davis testified he had conducted interviews with Hand's mother and sister. (Tr. 3869). However, Hand's mother and sister were never called to testify at mitigation. At the very least, Hand's mother and sister could have supported the defense strategy of asking for mercy.

Hand had an abusive childhood due to his alcoholic father and turbulent relationship between his parents. His parents divorced when he was a child and the family was brought to the attention of children's services because his mother was openly having sexual relations in front of the children. Gerald was removed from their home and placed in a receiving center before staying with a relative. There was a history of abuse and foster home placement. (Tr. 3871). No one from children's services was called to testify, nor were children's services records admitted—even though defense counsel possessed them. (Tr. 3869). Hand's family was not called to testify as to the full story of Hand's background and the direct effect this had on Hand. (Tr. 3869).

Hand served honorably in the U.S. Army and saw combat in Vietnam. (Tr. 3397-99). No one from the U.S. Army was called to testify and the records of his honorable service was not admitted, even though defense counsel possessed these military records. (Tr. 3869). Military service has been found to be mitigating by this Court. State v. Hessler, 90 Ohio St. 3d 108, 130, 734 N.E.2d 1237, 1257 (2000).

Hand attended five elementary schools, and did not graduate from high school. (Tr. 3871). No witnesses or evidence of his performance at school, if there were any behavioral problems, or related issues were presented at mitigation, even though defense counsel possessed his education records. (Tr. 3869).

Hand's mother and sister were willing and able to assist the defense and should have been called to testify. (Tr. 3869). They would have provided first-hand accounts of the physical, emotional, and sexual abuse present in Hand's home. (Tr. 3871). At the very least, these family members would have supported defense counsel's plea for mercy. (Tr. 3856).

Finally, counsel was deficient in presenting Hand's unsworn statement. While an unsworn statement from a defendant can be very compelling, the unsworn statement given by Hand in this case was limited to the fact that he would be a "model inmate." (Tr. 3894-5). As addressed previously, this was simply not a credible statement, as Hand had been convicted of escape. Therefore, it was prejudicial for counsel to advise Hand to make this statement and especially, to make it the centerpiece of his plea for a life sentence.

All of the evidence listed above which trial counsel failed to submit is admissible under O.R.C. § 2929.04(B). The defendant "shall be given great latitude in the presentation of evidence of [t]hese factors in mitigation of the imposition of the sentence of death." O.R.C. § 2929.04(C). In considering mitigating factors against the death penalty, the trier of fact must take into account and consider all evidence presented at and/or before the mitigation phase of trial. See O.R.C. § 2929.03(D)(1) and (2). Therefore, counsel's deficient performance and failures at mitigation prejudiced Hand.

**4. Failure to object to admittance of all trial phase evidence.**

The prosecution, at the beginning of the mitigation phase, moved to admit all evidence from the trial phase, with the exception of exhibits 220-227, 271-274, 289, which pertained to the escape charge. (Tr. 3830-3831). Defense counsel did not object to this motion, and the trial court admitted the evidence. (Tr. 3831).

Evidence which is irrelevant to the proceedings is never admissible. Ohio R. Evid. 402. Even if evidence is relevant, Evid. R. 403(A) expressly precludes the admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or of misleading the jury. Furthermore, O.R.C. § 2941.14(B), limits the aggravating circumstances which may be considered at mitigation. State v. Jenkins, 15 Ohio St. 2d 164, 473 N.E.2d 264 (1984). Therefore, at Hand's mitigation phase, only evidence that was relevant to the course-of conduct and escaping detection specifications was admissible at the mitigation phase. See O.R.C. § 2929.03 (D)(2).

Defense counsel was ineffective by not objecting to the admission of all evidence from the trial phase at mitigation. The admission of all evidence improperly delegated to the jury the responsibility of determining which evidence was relevant to mitigation, and which was not. If a sentencer in a capital case considers improper factors, the Eighth Amendment has been violated and reversal of that death sentence is required. Espinosa v. Florida, 505 U.S. 1079, 1081 (1992). There is an unacceptable risk that the jury weighed the killing itself in the sentencing process, and the resulting death sentence is unconstitutionally unreliable. See, Proposition of Law No. 9.

**5. Failure to present closing arguments at mitigation.**

Perhaps the most indicative element of defense counsel's unreasonable performance is the fact they did not give a closing argument at mitigation. After the prosecution completed their closing statements, defense counsel merely stated, "Your Honor, I said all I could on opening." (Tr. 3904-5). A closing argument is crucial for cementing the mitigation theory and outlining the factors that the jury must consider. The failure to give a closing argument goes beyond a merely unreasonable strategy and is instead a total abandonment of their constitutional duties as counsel.

Furthermore, defense counsel did not make any argument after the jury returned its verdict, but before the judge sentenced the Hand, instead limiting their statements to thanking the parties involved. (Tr. 3947-8). “[A] total abdication of duty should never be viewed as permissible trial strategy.” State v. Johnson, 24 Ohio St. 3d 87, 90, 494 N.E.2d 1061 (1986), quoting Pickens v. Lockhart, 714 F.2d 1455, 1467 (8th Cir. 1983). Therefore, defense counsel was ineffective by abandoning their duties to zealously represent their client and meet the statutorily and constitutionally required burden of proof.

## **6. Conclusion**

The failures of defense counsel to investigate and present available mitigating evidence, object to admittance of all trial phase evidence, and present closing arguments at mitigation was unreasonable and prejudicial under Strickland and Williams v. Taylor, 529 U.S. 362 (2000). Therefore, Hand’s right to effective assistance of counsel was violated, warranting relief. U.S. Const. amends. V, VI, VIII, IX, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

### Proposition Of Law No. 9

The capital defendant's right against cruel and unusual punishment and his right to due process are violated when the legal issue of relevance is left to the jury regarding sentencing considerations. U.S. Const. amend. VIII, XIV.

#### **1. Introduction.**

The trial court failed to instruct the jury regarding what evidence introduced at the trial phase was relevant and could be considered in its deliberations. The trial court's failure to provide the jury with the proper guidance resulted in a sentencing proceeding that failed to comply with the commands of the Eighth Amendment as well as the requirements of the Due Process Clause. U.S. Const. amend. VIII, XIV.

#### **2. Facts.**

After the presentation of mitigation evidence, the trial court instructed the jury regarding the consideration of trial evidence for purposes of reaching a sentencing determination.<sup>4</sup> The trial court instructed the jury to consider all of the testimony and evidence relevant to the aggravating circumstance Hand was found guilty of committing. (Tr. 3509). The trial court cautioned the jury that some of the evidence and testimony that was considered during the trial phase of the case could not be considered during the sentencing phase. (Tr. 3914). However, the trial court provided no additional guidance to the jury concerning the use of the trial phase evidence. Instead, the trial court instructed the jury that "[f]or purposes of this proceeding, only that evidence admitted in the first phase that is relevant to the aggravating circumstance and to any of the mitigating factors is to be considered by you". (Tr. 3914).

The trial court's failure to advise the jury what testimony was relevant to the aggravating circumstances resulted in the jury being left to determine what trial phase evidence was relevant

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<sup>4</sup> Prior to commencement of the mitigation phase, the State withdrew exhibits that related to the escape charge. (Tr. 3830).

to the sentencing deliberations. By failing to make the legal determination of relevance for the jury, the trial court abdicated the threshold legal determination of relevance to the lay persons of the jury. This Court should have no confidence that the jury understood the legal irrelevance of trial phase testimony that was permitted to be considered. Ultimately, the jury could consider all of the trial phase evidence in its capital sentencing deliberations. Much of that evidence, however, was irrelevant to the issue of Hand's moral culpability for aggravated murder. As a result, Hand's death sentence was rendered unreliable in violation of the Eighth and Fourteenth Amendments.

### **3. Evidence to Be Considered In Sentencing.**

Pursuant to O.R.C. § 2929.03 (D)(1), "the prosecutor may introduce any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing." This provision renders Ohio's weighing scheme unconstitutionally vague. See Proposition of Law No. 13. Assuming arguendo that it does not, the application of that statutory provision must nevertheless comport with the commands of the Eighth Amendment and the requirements of the Due Process Clause.

Capital punishment differs in kind from lesser forms of punishment because of its extreme finality. Lockett v. Ohio, 438 U.S. 586, 604 (1978). Resultantly, the Eighth Amendment requires a heightened degree of reliability in the application of the death penalty. Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976). See also Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring). To ensure reliability, the State cannot channel the sentencer's discretion to consider and weigh relevant mitigation. Romano v. Oklahoma, 512 U.S. 1, 7 (1994) (citation omitted). However, the State **must** narrow the sentencer's discretion with respect to aggravating factors in a capital sentencing proceeding. Unconstitutional

arbitrariness results when the sentencer has unguided or improperly guided discretion in the imposition of the death penalty. Furman v. Georgia, 408 U.S. 238 (1972). To avoid arbitrariness, “there is a required threshold below which the death penalty cannot be imposed .... [T]he State must establish rational criteria that narrow the decision maker’s judgment as to whether the circumstances of a particular defendant’s case meet the threshold.” McCleskey v. Kemp, 481 U.S. 279, 305 (1987) (citations omitted). The criteria established in Ohio to properly guide the jury is found in O.R.C. § 2929.04 (A) under Ohio’s sentencing calculus which limits the jury’s consideration to evidence of the proven aggravating circumstances. See State v. Wogenstahl, 75 Ohio St. 3d 344, 662 N.E.2d 311 (1996).

The constitutional principles that require a guided sentencing determination were breached in this case because the jury’s discretion was improperly guided by the failure of the trial court to identify relevant trial phase evidence. Juries are capable of understanding capital sentencing issues, however, “they must first be properly instructed.” Mills v. Maryland, 486 U.S. 367, 377 n.10 (1988). Moreover, this duty arises absent any request from assistance from the jury. “A trial judge’s duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part.” Kelly v. South Carolina, 534 U.S. 234, 266 (2002). Because of the trial court’s instructions in the present case, the jury had no rational frame-work to discern what trial phase evidence was relevant to its weighing process.

The trial court’s failure to properly instruct the jury left the legal determination of relevance to be made by the jury. This Court has made it clear in previous decisions that issues of fact are for the jury but issues of law are for the court. Based on this legal premise, this Court has concluded that it is the trial court’s responsibility, not the jury’s responsibility, to determine

what evidence is relevant for purposes of sentencing. State v. Cornwell, 86 Ohio St. 3d 560, 567, 715 N.E.2d 1144, 1152 (1999); State v. Getsy, 84 Ohio St. 3d 180, 201, 702 N.E.2d 866, 887 (1998). Moreover, this Court has concluded that it is error for a trial court to leave the issue of relevance to the jury.

This Court was faced with an almost identical instruction issue in State v. Jones, 91 Ohio St. 3d 335, 349-50, 744 N.E.2d 1163, 1179-80 (2001). In Jones, the trial court instructed the jury that “only that testimony and evidence which was presented in the first phase that is relevant to the aggravating circumstances [appellant] was found guilty of committing, or to any of the mitigating factors that will be described below is to be consider by you.” Id. at 349, 744 N.E.2d at 1179-80. Unlike in Hand’s case, the trial court went on to determine which of the exhibits were relevant and could be considered by the jury. Id. at 350, 744 N.E.2d at 1180. This Court agreed that the trial court’s instruction “could reasonably be interpreted by one or more members of the jury as implying that it was their responsibility to determine the relevance of evidence presented during the first phase of trial.” Id.<sup>5</sup> This Court concluded that, to the extent that the jury interpreted the trial court’s instruction as allowing them to determine relevancy, the trial court’s instruction misled the jury. However, this Court went on to conclude that the trial court’s misstatement did not prejudice the outcome of Jones’ case because much of the trial phase evidence was relevant at the sentencing phase since it was related to the aggravated circumstances in the case. Id.

The same cannot be said in the present case particularly since the trial court failed to remove any exhibits from the jury’s consideration. Because the trial court did not fulfill its responsibility to determine what evidence was relevant for consideration in the sentencing phase,

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<sup>5</sup> The court also determined that the jury may have interpreted the instruction as instructing them to consider only that evidence that the court deemed relevant.

the jury was able to consider a wealth of information, much of which was irrelevant to the aggravating circumstances of which Hand was convicted and much of which was extremely prejudicial to the jury's consideration of the appropriate sentence in the case.

**4. Application of law to facts.**

Among the evidence the jury was able to consider in imposing the death penalty was the evidence of the actual homicides themselves, which was introduced through the testimony of the pathologists and through photographs which depicted the murder of the victims. See, Testimonies of Dr. Norton (Jill Hand and Lonnie Welch examinations) Tr. 1752-1807 and Exh. 143, 147-152; Mr. Fardal (Lori Hand examination) Tr. 2341-2354 and Exh. 184-190; Dr. Zipf (Donna Hand examination) Tr. 2957-2974 and Exh. 208-212. This is impermissible under Ohio law. See State v. Jenkins, 15 Ohio St. 3d 164, 1678, 473 N.E.2d 264, 281 (1984) (aggravating circumstance narrows "class of homicides" for use of death penalty). The coroner's testimonies as well as the photographs and exhibits had little probative value to any issue in the specifications to be considered for Hand's sentencing.

In addition to the undue emphasis placed on the homicide, the jury also had discretion to consider the wealth of improper other acts evidence that was introduced during the State's case. See, Proposition of Law No. 2. This included the testimony regarding whether Hand acted sad about Jill's death, (Tr. 1901) as well as evidence the prosecutor introduced that Hand kicked his father out of his business, was obsessed with money, and enjoyed reading true crime stories. (Tr. 2440, 243). None of this information was relevant to proving to the jury's sentencing determination.

Even more prejudicial was the jury's power to consider the fraudulent business and tax practices as part of the sentencing determination. (Tr. 978, 992, 1011, 1022, 1046, 1093, 1103,

1114, 1129, 1153, 1165, 1187, 1206, 1225, 1236, 1241, 1251, 1262, 1268, 1278, 1281, 1287, 1303, 1328, 1343, 1356, 1350, 1390, 1471, 1481, 1487, 1493, 3223, 3234; Exhs 1-73, 275-279). See, Proposition of Law No. 2. This evidence of Hand's behavior and conduct was not relevant to the aggravating circumstances of the offense and was particularly prejudicial in the penalty phase of his trial. All that the evidence tended to demonstrate was that Hand was an individual who did not hesitate to violate the law and was influenced by money.

There is a manifest risk that the jury improperly considered Hand's acts and bad character and utilized such evidence in reaching a determination regarding the appropriate sentence. The evidence invited the jury to improperly consider non-statutory aggravating circumstances in performing its weighing obligation. See State v. Green, 90 Ohio St. 3d 352, 362, 738 N.E.2d at 1208, 1223 (2000); Wogenstahl, 75 Ohio St. 3d, at 352-55, 662 N.E.2d at 319, 321 (1996); State v. Davis, 38 Ohio St. 3d 361, 367-369, 528 N.E.2d 925, 931-933 (1988).

## **5. Conclusion.**

The court's duty in Hand's case was to ensure that the jury weighed only evidence of the aggravating circumstance from each count against the mitigating factors. The court breached this duty. As a result, much of the evidence considered by the jury was legally irrelevant to the nature and circumstances of the aggravating circumstances and should not have been utilized by the jury in rendering a sentencing determination.

The trial court's failure to advise the jury as to the relevant testimony to be considered for sentencing purposes was improper. Hand's sentencing determination was made with the type of open-ended discretion that the Eighth Amendment forbids. See Stringer v. Black, 503 U.S. 222, 237 (1992); Sochor v. Florida, 504 U.S. 527, 532 (1992). Therefore, Hand's death sentence must be vacated. See O.R.C. § 2929.06.

## Proposition Of Law No. 10

A capital defendant's right against cruel and unusual punishment under the Eighth and Fourteenth Amendments is denied when the sentencer is precluded from considering residual doubt of guilt as a mitigating factor. The preclusion of residual doubt from a capital sentencing proceeding and the trial court's refusal to instruct the jury to consider it also violate the Defendant's due process right to rebuttal under the Fourteenth Amendment. The preclusion of residual doubt may also infringe a capital defendant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments. U.S. Const. Amends. VI, VIII, XIV; Ohio Const. Art. I, §§ 9, 10, 16.

### 1. Introduction.

In State v. McGuire, 80 Ohio St. 3d 390, 403-04, 686 N.E.2d 1112, 1123 (1997), this Court held that residual doubts of guilt are irrelevant to the issue of whether a person convicted of a capital crime should be sentenced to death or a lesser punishment. This decision flatly precludes the capital sentencer in Ohio from entertaining residual doubts of guilt with regard to the capital defendant's moral culpability; notwithstanding proof beyond a reasonable doubt of his or her legal culpability. Gerald Hand urges this Court to reconsider McGuire.<sup>6</sup>

### 2. Facts.

Just prior to the beginning of the penalty phase, defense counsel filed a motion requesting that the jury be instructed that it may consider residual doubt as a mitigating factor during the mitigation phase of Hand's trial. (T.d. 468) The trial court overruled counsel's request.

Had counsel been permitted to argue residual doubt, a strong argument could have been made on Hand's behalf. Defense could have emphasized that nearly all of the evidence in support of the aggravating circumstances came in through hearsay statements attributed to

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<sup>6</sup> Similar claims have been denied on the merits by this Court, e.g. State v. Smith, 97 Ohio St. 3d 367, 780 N.E.2d 221 (2002) and this Court may summarily reject this claim on the merits if it disagrees with Appellant's view of Federal law. State v. Poindexter, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).

Lonnie Welch. The defense could have further emphasized the evidence in support of the self-defense instruction given by the trial court in the trial phase. Such an argument would have saved counsel from having to distance themselves from their presentation in the trial phase as emphasized by trial counsel's comments in the opening remarks of the penalty phase: "I've talked to lawyers who have done these types of trials before, and they say that you take a great chance when you defend the case in trial and you lose; you take a great chance that when the same jury comes back, they won't listen to you. They didn't listen to you at trial, and they won't listen to you at the mitigation hearing." (Tr. 3850-51) Had the defense been able to argue residual doubt in the penalty phase, their arguments would have been more consistent.

### **3. Argument.**

#### **A. It is not illogical or inconsistent to permit arguments or evidence of residual doubt in mitigation after a guilty verdict at the trial phase.**

In McGuire this Court rejected residual doubt as a mitigating factor, inter alia, because it reasoned that residual doubt of guilt was "illogical" following a verdict of guilt beyond a reasonable doubt. 80 Ohio St. 3d at 403, 686 N.E.2d at 1123. This reasoning overlooks, however, the essential distinction between residual doubt as mitigation and the State's burden of proof at trial. At trial, the issue for the trier of fact is whether the accused is legally culpable on each essential element beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). A proper standard of proof beyond a reasonable doubt must direct the trier of fact to decide the legal, and not moral, culpability of the accused. See Victor v. Nebraska, 511 U.S. 1, 21 (1994) (Kennedy J., concurring).

Unlike the trial phase, in which the issue is legal culpability beyond a reasonable doubt, the issue for the trier of fact at the penalty phase is the moral culpability of the already convicted defendant. See Gregg v. Georgia, 428 U.S. 153, 184 (1976) (capital punishment is "expression

of society's moral outrage) (footnote omitted); Enmund v. Florida, 458 U.S. 782, 800 (1982) (intent of capital defendant relevant to "moral guilt"); Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter J., Concurring) (Eighth Amendment requires "reasoned moral judgment" in capital cases); California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (capital sentencing proceeding inquires into defendant's moral culpability). Thus, this Court was incorrect in McGuire to call residual doubts "illogical". See 80 Ohio St. 3d at 405, 686 N.E.2d at 1124. (Pfeifer J., concurring). Reasonable doubts exist in the context of the quantum of proof for legal, and not moral, culpability. See Victor, 511 U.S. at 21 (Kennedy J., concurring). Residual doubts exist in the context of a convicted person's moral culpability. Further, the use of the beyond a reasonable doubt standard for sentencing under O.R.C. § 2929.03(D)(1) does not diminish this distinction between legal and moral culpability. Instead, the Revised Code merely provides guidance to weigh those factors that are used to assess the moral culpability of the defendant. See McGuire, 80 Ohio St. 3d at 405, 686 N.E.2d at 1124 (Pfeifer J., concurring) ("It is entirely logical to be certain beyond a reasonable doubt as to a man's guilt, yet not be certain enough to send him to death.")

**B. Residual doubt of guilt offered in mitigation must be considered under the reliability component of the Eighth Amendment.**

Death is different in kind from lesser punishments because of its extreme finality. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Due to the unique nature of death as a punishment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Id. Accordingly, the Supreme Court of the United States held in Woodson, and since then, that there is a reliability component to capital jurisprudence under the Eighth and Fourteenth Amendments. See id.; Simmons v. South Carolina, 512 U.S. at 172 (Souter J., concurring) (citations omitted); Beck v. Alabama, 447 U.S.

625, 637-38 (1980) (instruction on lesser offense required in capital case when supported by evidence because of risk of mistake in imposition of death penalty); Parker v. Dugger, 498 U.S. 308, 321 (1991) (meaningful appellate review is crucial to review of capital sentences).

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

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

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

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

80 Ohio St. 3d at 405, 686 N.E.2d at 1124 (Pfeifer, J., concurring).

Another Ohioan wrongly sentenced to death was Dale Johnston:

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

because one witness had been hypnotized. The state later dropped charges against Johnston.”

Richard C. Dieter, *Innocence And The Death Penalty: The Increasing Danger Of Executing The Innocent*, A Death Penalty Information Center Report at 12-13 (July 1997) [hereinafter, Dieter] [Reprinted in Appendix at A-76-96].

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

Aside from the defendant’s interest in reliability, society also has an interest in having its ultimate punishment inflicted with assurances of reliability. See generally, Gregg, 428 U.S. 153; Woodson, 428 U.S. 280. Although far less personal to society than to the defendant, the risk of avoiding a mistake in capital sentencing creates a strong societal interest in the reliability of death cases. Residual doubt is a necessary “backstop” to avoid mistakes. If the wrong result is reached at trial, but the evidence is nevertheless legally sufficient under the stringent test in Jackson v. Virginia, 443 U.S. 307 (1979), the defendant must produce evidence outside the record to exonerate himself or herself. However, changes to Ohio law have accelerated the pace of direct appeals and collateral litigation. See O.R.C. § 2953.21; O.R.C. § 2929.05(A). Further, changes to the habeas corpus statutes have decreased the capital defendant’s chances for obtaining discovery and for unearthing exculpatory facts in federal court. See c.g., 28 U.S.C. § 2254(d)(2). Given this compression of time from trial to execution, it will be more difficult for innocent capital defendants to prove their innocence. Mitigation as residual doubt, however, may correct this problem. If residual doubt results in a life sentence, then the defendant lives to

fight for his innocence from prison.<sup>7</sup> The American Law Institute noted this benefit of residual doubt when the ALI included residual doubt in its Model Penal Code:

After the U.S. Supreme Court overturned existing death penalty statutes in 1972, many states wrote statutes which closely paralleled the recommendations of the American Law Institute's (ALI) Model Penal Code. Indeed, in Gregg v. Georgia, which gave approval to some states, new statutes, the Court specifically referred to the Model Penal Code as a source for constructing an acceptable statute. In this code, there was an attempt to minimize mistaken executions by allowing the trial court to withhold a death sentence if the evidence left some doubt about the defendant's guilt. These drafters realized the lingering possibility of innocence despite a conviction "beyond a reasonable doubt." The Model Penal Code contained the following provision:

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

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

\* \* \* \*

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

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

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

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

The prospect of a mistake in capital sentencing is very real: "For every 7 executions—486 since 1976 – 1 other prisoner on death row has been found innocent." Joseph P. Shapiro, The Wrong Men On Death Row, U.S. News & World Report, Nov. 9, 1998 at 22. See also

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<sup>7</sup> As a life sentence is a very serious form of punishment, it is not a windfall for a guilty person. See State v. Berry, 80 Ohio St. 3d 371, 686 N.E.2d 1097 (1997) (competent defendant preferred death to life in prison).

Dieter at iii (69 people released from death row between 1973 and July 1997 “after evidence of their innocence emerged”). Because residual doubt in mitigation lessens the risk of a mistake, McGuire must be overruled. McGuire undermines society’s interest in reliable capital sentencing. See McGuire, 80 Ohio St. 3d at 405, 686 N.E.2d at 1124 (Pfeifer J., concurring) (“Ohio’s death penalty statutory scheme, with its high hoops is less a protection for defendant’s than it is a protection for our status as a civilized society”).

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

As the Court noted in Caldwell:

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

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

can alleviate the very real personal strain of capital sentencing. McGuire exacts too heavy a toll on persons of good conscience who must decide the issue of life or death.

**C. Franklin v. Lynaugh, 487 U.S. 164 (1988), did not expressly hold that residual doubt could be completely excluded from a capital sentencer’s consideration.**

In McGuire this Court relied on Franklin for the proposition that a state could completely exclude residual doubt from the capital sentencer’s consideration. 80 Ohio St. 3d at 403, 686 N.E.2d at 1122. This reading of Franklin is too broad. Admittedly, the Franklin Court expressed doubt whether residual doubt was constitutionally required. 487 U.S. at 172-75. The Court assumed no constitutional error in Franklin, however, because “[t]he trial court placed no limit whatsoever on [Franklin’s] opportunity to press the ‘residual doubts’ question with the sentencing jury.” Id. at 174. Thus, the issue presented here, whether the sentencer may be precluded from entertaining any residual doubts, was absent in Franklin.

Unlike Franklin, in this case the trial court precluded all arguments about residual doubt. (Apr. 25, 2002, Tp. 25; June 20, 2002, Tp. 20-21). Hand asserts that because of this crucial difference, Franklin v. Lynaugh is distinguished. Constitutional error resulted in his case under the Eighth and Fourteenth Amendments.

**D. It is unconstitutional to limit the relevance of mitigation to the capital defendant’s character, record, and the circumstances of his or her offense.**

In McGuire, this Court relied on Franklin v. Lynaugh, 487 U.S. at 174, for the proposition that residual doubt is irrelevant as mitigation because it is not evidence of the defendant’s character, or record, or circumstances of the offense. 80 Ohio St. 3d at 403, 686 N.E.2d at 1122. Justice O’Connor’s concurring opinion in Franklin stated that the constitutional relevance of mitigation is defined by the three factors stated in Lockett v. Ohio, 438 U.S. 586 (1978): the character and record of the defendant and the circumstances of the offense.

Franklin, 487 U.S. at 185 (O'Connor, J., concurring). See O.R.C. § 2929.04(B). Based on that language in Franklin, this Court's holding in McGuire seems at first blush to be a proper statement of the law. Upon a closer scrutiny of capital case jurisprudence, however, it is evident that the constitutional definition of relevance for mitigation is not so narrow.

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

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

(emphasis added).

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

In Skipper, the Court held that a capital defendant's adjustment to life in prison was a constitutionally required mitigating factor. Id. at 4-5. To a certain extent, Skipper mitigation relies on the defendant's past behavior while incarcerated, and therefore, it relies in part on the defendant's character or record. Nevertheless, the Court made clear in Skipper that this type of mitigation also involves the defendant's "probable future conduct" while incarcerated. Id. at 4.

Thus, the Court opined that the predictive element of Skipper mitigation is constitutionally relevant, even assuming that it was not evidence of the defendant's character:

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

Id. at 6-7.

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

This Court overlooked Skipper, and the corollary rule to Lockett, in McGuire. Accordingly, this Court's interpretation of Franklin v. Lynaugh unduly restricted the jury from considering residual doubt in mitigation of Smith's intent to kill. Cf. Williamson v. Reynolds, 904 F.Supp. 1529, 1565 (E.D. Okla. 1995) ("It has been well established by the Supreme Court in Lockett and Eddings that a defendant has a right to suggest during mitigation...that a possible third person might have committed the crime...").

**E. Evidence of residual doubt is relevant as mitigation when considered as part of the nature and circumstances of the offense under O.R.C. § 2929.04(B).**

In McGuire, this Court held that residual doubt is irrelevant to the nature and circumstances of the offense. 80 Ohio St. 3d at 403-04, 686 N.E.2d at 1123. In reaching this conclusion, this Court followed the conclusory statement in Franklin v. Lynaugh, 487 U.S. at 174, that residual doubts are irrelevant to the circumstances of the offense. 80 Ohio St. 3d at 403, 686 N.E.2d at 1122. Hand urges this Court to reconsider McGuire because Franklin's unreasoned conclusion is incorrect. Residual doubt in mitigation may certainly be relevant under the statutory factor of the nature and circumstances of the offense.

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

For example, in State v. Watson, 61 Ohio St. 3d 1, 572 N.E.2d 97 (1991), this Court vacated the death sentence because the facts adduced at trial created residual doubts. Four disinterested witnesses saw someone other than Watson run away from the crime scene. Id. at 18, 572 N.E.2d at 111. Further, the facts adduced at trial showed that the offender pumped his shotgun at the crime scene, which ejected a live shell. Id. at 2, 572 N.E.2d at 101. Another suspect's fingerprint was found on that ejected shotgun shell. Id. The nature and circumstances of the offense in Watson provided mitigation as residual doubt. Id. at 17, 572 N.E.2d at 111. Accordingly, McGuire was incorrect to conclude that residual doubt cannot be found within the facts of an offense.

The facts of an offense may create residual doubt as to either identity or to a discrete element of either the offense or the aggravating circumstance. Here, the defendant's inability to cross-examine the chief witness against him raises doubts as to the reliability of the conviction.

This type of case, one with a dead alleged co-conspirator, may create residual doubt. The alleged testimony of the co-conspirator might well be compelling enough to secure an unjust capital conviction. In such a case, the facts of the offense should be mitigating as residual doubt. In such a case, the consideration of residual doubt may well prevent an unjust execution. In light of these considerations, it is clear that McGuire exacts too high a price for too little benefit.

**F. This Court's interpretation of the O.R.C. § 2929.04(B)(7) mitigating factor in McGuire unduly restricts the capital sentencer's consideration of non-statutory mitigation in violation of Hitchcock v. Dugger, 481 U.S. 393 (1987).**

In McGuire, this Court stated that mitigation under O.R.C. § 2929.04(B)(7) "must be read in relation to O.R.C. 2929.04(B)". 80 Ohio St. 3d at 403, 686 N.E.2d at 1122. Thus, this Court restricted the scope of (B)(7) "catch all" mitigation to the O.R.C. § 2929.04(B) factors of the defendant's history, character and background, and the nature and circumstances of the offense. Id. This interpretation of O.R.C. § 2929.04(B)(7) unduly restricts the sentencer's consideration of constitutionally required non-statutory mitigation. Hitchcock, 481 U.S. at 398-99.

In Hitchcock, the Supreme Court vacated a capital sentence because the trial court limited the jury's consideration to statutory mitigating factors. Id. at 398. The Court held that the restriction of non-statutory mitigation "did not comport with the requirements of [Skipper v. South Carolina, Eddings v. Oklahoma, and Lockett v. Ohio]." Id. at 398-99. As in Hitchcock, this Courts' restrictive view of the (B)(7) non-statutory, catch all factor is unconstitutionally preclusive.

Ohio's former death penalty statute was invalidated in Lockett because it limited the sentencer to three mitigating factors. 438 U.S. at 604-05. Doubtlessly, the current statute was drafted with the intent to avoid any similar constitutional errors. Accordingly, O.R.C. § 2929.04(B) lists the factors in Lockett, "and all of the following factors" listed in (B)(1) through (B)(6). Thereafter, the statute directs the sentencer to consider, in addition to the factors previously stated in O.R.C. § 2929.04(B) and (B)(1) through (B)(6), "[a]ny other factors that are relevant to the issue [of punishment]." O.R.C. § 2929.04(B)(7). See McGuire, 80 Ohio St. 3d at 405, 686 N.E.2d at 1124 (Pfeifer, J., concurring). By the plain language of the statute, the General Assembly did not intend to limit (B)(7) catch all mitigation to mitigation that was previously listed. See id. "Any other" logically means anything other than that already listed. See id. The interpretation of the statute in the McGuire concurrence prevails when the statute is read in pari materi. See O.R.C. § 2929.04(C). This is especially so when the history of Ohio's previous death penalty statute is considered. See Lockett, 438 U.S. at 604-05. Hand therefore urges this Court to adopt the statutory interpretation of (B)(7) mitigation as expressed in the concurring opinion in McGuire.

**G. When the State relies on arguments or evidence of legal guilt to seek the death penalty, a capital defendant has a due process right to rebut such arguments or evidence. The defendant's only means of rebuttal is to argue or rely on evidence of residual doubt.**

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

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

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

Although the existence of the aggravating circumstance is moot for sentencing, the Revised Code permits the State to re-litigate the aggravating circumstance by introducing evidence of the "nature and circumstances of the aggravating circumstance". O.R.C. § 2929.03 (D)(1). Further, case law from this Court allows the State to re-litigate the aggravating circumstance at the penalty phase by commenting on the trial phase facts that encompass the aggravating circumstance. See State v. Gumm, 73 Ohio St. 3d 413, 653 N.E.2d 253 (1995). Despite the mootness of the existence of the aggravating circumstance, the State has free reign to re-litigate it by introducing trial phase evidence, and by arguing trial phase facts. See id.

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

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

Here, the State relied on the trial phase evidence for sentencing. (Tr. 3846-47, 3899, 3901) The State also argued for death by emphasizing an element of aggravated murder that the jury found proven at trial: Hand's killing of Welch in order "to silence" him. (Tr. 3899)

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

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

**H. McGuire should be overruled because it prevents the capital defendant from offering evidence with arguably exculpatory value in mitigation, when such evidence is discovered between the guilty verdict and the penalty phase.**

Before McGuire, a capital defendant could argue residual doubts as mitigation. See Watson, 61 Ohio St. 3d at 17, 572 N.E.2d at 111; State v. Gillard, 40 Ohio St. 3d 226, 239, 533 N.E.2d 272, 281 (1988). Because residual doubt was a valid mitigating factor, the defense could introduce arguably exculpatory evidence as evidence of residual doubt, even when that evidence first became available to counsel between the trial and penalty phases. See O.R.C. § 2929.04(C). The standard for admitting this type of newly discovered evidence for sentencing purposes was

not strict. Indeed, this Court held that the Rules of Evidence must be construed liberally for the defendant at the penalty phase. See State v. Landrum, 53 Ohio St. 3d 107, 115, 559 N.E.2d 710, 721 (1990); State v. Williams, 23 Ohio St. 3d 16, 23, 490 N.E.2d 906, 913 (1986). See also O.R.C. § 2929.04(C). After McGuire, however, the defense is prevented from offering arguably exculpatory evidence to the trier of fact, when that evidence is discovered between the trial and penalty phases.

This restriction is unjust and it renders capital sentencing unreliable when new evidence arises. Hand concedes that he did not offer any such new evidence in his case. He argues nonetheless that this is a key policy consideration for this Court to consider as it decides whether to overrule the syllabus in McGuire and allow residual doubt in mitigation.

Doubtlessly, the typical juror or panel judge would want to know about new evidence with arguably exculpatory value before deciding whether to sentence a fellow human being to death. Compare Harris v. Alabama, 513 U.S. at 518 (jurors “answer only to their own consciences”) (Stevens, J., dissenting). As Justice Pfeifer wrote in McGuire, “the execution of an innocent person would be the ultimate failure of our justice system. The mitigating factor of residual doubt reaches that deepest, most basic of concerns.” 80 Ohio St. 3d at 405; 686 N.E.2d at 1124 (Pfeifer, J., concurring). This basic concern is never more apparent than when the defense produces new evidence with arguably exculpatory value. After McGuire, capital sentencers will be precluded from considering such evidence whenever it is found between the trial and penalty phase.

The availability of post-conviction remedies does not correct this oversight in McGuire. See O.R.C. § 2953.21. Evidence discovered between the trial and penalty phases is still evidence that is available to the defense during the trial proceedings. The doctrine of res judicata bars

evidence on post-conviction that is available to the defense during any stage of the trial proceeding. See State v. Perry, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967).

A motion for a new trial under Criminal Rule 33 is equally unavailing for this situation. To satisfy the high threshold for a new trial motion, the defendant must show that the new evidence discloses a strong probability that it will change the result if a new trial is granted. State v. Petro, 148 Ohio St. 505, 76 N.E.2d 370 (1947). This is a much higher burden for the defendant to meet when compared to the relaxed standard for the admissibility of evidence at the penalty phase under Landrum and Williams. See 53 Ohio St. 3d at 115, 559 N.E.2d at 721; 23 Ohio St. 3d at 23, 490 N.E.2d at 913. Thus, new evidence that would be admissible at sentencing before McGuire might not satisfy the test for Criminal Rule 33. Under such circumstances, evidence that is relevant to society's "most basic of concerns" would simply be lost. See McGuire, 80 Ohio St. 3d at 405, 686 N.E.2d at 1124 (Pfeifer, J., concurring).

Last, even if such new evidence could be considered in collateral review, it cannot be gainsaid that the trial is the main event in the criminal justice system. See generally, Herrera v. Collins, 506 U.S. 390 (1993). Issues of fact that can be decided at trial should be decided at trial. For the sake of judicial economy, and fundamental fairness, the capital defendant should be allowed to offer new evidence with arguably exculpatory value when that evidence is disclosed between the trial and penalty phases.

**I. McGuire's prohibition on residual doubt will interfere with the reasonable strategic choices of the defense in mitigation.**

In State v. Tyler, this Court held that the defendant may waive mitigation as a matter of strategy. 50 Ohio St. 3d 24, 553 N.E.2d 576 (1990). This Court held in State v. Goodwin that it was a reasonable strategy for defense counsel not to present any new mitigating evidence but instead to argue residual doubt. 84 Ohio St. 3d 331, 703 N.E.2d 1251 (1999). From those cases,

it follows that it is a reasonable strategic choice for defense counsel to forego mitigation and instead maintain his or her client's innocence in order to have a defense that is consistent from the not guilty plea up to the penalty phase. See id.

After McGuire, this type of strategy is foreclosed; even though it was deemed reasonable by this Court in Goodwin. McGuire forces the defense to abandon an acknowledged strategic choice of maintaining innocence for the sake of consistency. For defendants like the one in Tyler, McGuire's holding has left them utterly defenseless after the trial phase. Their right to waive mitigation in order to protest their innocence to the jury is rendered meaningless. If this Court believes that the tactic used in Goodwin was a reasonable strategic choice, then it must permit defense counsel to give effect to that strategic choice by arguing for residual doubts. Accordingly, the McGuire holding will infringe on a capital defendant's Sixth and Fourteenth Amendment right to the effective assistance of counsel by state interference. See United States v. Cronie, 466 U.S. 648 (1984).

Hand concedes that he did not forego mitigation to argue for residual doubt. However, this Court should consider this issue as a policy matter in deciding whether to overrule McGuire.

#### **4. Conclusion**

The McGuire decision was imprudent. It unduly restricts non-statutory mitigation, it violates the reliability component of the Eighth Amendment, and it overlooks the reality that the circumstances of an offense may raise doubts as to the defendant's moral culpability. Moreover, it overlooks the basic unfairness in capital litigation which allows the prosecutor to re-litigate trial issues without giving the defense an opportunity to rebut such re-litigation with evidence and argument in kind. Gerald Hand respectfully urges this Court to overrule the syllabus in McGuire and to recognize residual doubt as a mitigating factor. Gerald Hand's death sentence

must be vacated and his case remanded for re-sentencing to include consideration of residual doubt. See O.R.C. § 2929.06 (B).

### Proposition Of Law No. 11

Gerald Hand's death sentence must be vacated by this Court as inappropriate because the evidence in mitigation was not outweighed by the aggravating circumstances.

The death penalty is not the appropriate punishment for Gerald Hand. Under the independent analysis mandated by Ohio Rev. Code § 2929.05, this Court must review all of the evidence presented at Hand's capital trial and conclude that death is not appropriate in this case.

Despite the many charges brought and the volume of evidence presented by the State in the trial phase of this case, the weighing process now before this Court is very straightforward. Gerald Hand was convicted of two counts of aggravated murder. Following the trial court's merger of the multiple death specifications attached to Count II, each count of aggravated murder contains one death penalty specification to be weighed in this sentencing process. As to Count I, the aggravating circumstance is the fact that the aggravated murder was "part of a course of conduct involving the purposeful killing of Jill J. Hand and Walter Lonnie Welch." (Tr. 3842) As to Count II, the Court must consider the aggravating circumstance that "the aggravated murder of Lonnie Welch was for the purpose of escaping detection, apprehension, trial, or punishment for his complicity in the murders of Lori L. Hand and Donna A. Hand, and the murder of Jill J. Hand." (Tr. 3842) For each count, the Court must weigh the single aggravating circumstance against the totality of the mitigating evidence. State v. Cooney, 46 Ohio St. 3d 20, 544 N.E.2d 895 (1989). From this weighing process, the Court must conclude that the death penalty is not the appropriate punishment for either count.

Before undertaking its weighing process, the Court must "determine if the evidence supports the finding of the aggravating circumstance" found below. Ohio Rev. Code § 2929.05(A). The evidence that supports the aggravating circumstance in each count comes

largely from hearsay statements attributed to Lonnie Welch. Hand has never had any opportunity to cross-examine these statements. Given the fact that much of the evidence comes from Lonnie through inadmissible and unreliable hearsay (See Proposition of Law No. 1), the Court should either determine that the specification is not adequately established or that it should carry less weight. This Court should not affirm a death sentence on this type of evidence.

The specification to Count II has almost no evidentiary support except through the hearsay statements of Lonnie Welch. The State's theory is that Bob Hand had hired Welch to kill his first two wives and that Welch had agreed to kill Jill Hand. The motive for Welch's murder was therefore to keep him silent about these crimes. Almost no evidence of this plot exists except through hearsay statements attributed to Welch by witnesses such as Pete Adams, Betty Evans, Anna Hughes, David Jordan, Barbara McKinney, Tezona McKinney, and Shannon Welch. Although the murders of Donna and Lori Hand were thoroughly investigated in the 1970's, no charges were ever brought against Gerald Hand. Even today with improved DNA technology, no physical evidence links the crimes to either Gerald Hand or Lonnie Welch. The only basis for this conviction is the hearsay evidence.

There is no non-hearsay evidence that would show that Welch killed either Donna or Lori Hand. In fact, the evidence points elsewhere. The gloves that were worn by Lori Hand's murderer failed to contain any DNA from Welch. (Tr. 3161) There is no independent evidence of any payouts from Bob Hand to Lonnie Welch. At the same time, the evidence showed that Hand had fired Welch back in the mid 1990's and that he would not bail him out of jail shortly before he was allegedly supposed to murder Jill Hand. (Tr. 2730, 2647)

Furthermore, the State's theory as to the specification to Count I, that Bob Hand purposely killed his wife and Welch as a part of a course of conduct to kill two or more people,

is also based on the same hearsay evidence. In order to find that the State has established that charge, the trier of fact must believe that Welch was in the Hand home at Hand's request, that Hand set up the situation that occurred. That finding can only be made by believing the hearsay evidence. For these reasons, the Court should find that the evidence does not support the finding of the aggravating circumstance attached to either count. Or, in the alternative, the Court should accord less weight to aggravating circumstances supported by evidence that was never subject to cross-examination by the defendant.

This same evidence would also support an argument of residual doubt. (See Proposition of Law No. 10) As an independent sentencer, this Court's failure to consider such mitigating evidence, would be constitutional error.

At the same time it should discount hearsay evidence supporting the aggravating circumstances, the Court should accord significant weight to the mitigating evidence presented at trial. Gerald Hand was 54 years old at the time of trial (tr. 3393) and had no previous criminal record. He is a Vietnam veteran. (Tr. 3397) He has a loving relationship with his son whom he raised and he will likely be able to make a positive contribution in prison. Society would be better served in this case with a life sentence.

Gerald Hand's age of 54 at the time of trial should weigh heavily in mitigation. First, his age and his lack of violent behavior in institutional settings show that he would be very little risk of violent behavior in prison. (Tr. 3876) Cf. State v. Bradley, 42 Ohio St. 3d 136, 146, 538 N.E. 2d 373, 385 (1989) (Court accorded little mitigating weight to appellant's advanced age because murder had taken place in prison.) More importantly, the fact that he is much older than most death-row inmates, is a basis for a less harsh punishment. In any case scenario, the appeals

process will take years and his age at any eventual execution will even more advanced. The fact that an inmate, such as Gerald Hand, is of advancing age is worthy of weight in mitigation.

Furthermore, Hand's honorable service in Vietnam deserves weight in mitigation. Hand was drafted when he was only twenty years old and spent a year and saw combat in Vietnam. (Tr. 3397-98) He was honorably discharged. (Tr. 3399) This service is mitigating and is evidence that Hand can function well in a structured setting. See State v. Hessler, 90 Ohio St. 3d 108, 130, 734 N.E.2d 1237, 1257 (2000) (noting military service as mitigating evidence).

This Court must also consider the fact that Gerald and Lori Hand's son, Robert, presented testimony that his father would continue to be a positive influence on him and his children even if he were to spend the rest of his life in prison. (Tr. 3890) Robbie Hand has already suffered the loss of his mother, Lori Hand, and asked the jury to spare his father's life. (Tr. 3891) Gerald Hand volunteered as a scout master for his son and did charity work through the scouting organization. (Tr. 3883, 3890) For Robbie, Gerald Hand has "really been the only close family member I've ever had, the only one I've had to look up to, and to take care of me, provide for me." (Tr. 3888) This Court must consider this evidence and weigh it in mitigation.

The defense also presented evidence to show that Gerald Hand had a difficult childhood. His father was an alcoholic who did not get along with Gerald's mother and who may have abused her. (Tr. 3871) They divorced when Gerald was a child. (Id.) Gerald was eventually placed with Franklin County Children's Services after there was an allegation that his mother was openly cohabitating with men in front of the children. (Id.) A chaotic and troubled childhood is worthy of weight in mitigation.

Throughout his adult life, Hand has held a job and has acquired useful vocational skills. Because he is reasonably intelligent and has no history of drinking or substance abuse, he should

be able to use his vocational skills within the prison setting and be able to contribute something to society. (Tr. 3874-75)

For all of these reasons, the death penalty is not appropriate in this case. The evidence presented at trial in support of the aggravating circumstances has not been tested through cross-examination. Even if this Court determines that it was correctly admitted at trial, it is not of sufficient reliability to support a death sentence. Furthermore, there is compelling mitigating evidence to show that this older man could still contribute some good by working within the prison system. Carrying out the death sentence on a man who will be over 60 years old when all litigation is finished is not the appropriate here. This Court should vacate Gerald Hand's death sentence through its independent reweighing.

## Proposition of Law No. 12

A capital defendant's right to due process is violated when the State is permitted to convict upon a standard of proof below proof beyond a reasonable doubt. U.S. Const. amend. XIV; Article I, § 16 of the Ohio Constitution

### 1. Introduction.

"There is always in litigation a margin of error" and "[i]t is critical that the moral force of the criminal law not to be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." In re Winship, 397 U.S. 358, 364 (1970). To maintain confidence in our system of laws proof beyond a reasonable doubt must be held to be proof of guilt "with utmost certainty." Id. Thus, a capital defendant's conviction and death sentence must be reversed where the instruction on reasonable doubt could have led jurors to find guilt "based on a degree of proof below that required by the Due Process Clause." Cage v. Louisiana, 498 U.S. 39, 41 (1990). The instruction given by the trial court allowed the jurors to find Gerald Hand guilty on "a degree of proof below that required by the Due Process Clause." Hand's convictions and death sentence must be reversed. See id.

### 2. Facts.

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

Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are **firmly convinced of the truth of the charge**. Reasonable doubt is a doubt based upon reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to **human affairs or depending on moral evidence**, is open to some possible or imaginary doubt. Proof beyond a reasonable is proof of such character that an ordinary person would be **willing to rely and act upon it in the most important of his or her own affairs**.

(Tr. 3750) (emphasis added).

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

Reasonable doubt is present when, after you have carefully [sic] and compared all the evidence, you cannot say you are **firmly convinced** that the aggravating circumstance of which defendant was found guilty outweighs the mitigating factors. Reasonable doubt is a doubt based upon reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to **human affairs or depending upon moral evidence** is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be **willing to rely upon it and act upon it in the most important of his or her own affairs.**

(Fr. 3907) (emphasis added).

The trial court's charge, taken as whole, did not adequately convey to jurors the stringent "beyond a reasonable doubt" standard. Hand points this Court to three specific flaws within the trial court's instructions. First, the "willing to act" language of O.R.C. § 2901.05 did not guide the jury because it is too lenient. Second, the statutory definition of reasonable doubt is flawed because the "firmly convinced" language represents only a clear and convincing standard. Third, the Court's use of "moral evidence" was improper.

The trial court's erroneous instructions resulted in the jury convicting Hand on a standard below that required by the Due Process Clause of the Fourteenth Amendment. This is a fundamental, structural error that requires reversal of Hand's convictions. See Sullivan v. Louisiana, 508 U.S. 275 (1993).

### **3. Willing to act.**

The trial court's definition of reasonable doubt, which included instructing the jury that reasonable doubt was "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs," allowed the jurors to find guilt on proof below that required by the Due Process Clause. This Court has held that Ohio's statutory reasonable doubt definition is not an unconstitutional dilution of the State's burden of proof. State v. Nabozny, 54 Ohio St. 2d 195, 202-03, 375 N.E.2d 784, 791 (1978). However, the

Supreme Court of the United States, several federal circuit courts, and lower Ohio courts have condemned the language in the statute that defines reasonable doubt in this way.

The Supreme Court of the United States expressed strong disapproval of the “willing to act” language when defining proof beyond a reasonable doubt in Holland v. United States, 348 U.S. 121, 140 (1954). The federal courts express a similar disapproval of this language. “There is a substantial difference between a juror’s verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him.” Scurry v. United States, 347 F.2d 468, 470 (D.C. Cir. 1965).

The Scurry court recognized that human experience shows that a prudent person, called upon to act in his more important business or family affairs, would gravely weigh the risks and considerations tending in both directions. After weighing these considerations, however, a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Id. As a result of this disapproval, several of the federal circuit courts have adopted a preference for defining proof beyond a reasonable doubt in terms of a prudent person who would hesitate to act when confronted with such evidence. See e.g., Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990); United States v. Colon, 835 F.2d 27 (2d Cir. 1987); United States v. Pinkney, 551 F.2d 1241 (D.C. Cir. 1976); United States v. Conley, 523 F.2d 650 (8th Cir. 1975).

Ohio courts have also expressed disapproval of the “willing to act” language of O.R.C. § 2901.05 (D). The Franklin County Court of Appeals concluded that the final sentence of O.R.C. § 2901.05 (D) should be eliminated or modified by adding the word “unhesitating” to the last sentence before the phrase “in the most important of his own affairs.” State v. Frost, No. 77AP-728, slip op. at 8 (Franklin Ct. App. May 2, 1978). Ordinary people who serve as jurors are frequently required to make important decisions based upon proof of a lesser nature by choosing

*Stripped Page*

the most preferable action. In fact, the “willing to act” language is the traditional test for the clear and convincing evidence standard of proof. State v. Crenshaw, 51 Ohio App. 2d 63, 65, 366 N.E.2d 84, 85 (Ohio App. 2 Dist. 1977). “A standard based upon the most important affairs of the average juror ... reflects adversely upon the accused.” Id.

#### **4. Firmly convinced.**

The “firmly convinced” language also did not define the reasonable doubt standard, but rather, defined the clear and convincing standard. This Court has defined clear and convincing evidence as that “which will provide in the mind of the trier of facts a firm belief or conviction to the facts sought to be established.” Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118, syl. (1954). That definition is similar to O.R.C. § 2901.05 (D), where reasonable doubt is present only if jurors “cannot say they are firmly convinced of the truth of the charge.” Resultantly, the jurors were given a definition of reasonable doubt that failed to satisfy the Due Process Clause.

#### **5. Moral Evidence.**

The court’s definition of reasonable doubt was further flawed because it informed the jury that “[r]easonable doubt is not mere possible doubt because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt.” (Vol. 7, Tp. 1453; June 20, 2002, Tp. 120) The phrase “moral evidence” improperly shifted the focus of this jury to the subjective morality of Gerald Hand and from the required legal quantum of proof, Victor v. Nebraska, 511 U.S. 1 (1994), notwithstanding.

It is possible for a challenge to a jury instruction that includes the phrase “moral evidence” to survive that challenge, however, it is the context of the phrase that determines this. In Victor, the Court rejected a due process challenge to a jury instruction that included the phrase “moral evidence.” Id. at 13. But see id. at 21 (Kennedy J., concurring). The Court found no

error because the phrase “moral evidence” was proper when placed in the context of the jury instruction on reasonable doubt that was given:

[T]he instruction itself gives a definition of the phrase. The jury was told that “everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt” - in other words, that absolute certainty is unattainable in matters relating to human affairs. **Moral evidence, in this sentence, can only mean empirical evidence offered to prove such matters** - the proof introduced at trial.

Id. at 13 (emphasis added).

Unlike Victor, the instruction in this case did not guide the jury by placing the phrase “moral evidence” within any proper context. In Victor, the instruction properly guided the jury on the phrase “moral evidence” because it was conjunctively paired with the phrase “matters relating to human affairs.” Id. Here, “moral evidence” was disjunctively stated as an alternative to the phrase “relating to human affairs.” (Vol. 7, Tp. 1453; June 20, 2002, Tp. 120) The trial court did not direct this jury to consider “moral evidence” as evidence “related to human affairs.” Instead, the trial court instructed this jury to consider either evidence related to human affairs “or moral evidence.” Compare Tp. Volume 7, Tp. 1453 and June 20, 2002, Tp. 120 with Victor, 511 U.S. at 13. Accordingly, the reasonable doubt instruction permitted the jury to convict Hand based on considerations of subjective morality, rather than evidentiary proof required by Due Process Clause. Victor, 511 U.S. at 21 (Kennedy J., concurring) (“[the] use of ‘moral evidence’ ... seems quite indefensible ... the words will do nothing but baffle”).

## **6. Conclusion.**

Juries in Ohio are convicting criminal defendants on a clear and convincing evidence standard. The “willing to act” language found in O.R.C. § 2901.05 (D) represents a standard of proof below that required by the Due Process Clause. The “firmly convinced” language in the first sentence of O.R.C. § 2901.05 (D) defines the presence of reasonable doubt in terms nearly

identical to the accepted definition of clear and convincing evidence. Courts that have disapproved the “willing to act” language have generally allowed it to be used only when the instruction, taken in its entirety, conveyed the true meaning of “reasonable doubt” as required by the Due Process Clause. See Holland, 384 U.S. at 140.

This is not, however, the case in Ohio. O.R.C. § 2901.05 (D) defines reasonable doubt in terms far too similar to the definition of “clear and convincing” evidence. The “willing to act” language in the last sentence of O.R.C. § 2901.05 (D) is defective because reasonable doubt is also defined in a clear and convincing standard from the outset in the phrase “firmly convinced.” O.R.C. § 2901.05 (D), as applied to this case, defines reasonable doubt by an insufficient standard. Furthermore, the reference to “moral evidence” improperly shifts the jury’s focus to Hand’s subjective moral culpability. Accordingly, the instructions in this trial allowed the jury to find guilt “based on a degree of proof below that required by the Due Process Clause.” Cage, 498 U.S. at 41. Hand’s convictions must be reversed.<sup>8</sup>

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<sup>8</sup> Similar claims have been denied on the merits by this Court, e.g. State v. Van Gundy, 64 Ohio St. 3d 230, 594 N.E.2d 604 (1992) and this Court may summarily reject this claim on the merits if it disagrees with Appellant’s view of Federal law. State v. Poindexter, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).

### Proposition of Law No. 13

Ohio's death penalty law is unconstitutional. Ohio Rev. Code Ann. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Gerald Hand. U.S. Const. amends. V, VI, VIII, And XIV; Ohio Const. Art. I, §§ 2, 9, 10, And 16. Further, Ohio's death penalty statute violates the United States' obligations under international law.

The Eighth Amendment to the United States Constitution and Article I, § 9 of the Ohio Constitution prohibit the infliction of cruel and unusual punishment. The Eighth Amendment's protections are applicable to the states through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660 (1962). Punishment that is "excessive" constitutes cruel and unusual punishment. Coker v. Georgia, 433 U.S. 584 (1977). The underlying principle of governmental respect for human dignity is the Court's guideline to determine whether this statute is constitutional. See Furman v. Georgia, 408 U.S. 238 (1972) (Brennan, J., concurring); Rhodes v. Chapman, 452 U.S. 337, 361 (1981); Trop v. Dulles, 356 U.S. 86 (1958). The Ohio scheme offends this bedrock principle in the following ways:

#### 1. **Arbitrary and unequal punishment.**

The Fourteenth Amendment's guarantee of equal protection requires similar treatment of similarly situated persons. This right extends to the protection against cruel and unusual punishment. Furman, 408 U.S. at 249 (Douglas, J., concurring). A death penalty imposed in violation of the Equal Protection guarantee is a cruel and unusual punishment. See id. Any arbitrary use of the death penalty also offends the Eighth Amendment. Id.

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

standards for imposition of a death sentence and were therefore removed from judicial review. Woodson v. North Carolina, 428 U.S. 280 (1976). Prosecutors' uncontrolled discretion violates this requirement.

Ohio's system imposes death in a racially discriminatory manner. Blacks and those who kill white victims are much more likely to get the death penalty. While African-Americans are less than twenty percent of Ohio's population, 106 or fifty-one percent of Ohio's death row inmates are African-American. See Ohio Public Defender Commission Statistics, February 12, 2003; see also The Report of the Ohio Commission on Racial Fairness, 1999. While three Caucasians were sentenced to death for killing African-Americans, forty-eight African-Americans sit on Ohio's death row for killing a Caucasian. Ohio Public Defender Commission Statistics, February 12, 2003. Ohio's statistical disparity is tragically consistent with national findings. The General Accounting Office found victim's race influential at all stages, with stronger evidence involving prosecutorial discretion in charging and trying cases. Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities, U.S. General Accounting Office, Report to Senate and House Committees on the Judiciary (February 1990).

Ohio courts have not evaluated the implications of these racial disparities. While the General Assembly established a disparity appeals practice in post-conviction that may encourage the Ohio Supreme Court to adopt a rule requiring tracking the offender's race, O.R.C. § 2953.21(A)(2), no rule has been adopted. Further, this practice does not track the victim's race and does not apply to crimes committed before July 1, 1996. In short, Ohio law fails to assure against race discrimination playing a role in capital sentencing.

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. Commonwealth v. O'Neal, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro.

C.J., concurring); Utah v. Pierre, 572 P.2d 1338 (Utah 1977) (Maughan, J., concurring and dissenting). Moreover, where fundamental rights are involved personal liberties cannot be broadly stifled "when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479 (1960). To take a life by mandate, the State must show that it is the "least restrictive means" to a "compelling governmental end." O'Neal II, 339 N.E.2d at 678.

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

## **2. Unreliable sentencing procedures.**

The Due Process and Equal Protection Clauses prohibit arbitrary and capricious procedures in the State's application of capital punishment. Gregg v. Georgia, 428 U.S. 153, 188, 193-95 (1976); Furman, 408 U.S. at 255, 274. Ohio's scheme does not meet those requirements. The statute does not require the State to prove the absence of any mitigating factors or that death is the only appropriate penalty.

The statutory scheme is unconstitutionally vague which leads to the arbitrary imposition of the death penalty. The language "that the aggravating circumstances ... outweigh the mitigating factors" invites arbitrary and capricious jury decisions. "Outweigh" preserves reliance on the lesser standard of proof by a preponderance of the evidence. The statute requires only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors. This creates an unacceptable risk of arbitrary or capricious sentencing.

Additionally, the mitigating circumstances are vague. The jury must be given "specific and detailed guidance" and be provided with "clear and objective standards" for their sentencing discretion to be adequately channeled. Gregg; Godfrey v. Georgia, 446 U.S. 420 (1980).

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor is within the individual decision-maker's discretion. State v. Fox, 69 Ohio St. 3d 183, 193, 631 N.E.2d 124, 132 (1994). Giving so much discretion to juries inevitably leads to arbitrary and capricious judgments. The Ohio open discretion scheme further risks that constitutionally relevant mitigating factors that must be considered as mitigating [youth or childhood abuse (Eddings v. Oklahoma, 455 U.S. 104 (1982)), mental disease or defect (Penry v. Lynaugh, 492 U.S. 302 (1989)), level of involvement in the crime (Enmund v. Florida, 458 U.S. 782 (1982)), or lack of criminal history (Delo v. Lashley, 507 U.S. 272 (1993))] will not be factored into the sentencer's decision. While the federal constitution may allow states to shape consideration of mitigation, see Johnson v. Texas, 509 U.S. 350 (1993), Ohio's capital scheme fails to provide adequate guidelines to sentencers, and fails to assure against arbitrary, capricious, and discriminatory results.

Empirical evidence is developing in Ohio and around the country that, under commonly used penalty phase jury instructions, juries do not understand their responsibilities and apply inaccurate standards for decision. See Cho, Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death, 85 J. Crim. L. & Criminology 532, 549-557 (1994), and findings of Zeisel discussed in Free v. Peters, 12 F.3d 700 (7th Cir. 1993). This confusion violates the federal and state constitutions. Because of these deficiencies, Ohio's statutory scheme does not meet the requirements of Furman and its progeny.

**3. Defendant's right to a jury is burdened.**

The Ohio scheme is unconstitutional because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. A defendant who pleads guilty or no contest benefits from a trial judge's discretion to dismiss the specifications "in the interest of justice." Ohio R. Crim. P. 11(C)(3). Accordingly, the capital indictment may be dismissed regardless of mitigating circumstances. There is no corresponding provision for a capital defendant who elects to proceed to trial before a jury.

Justice Blackmun found this discrepancy to be constitutional error. Lockett v. Ohio, 438 U.S. 586, 617 (1978) (Blackmun, J., concurring). This disparity violated United States v. Jackson, 390 U.S. 570 (1968), and needlessly burdened the defendant's exercise of his right to a trial by jury. Since Lockett, this infirmity has not been cured and Ohio's statute remains unconstitutional.

**4. Mandatory submission of reports and evaluations.**

Ohio's capital statutes are unconstitutional because they require submission of the pre-sentence investigation report and the mental evaluation to the jury or judge once requested by a capital defendant. O.R.C. § 2929.03 (D)(1). This mandatory submission prevents defense counsel from giving effective assistance and prevents the defendant from effectively presenting his case in mitigation.

**5. O.R.C. § 2929.04 (A)(7) is constitutionally invalid when used to aggravate O.R.C. § 2903.01 (B) aggravated murder.**

"[T]o avoid [the] constitutional flaw of vagueness and over breadth under the Eighth Amendment, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of a defendant as compared to others found guilty of (aggravated) murder." Zant v. Stephens, 462

U.S. 862, 877 (1983). Ohio's statutory scheme fails to meet this constitutional requirement because O.R.C. § 2929.04(A)(7) fails to genuinely narrow the class of individuals eligible for the death penalty.

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

The scheme is unconstitutional because the O.R.C. § 2929.04 (A)(7) aggravating circumstance merely repeats, as an aggravating circumstance, factors that distinguish aggravated felony-murder from murder. O.R.C. § 2929.04(A)(7) repeats the definition of felony-murder as alleged, which automatically qualifies the defendant for the death penalty. O.R.C. § 2929.04(A)(7) does not reasonably justify the imposition of a more severe sentence on felony-murderers. But, the prosecuting attorney and the sentencing body are given unbounded discretion that maximizes the risk of arbitrary and capricious action and deprivation of a defendant's life without substantial justification. The aggravating circumstance must therefore fail. Zant, 462 U.S. at 877.

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

The killer who kills with prior calculation and design is treated less severely, which is also nonsensical because his blameworthiness or moral guilt is higher, and the argued ability to

deter him less. From a retributive stance, this is the most culpable of mental states. Comment, The Constitutionality of Imposing the Death Penalty for Felony Murder, 15 Hous. L. Rev. 356, 375 (1978).

Felony-murder also fails to reasonably justify the death sentence because this Court has interpreted O.R.C. § 2929.04 (A)(7) as not requiring that intent to commit a felony precede the murder. State v. Williams, 74 Ohio St. 3d 569, 660 N.E.2d 724, syl. 2 (1996). The asserted state interest in treating felony-murder as deserving of greater punishment is to deter the commission of felonies in which individuals may die. Generally courts have required that the killing result from an act done in furtherance of the felonious purpose. Id., referencing the Model Penal Code. Without such a limitation, no state interest justifies a stiffer punishment. This Court has discarded the only arguable reasonable justification for the death sentence to be imposed on such individuals, a position that engenders constitutional violations. Zant v. Stephens, 462 U.S. 862 (1983). Further, this Court's current position is inconsistent with previous cases, thus creating the likelihood of arbitrary and inconsistent applications of the death penalty. See e.g., State v. Rojas, 64 Ohio St. 3d 131, 592 N.E.2d 1376 (1992).

Equal protection of the law requires that legislative classifications be supported by, at least, a reasonable relationship to legitimate State interests. Skinner v. Oklahoma, 316 U.S. 535 (1942). The State has arbitrarily selected one class of murderers who may be subjected to the death penalty automatically. This statutory scheme is inconsistent with the purported State interests. The most brutal, cold-blooded and premeditated murderers do not fall within the types of murder that are automatically eligible for the death penalty. There is no rational basis or any State interest for this distinction and its application is arbitrary and capricious.

6. **O.R.C. §§ 2929.03 (D)(1) and 2929.04 are unconstitutionally vague.**

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

To avoid arbitrariness in capital sentencing, states must limit and channel the sentencer's discretion with clear and specific guidance. Lewis v. Jeffers, 497 U.S. 764, 774 (1990); Maynard v. Cartwright, 486 U.S. 356, 362 (1988). A vague aggravating circumstance fails to give that guidance. Walton v. Arizona, 497 U.S. 639, 653 (1990), *vacated on other grounds* Ring v. Arizona, 536 U.S. 584 (2002), Godfrey, 446 U.S. at 428. Moreover, a vague aggravating circumstance is unconstitutional whether it is an eligibility or a selection factor. Tuilaepa v. California, 512 U.S. 967 (1994). The aggravating circumstances in O.R.C. § 2929.04(A)(1)-(8) are both.

O.R.C. § 2929.04 (B) tells the sentencer that the nature and circumstances of the offense are selection factors in mitigation. Moreover, because the nature and circumstances of the offense are listed only in O.R.C. § 2929.04(B), they must be weighed only as selection factors in mitigation. See State v. Wogenstahl, 75 Ohio St. 3d 344, 356, 662 N.E.2d 311, 321-22 (1996). However, the clarity and specificity of O.R.C. § 2929.04(B) is eviscerated by O.R.C. § 2929.03 (D)(1); selection factors that are strictly mitigating become part and parcel of the aggravating circumstance.

Despite wide latitude, Ohio has carefully circumscribed its selection factors into mutually exclusive categories. See O.R.C. § 2929.04 (A) and (B); Wogenstahl, 75 Ohio St. 3d at 356, 662 N.E.2d at 321-22. O.R.C. § 2929.03 (D)(1) makes O.R.C. § 2929.04(B) vague because it incorporates the nature and circumstances of an offense into the aggravating circumstances. The sentencer cannot reconcile this incorporation. As a result of O.R.C. § 2929.03 (D)(1), the “nature and circumstances” of any offense become “too vague” to guide the jury in its weighing or selection process. See Walton, 497 U.S. at 654. O.R.C. § 2929.03(D)(1) therefore makes O.R.C. § 2929.04(B) unconstitutionally arbitrary.

O.R.C. § 2929.03 (D)(1) is also unconstitutional on its face because it makes the selection factors in aggravation in O.R.C. § 2929.04 (A)(1)-(8) “too vague.” See Walton, 497 U.S. at 654. O.R.C. § 2929.04(A)(1)-(8) gives clear guidance as to the selection factors that may be weighed against the defendant’s mitigation. However, O.R.C. § 2929.03 (D)(1) eviscerates the narrowing achieved. By referring to the “nature and circumstances of the aggravating circumstance,” O.R.C. § 2929.03 (D)(1) gives the sentencer “open-ended discretion” to impose the death penalty. See Maynard, 486 U.S. at 362. That reference allows the sentencer to impose death based on (A)(1)-(8) plus any other fact in evidence arising from the nature and circumstances of the offense that the sentencer considers aggravating. This eliminates the guided discretion provided by O.R.C. § 2929.04 (A). See Stringer v. Black, 503 U.S. 222, 232 (1992).

#### **7. Proportionality and appropriateness review.**

Ohio Revised Code §§ 2929.021 and 2929.03 require data be reported to the courts of appeals and to the Supreme Court of Ohio. There are substantial doubts as to the adequacy of the information received after guilty pleas to lesser offenses or after charge reductions at trial. O.R.C. § 2929.021 requires only minimal information on these cases. Additional data is

necessary to make an adequate comparison in these cases. This prohibits adequate appellate review.

Adequate appellate review is a precondition to the constitutionality of a state death penalty system. Zant, 462 U.S. at 879; Pulley v. Harris, 465 U.S. 37 (1984). The standard for review is one of careful scrutiny. Zant, 462 U.S. at 884-85. Review must be based on a comparison of similar cases and ultimately must focus on the character of the individual and the circumstances of the crime. Id.

Ohio's statutes' failure to require the jury or three-judge panel recommending life imprisonment to identify the mitigating factors undercuts adequate appellate review. Without this information, no significant comparison of cases is possible. Without a significant comparison of cases, there can be no meaningful appellate review. See State v. Murphy, 91 Ohio St. 3d 516, 562, 747 N.E.2d 765, 813 (2001) (Pfeifer, J., dissenting) ("When we compare a case in which the death penalty was imposed only to other cases in which the death penalty was imposed, we continually lower the bar of proportionality. The lowest common denominator becomes the standard.")

The comparison method is also constitutionally flawed. Review of cases where the death penalty was imposed satisfies the proportionality review required by O.R.C. § 2929.05 (A). State v. Steffen, 31 Ohio St. 3d 111, 509 N.E.2d 383, syl. 1 (1987). However, this prevents a fair proportionality review. There is no meaningful manner to distinguish capital defendants who deserve the death penalty from those who do not.

This Court's appropriateness analysis is also constitutionally infirm. O.R.C. § 2929.05 (A) requires appellate courts to determine the appropriateness of the death penalty in each case. The statute directs affirmance only where the court is persuaded that the aggravating circumstances

outweigh the mitigating factors and that death is the appropriate sentence. *Id.* This Court has not followed these dictates. The appropriateness review conducted is very cursory. It does not "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460 (1984).

The cursory appropriateness review also violates the capital defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The General Assembly provided capital appellants with the statutory right of proportionality review. When a state acts with significant discretion, it must act in accordance with the Due Process Clause. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). The review currently used violates this constitutional mandate. An insufficient proportionality review violates Gerald Hand's due process, liberty interest in O.R.C. § 2929.05.

#### **8. Lethal injection is cruel and unusual punishment.**

Ohio Revised Code § 2949.22 (B)(1) provides that death by lethal injection "shall be executed by causing the application to the person of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death[.]" This mode of punishment offends contemporary standards of decency. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). It also violates the United States' obligations under the International Convention on Civil and Political Rights (1992) (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1994) (CAT). Lethal injection causes unnecessary pain. See Marian J. Borg and Michael Radelet, *Botched Lethal Injections*, 53 Capital Report, March/April 1998; Kathy Sawyer, *Protracted Execution In Texas Draws Criticism: Lethal Injection Delayed by Search for Vein*, Washington Post, March 14, 1985; *Killer Lends a Hand to Find Vein for Execution*, LA Times, August 20, 1986; *Killer's Drug Abuse Complicates Execution*. Chicago

Tribune, April 24, 1992; Murderer Executed After a Leaky Lethal Injection, New York Times, December 14, 1988; Rector's Time Came, Painfully Late, Arkansas Democrat Gazette, January 26, 1992; Moans Pierced Silence During Wait, Arkansas Democrat Gazette, January 26, 1992; Gacy Lawyers Blast Method: Lethal Injections Under Fire After Equipment Malfunction, Chicago Sun-times, May 11, 1994; Lou Ortiz and Scott Fornek Witnesses Describe Killer's 'Macabre' Final Few Moments, Chicago Sun-Times, May 11, 1994; Cf. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (Eighth Amendment proscribes "the unnecessary and wanton infliction of pain.")

Prisoners have been repeatedly stuck with a needle for almost an hour in an effort to find a vein suitable for use. Marian J. Borg and Michael Radelet, Botched Lethal Injections, 53 Capital Report, March/April 1998; Murderer of Three Women is Executed in Texas, NY Times, March 14, 1985; Kathy Sawyer, Protracted Execution In Texas Draws Criticism; Lethal Injection Delayed by Search for Vein, Washington Post, March 14, 1985; Killer's Drug Abuse Complicates Execution, Chicago Tribune, April 24, 1992; Rector's Time Came, Painfully Late, Arkansas Democrat Gazette, January 26, 1992. Prisoners have actually had to assist technicians in finding a vein suitable to use. Killer Lends a Hand to Find Vein for Execution, LA Times, August 20, 1986; Moans Pierced Silence During Wait, Arkansas Democrat Gazette, January 26, 1992. Equipment failures are not uncommon. Murderer Executed After a Leaky Lethal Injection, New York Times, December 14, 1988; Marian J. Borg and Michael Radelet, Botched Lethal Injections, 53 Capital Report, March/April 1998. Gasping and choking from the prisoner is not uncommon. Marian J. Borg and Michael Radelet, Botched Lethal Injections, 53 Capital Report, March/April 1998. Because the prisoner is restrained and paralyzed there may be no reaction to the pain felt, but death by lethal injection is not painless. Rather, it is cruel and

unusual punishment prohibited under the Eighth Amendment to the United States Constitution, the ICCPR, and the CAT.

## **9. Ohio's statutory death penalty scheme violates international law.**

International law binds each of the states that comprise the United States. Ohio is bound by international law whether found in treaty or in custom. Because the Ohio death penalty scheme violates international law, Hand's capital convictions and sentences cannot stand.

### **9.1 International law binds the State of Ohio.**

"International law is a part of our law[.]" The Paquete Habana, 175 U.S. 677, 700 (1900). A treaty made by the United States is the supreme law of the land. Article VI, United States Constitution. Where state law conflicts with international law, it is the state law that must yield. See Zschernig v. Miller, 389 U.S. 429, 440 (1968); Clark v. Allen, 331 U.S. 503, 508 (1947); United States v. Pink, 315 U.S. 203, 230 (1942); Kansas v. Colorado, 206 U.S. 46, 48 (1907); The Paquete Habana, 175 U.S. at 700; The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924). In fact, international law creates remediable rights for United States citizens. Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980); Forti v. Suarez-Mason, 672 F.Supp. 1531 (N.D. Cal. 1987).

### **9.2 Ohio's obligations under international charters, treaties, and conventions.**

The United States' membership and participation in the United Nations (U.N.) and the Organization of American States (OAS) creates obligations in all fifty states. Through the U.N. Charter, the United States committed itself to promote and encourage respect for human rights and fundamental freedoms. Art. 1(3). The United States bound itself to promote human rights in cooperation with the United Nations. Art. 55-56. The United States again proclaimed the

fundamental rights of the individual when it became a member of the OAS. OAS Charter, Art. 3.

The U.N. has sought to achieve its goal of promoting human rights and fundamental freedoms through the creation of numerous treaties and conventions. The United States has ratified several of these including: the International Covenant on Civil and Political Rights (ICCPR) ratified in 1992, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ratified in 1994, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) ratified in 1994. Ratification of these treaties by the United States expressed its willingness to be bound by these treaties. Pursuant to the Supremacy Clause, the ICCPR, the ICERD, and the CAT are the supreme laws of the land. As such, the United States must fulfill the obligations incurred through ratification. President Clinton recently reiterated the United States' need to fulfill its obligations under these conventions when he issued Executive Order 13107. In pertinent part, the Executive Order states:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and bearing in mind the obligations of the United States pursuant to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination on All Forms of Racial Discrimination (CERD), and other relevant treaties concerned with the protection and promotion of human rights to which the United States is now or may become a party in the future, it is hereby ordered as follows:

#### Section 1. Implementation of Human Rights Obligations.

(a) It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.

Ohio is not fulfilling the United States' obligations under these conventions. Rather, Ohio's death penalty scheme violates each convention's requirements and thus must yield to the requirements of international law. (See discussion *infra* Subsection 1).

### **9.2.1 Ohio's statutory scheme violates the ICCPR's and ICERD's guarantees of equal protection and due process.**

Both the ICCPR, ratified in 1992, and the ICERD, ratified in 1994, guarantee equal protection of the law. ICCPR Art. 2(1), 3, 14, 26; ICERD Art. 5(a). The ICCPR further guarantees due process via Articles 9 and 14, which includes numerous considerations: a fair hearing (Art. 14(1)), an independent and impartial tribunal (Art. 14(1)), the presumption of innocence (Art. 14(2)), adequate time and facilities for the preparation of a defense (Art. 14(3)(a)), legal assistance (Art. 14(3)(d)), the opportunity to call and question witnesses (Art. 14(3)(e)), the protection against self-incrimination (Art. 14(3)(g)), and the protection against double jeopardy (Art. 14(7)). However, Ohio's statutory scheme fails to provide equal protection and due process to capital defendants as contemplated by the ICCPR and the ICERD.

Ohio's statutory scheme denies equal protection and due process in several ways. It allows for arbitrary and unequal treatment in punishment. (See discussion *infra* § 1). Ohio's sentencing procedures are unreliable. (See discussion *infra* § 2). Ohio's statutory scheme fails to provide individualized sentencing. (See discussion *infra* § 1, 2). Ohio's statutory scheme burdens a defendant's right to a jury. (See discussion *infra* § 3). Ohio's requirement of mandatory submission of reports and evaluations precludes effective assistance of counsel. (See discussion *infra* § 4). O.R.C. § 2929.04 (B)(7) arbitrarily selects certain defendants who may be automatically eligible for death upon conviction. (See discussion *infra* § 5). Ohio's proportionality and appropriateness review is wholly inadequate. (See discussion *infra* § 7). As a result, Ohio's statutory scheme violates the ICCPR's and the ICERD's guarantees of equal

protection and due process. This is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

### **9.2.2 Ohio's statutory scheme violates the ICCPR's protection against arbitrary execution.**

The ICCPR speaks explicitly to the use of the death penalty. The ICCPR guarantees the right to life and provides that there shall be no arbitrary deprivation of life. Art. 6(1). It allows the imposition of the death penalty only for the most serious offenses. Art. 6(2). Juveniles and pregnant women are protected from the death penalty. Art. 6(5). Moreover, the ICCPR contemplates the abolition of the death penalty. Art. 6(6).

However, several aspects of Ohio's statutory scheme allow for the arbitrary deprivation of life. Punishment is arbitrary and unequal. (See discussion *infra* § 1). Ohio's sentencing procedures are unreliable. (See discussion *infra* § 2). Ohio's statutory scheme lacks individualized sentencing. (See discussion *infra* § 1, 2). The (A)(7) aggravator maximizes the risk of arbitrary and capricious action by singling one class of murders who may be eligible automatically for the death penalty. (See discussion *infra* § 5). The vagueness of O.R.C. §§ 2929.03 (D)(1) and 2929.04 similarly render sentencing arbitrary and unreliable. (See discussion *infra* § 6). Ohio's proportionality and appropriateness review fails to distinguish those who deserve death from those who do not. (See discussion *infra* § 7). As a result, executions in Ohio result in the arbitrary deprivation of life and thus violate the ICCPR's death penalty protections. This is a direct violation of international law and a violation of the Supremacy Clause of the United States Constitution.

### **9.2.3 Ohio's statutory scheme violates the ICERD's protections against race discrimination.**

The ICERD, speaking to racial discrimination, requires that each state take affirmative steps to end race discrimination at all levels. Art. 2. It requires specific action and does not

allow states to sit idly by when confronted with practices that are racially discriminatory. However, Ohio's statutory scheme imposes the death penalty in a racially discriminatory manner. (See discussion *infra* § 1). A scheme that sentences blacks and those who kill white victims more frequently and which disproportionately places African-Americans on death row is in clear violation of the ICERD. Ohio's failure to rectify this discrimination is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

#### **9.2.4 Ohio's statutory scheme violates the ICCPR's and the CAT's prohibitions against cruel, inhuman or degrading punishment.**

The ICCPR prohibits subjecting any person to torture or to cruel, inhuman or degrading treatment or punishment. Art. 7. Similarly, the CAT requires that states take action to prevent torture, which includes any act by which severe mental or physical pain is intentionally inflicted on a person for the purpose of punishing him for an act committed. See Art. 1-2. As administered, Ohio's death penalty inflicts unnecessary pain and suffering, see discussion *infra* § I, in violation of both the ICCPR and the CAT. Thus, there is a violation of international law and the Supremacy Clause of the United States Constitution.

#### **9.2.5 Ohio's obligations under the ICCPR, the ICERD, and the CAT are not limited by the reservations and conditions placed on these conventions by the Senate.**

While conditions, reservations, and understandings accompanied the United States' ratification of the ICCPR, the ICERD, and the CAT, those conditions, reservations, and understandings cannot stand for two reasons. Article 2 § 2 of the United States Constitution provides for the advice and consent of two-thirds of the Senate when a treaty is adopted. However, the United States Constitution makes no provision for the Senate to modify, condition, or make reservations to treaties. The Senate is not given the power to determine what aspects of a treaty the United States will and will not follow. Their role is to simply advise and consent.

Thus, the Senate's inclusion of conditions and reservations in treaties goes beyond that role of advice and consent. The Senate picks and chooses which items of a treaty will bind the United States and which will not. This is the equivalent of the line-item veto, which is unconstitutional. Clinton v. City of New York, 524 U.S. 417, 438 (1998). The United States Supreme Court specifically spoke to the enumeration of the president's powers in the Constitution in finding that the president did not possess the power to issue line item vetoes. Id. If it is not listed, then the President lacks the power to do it. See id. Similarly, the Constitution does not give the power to the Senate to make conditions and reservations, picking and choosing what aspects of a treaty will become law. Thus the Senate lacks the power to do just that. Therefore, any conditions or reservations made by the Senate are unconstitutional. See id.

The Vienna Convention on the Law of Treaties further restricts the Senate's imposition of reservations. It allows reservations unless: they are prohibited by the treaty, the treaty provides that only specified reservations, not including the reservation in question, may be made, or the reservation is incompatible with the object and purpose of the treaty. Art. 19(a)-(c). The ICCPR specifically precludes derogation of Articles 6-8, 11, 15-16, and 18. Pursuant to the Vienna Convention, the United States' reservations to these articles are invalid under the language of the treaty. See id. Further, it is the purpose of the ICCPR to protect the right to life and any reservation inconsistent with that purpose violates the Vienna Convention. Thus, United States reservations cannot stand under the Vienna Convention as well.

#### **9.2.6 Ohio's obligations under the ICCPR are not limited by the Senate's declaration that it is not self-executing.**

The Senate indicated that the ICCPR is not self-executing. However, the question of whether a treaty is self-executing is left to the judiciary. Erolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985) (Restatement (Second) of Foreign Relations Law of the

United States, Sec. 154(1) (1965)). It is the function of the courts to say what the law is. See Marbury v. Madison, 5 U.S. 137 (1803).

Further, requiring the passage of legislation to implement a treaty necessarily implicates the participation of the House of Representatives. By requiring legislation to implement a treaty, the House can effectively veto a treaty by refusing to pass the necessary legislation. However, Article 2, § 2 excludes the House of Representatives from the treaty process. Therefore, declaring a treaty to be not self-executing gives power to the House of Representatives not contemplated by the United States Constitution. Thus, any declaration that a treaty is not self-executing is unconstitutional. See Clinton, 524 U.S. at 438.

### **9.3 Ohio's obligations under customary international law.**

International law is not merely discerned in treaties, conventions and covenants. International law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law." United States v. Smith, 18 U.S. 153, 160-61 (1820). Regardless of the source "international law is a part of our law[.]" The Paquete Habana, 75 U.S. at 700.

The judiciary and commentators recognize the Universal Declaration of Human Rights (DHR) as binding international law. The DHR "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community." Filartiga, 630 F.2d at 883 (internal citations omitted); see also William A. Schabas, The Death Penalty as Cruel Treatment and Torture (1996).

The DHR guarantees equal protection and due process (Art. 1, 2, 7, 11), recognizes the right to life (Art. 3), prohibits the use of torture or cruel, inhuman or degrading punishment (Art. 5) and is largely reminiscent of the ICCPR. Each of the guarantees found in the DHR are

violated by Ohio's statutory scheme. (See discussion *infra* §§ 1-8). Thus, Ohio's statutory scheme violates customary international law as codified in the DHR and cannot stand.

However, the DHR is not alone in its codification of customary international law. Smith directs courts to look to "the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law" in ascertaining international law. 18 U.S. at 160-61. Ohio should be cognizant of the fact that its statutory scheme violates numerous declarations and conventions drafted and adopted by the United Nations and the OAS, which may, because of the sheer number of countries that subscribe to them, codify customary international law. See id. Included among these are:

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

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

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

4. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the U.N. General Assembly in Resolution 3452 (XXX) in 1975. It prohibits torture, defined to include severe mental or physical pain intentionally inflicted by or at the instigation of a public official for a purpose including punishing him for an act he has committed, and requires that the states take action to prevent such actions. Art. 1, 4.

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

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

These documents are drafted by the people Smith contemplates and are subscribed to by a substantial segment of the world. As such they are binding on the United States as customary international law. A comparison of the §§ 1-9 clearly demonstrates that Ohio's statutory scheme is in violation of customary international law.

## **10. Conclusion.**

Ohio's death penalty scheme fails to ensure that arbitrary and discriminatory imposition of the death penalty will not occur. The procedures actually promote the imposition of the death

penalty and, thus, are constitutionally intolerable. Ohio Revised Code §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution and international law. Hand's death sentence must be vacated.<sup>9</sup>

### CONCLUSION

For each of the foregoing reasons, Appellant Gerald Hand's convictions and sentence must be reversed.

Respectfully submitted,

DAVID H. BODIKER  
Ohio Public Defender

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COUNSEL FOR APPELLANT

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<sup>9</sup> In State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), this Court upheld this death penalty statute and this Court may, therefore, reject this claim on its merits if it disagrees with Appellant's federal constitutional arguments. State v. Poindexter, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MERIT BRIEF AND APPENDIX TO MERIT BRIEF was sent by U.S. Mail to Marianne T. Hemmeter, 140 N. Sandusky Street, Delaware, Ohio 43015, this \_\_\_\_ day of May, 2004.

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PAMELA J. PRUDE-SMITHERS-0062206  
Assistant State Public Defender  
Counsel of Record

IN THE COURT OF CLAIMS OF OHIO  
VICTIMS OF CRIME DIVISION

IN RE: Application of	)	<u>OPINION</u>
GERALD R. HAND	)	
191 South Eureka	)	Claim No. V 78-3004
Columbus, Ohio 43204	)	
Applicant	)	

On March 24, 1976 in Columbus, Ohio, the decedent, Donna A. Hand, was criminally assaulted by an unidentified assailant, and subsequently died of injuries received in the assault. The Applicant is decedent's husband.

The assault was reported to the Columbus Police Department immediately upon discovery. Lacking any evidence to the contrary, it will be presumed, therefore, that neither the Applicant nor the decedent had such relationship with the person or persons responsible for the death as would preclude an award under R.C. 2743.60(B).

The Applicant assumed and paid for the decedent's funeral expenses, which amounted to \$2,574.00. \$255.00 of decedent's funeral expense was recouped from the Social Security Administration, for a net unreimbursed funeral expense of \$2,319.00.

**FILED**  
MAR 21 1979  
COURT OF CLAIMS OF OHIO  
CHARLES CROWLEY, Clerk

**CERTIFICATION**

I hereby certify that this page is a true copy of the original.

Clerk of the Court of Claims of Ohio

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By: *[Signature]*

Claim No. V 78-3004

-2-

OPINION

Any award to the Applicant is limited by R.C. 2743.51(F) which states in pertinent part that " . . . allowable expense includes a total charge not in excess of \$500.00 for expenses in any way related to funeral, cremation, and burial . . . ."

Prior to her death, the decedent had been gainfully employed as a clerk at Gray's Drug Store and also was engaged in the Applicant's home as a housewife. Surviving her is the Applicant, her sole dependent for the purposes of this determination. With his Finding of Fact and Recommendation, the Attorney General has submitted a study by an eminent economist based on the past and projected earnings record of the decedent which indicates that the present value of the economic loss to the Applicant will well exceed the \$50,000.00 limitation imposed by R.C. 2743.60(E). Based on such calculations, the present value of the economic loss to the Applicant equals \$199,673.00.

Therefore, the Applicant shall be granted an award of reparations in the amount of \$50,000.00, of which \$500.00 represents economic loss by way of allowable expense and \$49,500.00 represents dependent's replacement services loss.

The Court finds that lump sum payment will promote the interests of the Applicant. Thus, pursuant to R.C. 2743.66(B), the award shall be made by lump sum payment.

**CERTIFICATION**

I hereby certify that this page is a true copy of the original.

Clerk of the Court of Claims of Oh

Signature and date on last page

By: Howard D. W. [Signature]  
ASSISTANT CLERK

Date: May 6, 2003

**FILED**  
MAR 2 1979  
COURT OF CLAIMS OF OHIO  
CLARK COUNTY, OHIO

001-1000

Claim No. V 78-3004

-3-

OPINION

FINDINGS OF FACT

1) The decedent on March 24, 1976, in Columbus, Ohio, was criminally assaulted and killed by an assailant who was neither related to nor an accomplice of the decedent or the Applicant.

2) The assault was reported to a law enforcement officer or agency within seventy-two (72) hours after the occurrence.

3) The Applicant has suffered a net unreimbursable economic loss by way of allowable expense in the amount of \$500.00.

4) The present value of the economic loss to the Applicant equals \$191,673.00.

5) Lump sum payment will promote the interests of the Applicant.

CONCLUSIONS OF LAW

1) The Applicant for an Award of Reparations is a Claimant as defined by R.C. 2743.51(A).

2) The Applicant has suffered "economic loss" as defined in R.C. 2743.51(E) by way of incurring allowable expenses as defined in R.C. 2743.51(F) which were not reimbursed from a collateral source in the amount of \$500.00.

3) The Applicant has suffered dependent's economic loss and dependent's replacement services loss in the amount of \$49,500.00.

**FILED**  
MAR 2 1979  
CLERK OF CLAIMS OF OHIO  
CHARLES CROWLEY, Clerk

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Clerk of the Court of Claims of Ohio

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ASSISTANT CLERK

Date: May 6, 2003

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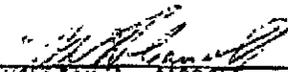
Claim No. V 78-3004

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OPINION

4) The State of Ohio and the Auditor of State as its agency for payment is liable to the Applicant for payment of the award in the sum of \$50,000.00.

The application for reparations will accordingly be GRANTED and an Order in conformity with this Opinion will be entered concurrently herewith.

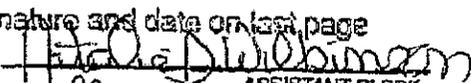
  
\_\_\_\_\_  
WILLIAM A. CARROLL  
Commissioner

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MAR 2 1979  
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CHARLES BROWLEY, Clerk

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