



## TABLE OF CONTENTS

### PAGES

TABLE OF CONTENTS .....	i
OVERVIEW .....	1
ARGUMENT .....	2

#### **Proposition of Law III:**

A capital defendant's right to allocution before being sentenced is mandatory. Where the sentencing court neglects this right, the subsequent sentence is void or voidable. ....	2
--	---

Authorities cited in above Proposition of Law:

R.C. §2929.03(F) .....	2
<u>State v. Reynolds</u> (1998) 80 Ohio St.3d 670 .....	2
Eighth Amendment of the United States Constitution .....	2
<u>Lockett v. Ohio</u> , 438 U.S. 586 (1978) .....	3
<u>Eddings v. Oklahoma</u> , 455 U.S. 104 (1982) .....	3
<u>Arizona v. Fulminante</u> (1991), 499 U.S. 279 .....	3
<u>State v. Roberts</u> (2006), 110 Ohio St.3d 71, 2006 Ohio 3665 .....	3, 4

#### **Proposition of Law XV:**

<b>Where the trial court fails to merge convictions and capital specifications, the resultant sentence is void or voidable as the weighing process is tainted with the consideration of improper aggravating factors. ....</b>	
--	--

#### **Proposition of Law XVI:**

<b>A trial court must merge capital specifications where warranted prior to the jury deliberations on the appropriate penalty. Where two statutory aggravators are merged, the jury must be instructed that it is to consider only one statutory aggravator in the weighing process. ....</b>	<b>4</b>
---	----------

Authorities cited in above Proposition of Law:

R. C. §2929.03(F) .....	4
R. C. § 2929.04(A)(7) .....	4
R. C. §2929.04(A)(8) .....	4
<u>State v. Turner</u> (2005), 105 Ohio St.3d 331 .....	5
<u>State v. Garner</u> , (1995) 74 Ohio St.3d 49, 1995 Ohio 168 .....	5, 6
Fifth Amendment of the United States Constitution .....	6
Sixth Amendment of the United States Constitution .....	6
Eighth Amendment of the United States Constitution .....	6
Fourteenth Amendment of the United States Constitution .....	6
CONCLUSION .....	7
SERVICE .....	8

## **OVERVIEW**

The appellant will address Propositions of Law III, XV, XVI, in this Reply Brief. These Propositions address the issues relating to allocution and the failure to merge the two capital specifications for sentencing.

The appellant stands the arguments made in his originally filed Merit Brief for the remaining Propositions.

## ARGUMENT

### Proposition of Law III:

**A capital defendant's right to allocution before being sentenced is mandatory. Where the sentencing court neglects this right, the subsequent sentence is void or voidable.**

In the present case, the trial court wrote the sentencing opinion prepared pursuant to R.C. §2929.03(F) *prior to* allowing the appellant his right to allocution. As noted in the appellant's merit brief, the trial court did permit Fry to make a statement, but only after the sentencing opinion sentencing him to death had already been prepared and filed. Clearly, the Fry's allocution would not be included in the sentencing opinion nor considered by the trial court.

The prosecutor does not contest that the sentencing entry was pre-prepared. The State argues harmless error. The brief relies upon the harmless error finding of State v. Reynolds (1998) 80 Ohio St.3d 670.

There are two-problems with this reliance. First, Fry's case factually differs from Reynolds. In Reynolds, this Court found no prejudicial error in the trial court's failure to ask the defendant whether he wished to make a statement. The defendant had already made an unsworn statement, presented a personal letter to the court during the mitigation phase and had defense counsel make a statement on his behalf. Thus, the sentencing court had knowledge of the personal information from the defendant which allowed the individualized consideration required by the Eighth Amendment.

Unlike Reynolds, Mr. Fry did not make an unsworn statement. He had not addressed the court in sentencing or prepared a statement for the court's consideration prior to the preparation of the sentencing opinion. The statement he did make was not made until after the trial court had

prepared the sentencing opinion, already having made up her mind that death was the appropriate penalty.

The record itself is unclear as to whether the appellant was aware of the opinion's filing. Knowing that the opinion which found death to be the appropriate sentence had already been filed would certainly effect the content of Fry's statement. Interestingly, the quote contained in the State's brief is consistent with this supposition. "You can do whatever you want to do. If y'all want to put a needle in my arm in poison me because I killed that thieving whore, do what you have got to do, but I hope got to, but I hope she burn in hell." (T. 2060) This statement is consistent with a man who knows he has already been condemned.

The failure to allow and consider allocution is really structural error. A trial court's should hear the sentence, then consider and write the sentencing opinion, with references to the allocution. Although the court need not give any weight to the statement, it is required to consider and give effect to any possible reasons contained in that statement as to why death would be inappropriate. The United States Constitution and R.C. 2929.03(F) so require. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

In Arizona v. Fulminante (1991), 499 U.S. 279, the United States Supreme Court distinguished between two types of constitutional error: 'trial error' and 'structural error.' Trial error "occur[s] during the presentation of the case to the jury, and \* \* \* may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." 499 U.S. at 307-308. Structural error affects "the entire conduct of the trial from beginning to end" as well as "the framework within which the trial proceeds." Such errors "defy analysis by 'harmless-error' standards." Id. at 309-

310. In Ohio's capital sentencing scheme, the failure to allow, consider and give effect to a defendant's allocution is structural error.

In addition, the Reynolds decision pre-dates State v. Roberts (2006), 110 Ohio St.3d 71, 2006 Ohio 3665. In Roberts, the trial court likewise prepared the sentencing opinion prior to the sentencing hearing. This Court in Roberts ordered that "the trial court shall provide Roberts with her right of allocution before imposing any new sentence." Id. at 95. A similar order must be issued here.

**Proposition of Law XV:**

**Where the trial court fails to merge convictions and capital specifications, the resultant sentence is void or voidable as the weighing process is tainted with the consideration of improper aggravating factors.**

**Proposition of Law XVI:**

**A trial court must merge capital specifications where warranted prior to the jury deliberations on the appropriate penalty. Where two statutory aggravators are merged, the jury must be instructed that it is to consider only one statutory aggravator in the weighing process.**

In the trial court's sentencing order filed pursuant to R. C. §2929.03(F), the trial court recited the convictions of Count one Aggravated Murder and the two capital specifications. However, the court failed merged the specifications before conducting the weighing process. As such, the court improperly considered both statutory aggravators when determining the sentence.

R. C. §2929.03(F) opinion at p.10.

In the case at bar, the trial court assessed two separate aggravating circumstances. The R. C. § 2929.04(A)(7) specification and the R. C. §2929.04(A)(8) specifications must merge. The appellant possessed the same animus for both specifications. The homicide was one act and one intent. In the prosecutor's brief, it is argued that the specifications do not merge because the offenses have dissimilar elements and that the evidence was separate and distinct. (State Brief p. 38) This does not comport with the argument at trial and indeed, in the brief itself.

The prosecutor cites this Court in State v. Turner (2005), 105 Ohio St.3d 331, 347, for the proposition that the killing of a witness strikes at the heart of the criminal justice system. This is self-evident. It is certainly proper for the prosecution to argue that a juror should attach significant weight to the specification for this very reason.

The problem here is that the evidence for the killing of a witness is not separate and distinct. The very purpose of the burglary was, according to the state, to kill a witness. The criminal act, which is an element of Aggravated Burglary, was the homicide. Thus, the trespass into the house was for the purpose of killing a witness. It is the same act, the same *mens rea*. There is no other act or purpose alleged.

In Proposition of Law VII, the state argues in great length about the reason for Mr. Fry entering the house. “. . . there was an overriding reason to kill Ms. Hardison, to prevent her from testifying against him.” State's Brief, p. 24. Again, it is uncontested that the state argued and the jury convicted Fry for entering the house for the sole purpose of killing a witness. Under these facts, the specifications should be merged.

This Court has used the same animus or course of conduct standard in determining

merger for capital specifications. For instance, in State v. Garner, (1995) 74 Ohio St.3d 49, 1995 Ohio 168, this Court found the failure to merger 2929.04(A)(3) (escape detection) with 2929.04(A)(7) (felony-murder - aggravated arson) specification. The elements of these specifications are different and distinct. This Court nevertheless affirmed a court of appeals finding that the specifications to merged because the aggravating circumstances arose from the same act or course of conduct, the setting of the fires which killed the five children.

The court of appeals correctly concluded that the specifications based on R.C. 2929.04 (3) and arose from an indivisible course of conduct, *i.e.*, Garner's actions in burglarizing and setting fire to the residence at 1969 Knob Court. Having reviewed the record in detail, we reject the state's factual contention that Garner had completed the theft offense and then initiated a second, separate course of conduct in setting the fires. The record instead justifies the conclusion that Garner set the fires before exiting the apartment for the final time with the last stolen item, the television. His actions in burglarizing the residence and attempting to cover up his conduct by setting the fires were *inextricably intertwined*, and thereby constituted one indivisible course of conduct. This conclusion obtains even though Garner may have had multiple motives in setting the fire, *i.e.*, he may have intended both to eliminate possible witnesses as well as to destroy fingerprints or other evidence of his presence. Similarly, the fact that the children did not actually die until some time after Garner left the premises does not require a finding that the specifications were non-duplicative, as the cause of the deaths, *i.e.*, the ignition of the fires, occurred in conjunction of time and place with the burglary and arson. We conclude that the defendant's motion to merge the specifications in this case for purposes of sentencing should have been granted, and the jury should have been instructed accordingly.

Garner at 53-54. (Emphasis added)

The specifications here are similarly “inextricably intertwined.” The specifications arise from the same indivisible course of conduct and are impermissibly duplicated.

The failure of the trial court to address and merge prior to the jury instructions and in the court’s 2929.03(F) opinion resulted in a sentence that was in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution.

## CONCLUSION

Pursuant to the preceding Propositions of Law IV, V, VI, IX, XI, XII, XVII and XVIII, the defendant-appellant, Clarence Fry, Jr, respectfully requests that this Honorable Court reverse the conviction in this matter and remand for a new trial. In the alternative, pursuant to Propositions of Law I, II, III, VII, X, XIV, XV, XVI, XVII, XIX and XX, the appellant respectfully requests reverse the sentence of death and remand this matter for a new sentencing hearing. Finally, pursuant to Proposition of Law VIII, it is respectfully requested that the conviction of Aggravated Murder be dismissed and for this Court to enter a conviction for the lesser included offense of Murder pursuant to R.C. §2903.02.

Respectfully submitted,

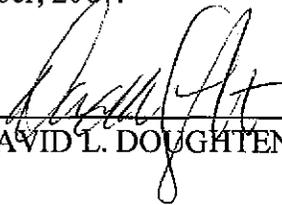
\_\_\_\_\_  
DAVID L. DOUGHTEN

\_\_\_\_\_  
GEORGE PAPPAS

Counsel for Appellant

**CERTIFICATE OF SERVICE**

A copy of the foregoing Reply Brief of Appellant was served upon Philip D. Bogdanoff Walsh, Esq., Summit County Prosecutor, 53 University Street, 7<sup>th</sup> Floor, Akron, OH 44308-1680 by Regular U.S. Mail on this 14<sup>th</sup> day of November, 2007.

  
\_\_\_\_\_  
DAVID L. DOUGHTEN