IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	
Plaintiff - Appellee,	:	**CASE NO. 2007-0755**
	:	
v.	:	
	:	
Charles Maxwell,	:	
	:	
Defendant - Appellant.	:	
	:	**CAPITAL CASE**
	:	

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MERIT BRIEF OF APPELLANT, CHARLES MAXWELL

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Overview of Case

The appellant Charles Maxwell was tried and convicted of killing his ex-domestic partner, Nichole McCorkle. The two had a child together. She had recently ended the relationship, partially because she had been the victim of his physical abuse. As the result of one such incident, she testified at a grand jury against him. Maxwell was not indicted as of the date of the shooting.

Prior to trial, the trial court referred Maxwell for a twenty day competency evaluation. This was recommended by the Cuyahoga County Psychiatric Clinic. One of the factors cited was that Maxwell was found to have an IQ as low as a 68. Maxwell was found to be competent. However counsel did not pursue an Atkins claim or seek to preclude the death penalty based upon Maxwell's low intelligence level.

The jury convicted Maxwell of Aggravated Murder with prior calculation and design. The defense argued that the evidence was insufficient to establish prior calculation and design as the killing grew out of jealousy, not the need to retaliate. The evidence of retaliation was based upon the testimony of John Gregg, a friend of the appellant's. Gregg purportedly had been on a three way phone conversation in which he had heard Maxwell threaten the decedent because of her grand jury testimony. The defense attacked his credibility based on a plea deal Gregg received in exchange for his testimony. The prosecutor elected to go forward with the single aggravator of retaliation against a witness pursuant to R.C. 2929.04(A)(8).

The defense argued residual doubt at the penalty phase and did not mention Maxwell's intelligence levels. This is because the defense had appointed an independent psychologist who,

upon retesting, found Maxwell to have a higher intelligence level than the previous assessment. This higher result may have been produced by the "Flynn effect, " which indicates that testers score approximately five points higher if they re-take an intelligence test within a relatively short time.

It is argued below that the evidence was insufficient to sustain convictions for prior calculation and design and that the homicide was undertaken to retaliate against a witness. It is also argued that trial counsel was ineffective for failing to develop the mental health or retardation issues and actually hindered such a finding by having another expert provide an invalid test. In general, the presentation of mitigation was below the professional norms and duties as outlined in the ABA Guidelines. This case was a spontaneous eruption based on domestic discord and should not have resulted in the death penalty.

STATEMENT OF THE CASE

On January 27, 2006, a Cuyahoga County grand jury capitally indicted the defendant-appellant (hereinafter appellant) Charles Maxwell. The grand jury indicted under alternative theories for the murder of his past domestic partner, Nichole McCorkle, the mother of his child. Count One charged Aggravated Murder with prior calculation and design in violation of R.C. §2903.01(A). Count Two charged Aggravated Murder during the commission of a felony in violation of R.C. §2903.01(B). Each charge included four capital murder specifications; R.C. §2929.04(A)(5) (attempt to kill more than one person), R.C. §2929.04(A)(7) (felony-murder), R.C. §2929.04(A)(8) (killing a witness) and R.C. §2929.04(A)(8) (Escape detection). These counts also included a firearm specification in violation of R. C. §2941.145.

The indictment included numerous other counts. These included Kidnapping in violation of R. C. §2905.01(A) (Count Three), Aggravated Burglary in violation of R. C. §2911.11(A) (Counts Four and Five), Attempted Murder in violation of R. C. §2903.02(A) (Count Six), Retaliation in violation of R. C. §2921.05(B) (Count Seven) and Having a Weapon While under a Disability in violation of R. C. §2923.13(A) (Count Eight). The appellant pleaded not guilty to all counts at his arraignment.

On October 12, 2006, the trial court ordered Maxwell to the Northcoast Behavioral Health Care Center for a 20 day evaluation on the issue of competency. On November 20, 2006, the court received a report from the center that Maxwell was competent. The defense requested an independent evaluation. The request was granted on November 28, 2006. (T. 34).

On February 6, 2007, the trial court conducted a competency hearing to determine the appellant Maxwell's ability to stand trial. The court determined that based upon the opinion of

Dr. Alice Cook of the Northcoast Behavioral Health Care Center, Maxwell was competent. The defense independent psychologist, Dr. John Fabian, indicated that he could not prepare a completed report without a neurological examination. The defense request for such an expert had been denied.

That same day, the judge conducted a hearing on appellant's motion to suppress a statement he gave where the arresting officer failed to provide *Miranda* warnings before asking him about the location of his gun. The motion was denied.

The appellant waived a jury as to Count Eight (Weapons Disability) and tried that count to the court. On February 7, 2007, a jury trial began with the death-qualification process. On February 23, 2007, the jury returned a verdict of guilt on Count One Aggravated Murder and the capital specifications of Retaliation and Escape detection. The jury found the appellant not guilty of the in violation of R. C. §2929.04(A)(5), the course of conduct specification. The jury also found the appellant not guilty of Attempted Murder.

Prior to jury deliberations, the trial court had found the appellant not guilty of counts Two (Alternative Aggravated Murder), Three (Kidnapping), and Counts Four and Five (both Aggravated Burglary). The trial court did find him guilty of Count Eight, Having a Weapon While under a Disability.

The penalty phase began on February 27, 2007. The next day, the jury recommended the death penalty. On March 21, 2007, the trial court submitted its opinion pursuant to R.C. §2929.03(F), accepting the jury's recommendation. The court sentenced the appellant to death on the first count.

The judge also sentenced the appellant to five years for both counts Seven and Eight. The

sentences are to be served concurrently but consecutively to the three year firearm specification.

The appellant filed a timely Notice of Appeal. This Brief on the Merits follows.

STATEMENT OF THE FACTS

The defendant-appellant Charles Maxwell was tried for aggravated murder in connection with the November 27, 2005 shooting death of Nichole McCorkle, with whom he had recently been involved in a prolonged relationship. The State maintained that Mr. Maxwell was guilty of capital murder based on four criteria. 1) the alleged aggravated murder was part of a course of conduct in which the offender killed Ms. McCorkle while also attempting to kill her sister, Lauretta Kenney; 2) the shooting took place while Maxwell was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping and /or aggravated burglary; 3) Ms. McCorkle was a witness to an offense and was purposely killed in retaliation for her testimony in a criminal proceeding; and 4) Mr. Maxwell purposely killed McCorkle so he could escape punishment for another offense.

The defense argued that the homicide was the result of an emotional rage triggered by his recent breakup with Nichole.

State's Case

The State called Nichole McCorkle's younger sisters Michelle and Lauretta Kenney, both of whom claimed to have witnessed the event itself or the circumstances that led up to it. Michelle Kenney testified that Nichole had been dating Maxwell since 1999 or 2000. He is the father of Nichole's youngest daughter, Cheyenne. (Tr. 789) While Nichole and Maxwell were together, he did some remodeling work for her at a discount. (Tr. 846)

In August of 2005, Nichole bought a house in Cleveland. (Tr. 792) Nichole lived in the house with her father and her two daughters, Dominique and Cheyenne. Mr. Maxwell would come and go during this time. Both Michelle and Nichole worked. Nichole was attending

nursing school, so they helped each other out with car pooling and babysitting where their schedules would allow it, and saw each other often. (Tr. 796-97) They talked on the phone daily. (Tr. 796)

During the first weekend in October 2005, however, Michelle was temporarily unable to reach her sister. She later learned that Nichole was at Huron Hospital recovering from a head injury. Nichole gave a statement to police implicating Maxwell as the individual who put her there. (Tr. 806-808) A detective interviewed Nichole and photographed her injuries. (Tr. 1336-1340) Criminal charges were eventually sought against Mr. Maxwell and a judge issued a Temporary Order of Protection (TPO), which required Mr. Maxwell to stay away from Ms. McCorkle. (Tr. 832-833, 1140-1141) The TPO also forbade Maxwell from calling or contacting Nichole or having anyone else do so on his behalf. (Tr. 1142-1143) Mr. Maxwell was never served with a copy of the TPO and there is no evidence that he was aware that there was one. (Tr. 1145, 1152)

Nichole's other sister, Lauretta Kenney, also testified about the October incident. She too talked to Nichole every day, and recalled that she had lost track of her in October of 2005 only to then learn that she was in the hospital. (Tr. 880-883) Nichole suffered bruises and a head injury that required stitches. (Tr. 1665, Ex. 71-76) She stayed with Lauretta for a week after the hospital released her. (Tr. 886)

After meeting with the police, Nichole testified in front of the grand jury. (Tr. 1424) On November 23, 2005, Mr. Maxwell was charged with felonious assault, domestic violence, and abduction based on the alleged altercation with Nichole in October. (Tr. 1174, 1344) The grand jury foreman did not sign the indictment until November 28, 2005. (Tr. 1177-1180)

During the early morning of November 27, 2005, Michelle received a call from her sister, Lauretta, who advised her that Mr. Maxwell was at Nichole's house. (Tr. 840) Following that call, Michelle contacted a detective she knew who was assigned to the district where Nichole lived. (Tr. 835-836) She then called 911 and drove over to Nichole's house herself. (Tr. 841) On the way she saw Nichole's sister, Lauretta, running down the street. Michelle picked her up and the two drove through the neighborhood looking for Maxwell. (Tr. 842)

When they returned to the house, the police were just arriving. Lauretta took care of Nichole's children, while an ambulance transported Nichole, who had been shot twice in the head, to the hospital. (Tr. 843-844) Nichole died later that morning. (Tr. 845)

Child Witness

After the court found her competent to testify, the prosecution called Cheyenne Maxwell, who was only three years old when her mother died. (Tr. 809-829) She recalled that on the night of the shooting, she had been in bed with her mother, when her dad appeared in the bedroom with a gun. (Tr. 859) The little girl remembered that her parents were arguing and she followed them as they took the argument downstairs and into the kitchen. At some point her Aunt Lauretta, arrived, the argument continued and she saw her dad shoot her mom. (Tr. 861-870)

Night of Shooting - Victim's Date

On the night of November 27, 2005, Nichole went on a date Lauretta had arranged with a friend of hers named Will Hutchinson. (Tr. 1502-1504) According to Hutchinson, the two shared a drink or two at a bar and then went their separate ways. (Tr. 1505) He called her later to make sure she got home okay. (Tr. 1507) When she answered the phone and said she could not talk, she seemed evasive. (Tr. 1515) Hutchinson called back and someone else answered then

quickly hung up. After four or five attempts, he still could not get through, so he called Lauretta. (Tr. 1516-1517)

Lauretta related that she received Hutchinson's call at about 2:30 a.m. and immediately tried to reach Nichole. (Tr. 887-888, 1028) Maxwell answered the phone and gave it to Nichole. Lauretta admonished Nichole to get Maxwell out of the house, then she called Michelle and told her she was heading over to Nichole's house. (Tr. 889-890, 1030) Lauretta called Nichole as she arrived at the house and asked to come inside. (Tr. 1033) Nichole opened the front door and came out on to the porch. Maxwell was standing directly behind her. (Tr. 1055) When Lauretta told Maxwell he had to leave, he responded that they were just talking. (Tr. 1038)

According to Lauretta, they argued, Maxwell became angry, pulled out a gun, and said "if anyone was leaving it was her" (Tr. 1038, 1079) Lauretta screamed, jumped off the porch and ran to some bushes for safety. She heard two shots as she retreated. (Tr. 1038) She heard another gunshot, saw Maxwell lean over Nichole, grab his hat and run off. (Tr. 1039-1042) Lauretta called 911 and then chased after Maxwell. (Tr. 1042) She encountered Michelle in her car at 146th and St. Clair Streets and together they pursued Maxwell before giving up and returning to the house. On the way, the sisters called 911 again and learned that Cheyenne's 14-year-old sister Dominique had also called 911. (Tr. 1043)

Dominique was asleep in the bedroom she normally shared with her sister, when she was awoken by the sound of gunfire and screaming. (Tr. 1577) She went downstairs and found her mom on the floor shaking. Her sister said, "my daddy shot my mommy." (Tr. 1573) When Michelle and Lauretta returned, Dominique was standing in the doorway with Nichole lying at her feet. (Tr. 1051) Police and an ambulance arrived. The ambulance took Nichole to the

hospital to treat her for a gunshot wound to the head, while police began to investigate what had transpired. (Tr. 1062, 1111, 1113-1115)

Police Investigation

Police responding to the disturbance secured and eventually processed Nichole's house as a crime scene. (Tr. 1115) During their investigation, police found blood in and around the front doorway. (Tr. 1247) Police also found two .25 caliber metal shell casings. (Tr. 1127, 1250) One of the casings was found on the stairs inside the house, the other on the floor by the front door. (Tr. 1136-1137) No evidence was recovered to confirm that a third shot had been fired. (Tr. 1289)

An autopsy concluded that Ms. McCorkle died after sustaining two gunshot wounds to the head at fairly close range. (Tr. 1478) Police did not recover a gun, but nonetheless opined that the casings came from bullets fired by the same weapon. (Tr. 1609-1612, 1620-1625)

Informant

The state also relied on the testimony of John Gregg. Gregg had known Maxwell for many years. The two worked together doing construction for Maxwell's brother and had become close friends. (Tr. 1647-1650) Gregg also knew Nichole and described the couple's relationship as "love/hate." (Tr. 1659) In accordance with a plea agreement in an unrelated fraud case (Tr. 1689), Gregg testified essentially to the following: He and Maxwell had talked about the October incident that prompted Nichole's trip to the hospital. Gregg recalled that during that conversation, Maxwell admitted that he hit Nichole with an iron. (Tr. 1664) When Gregg asked him to clarify what had happened, Maxwell allegedly told him that he hit Nichole with a gun. Gregg claimed he probed further, asking – "Oh my gosh, you pistol whipped her?" To which,

according to Gregg, Maxwell responded in the affirmative. (Tr. 1664-1665)

Gregg testified that in conversations with Maxwell after the October incident, Maxwell was afraid that he might be prosecuted and sent to prison because of what had happened. Accordingly, he asked Gregg to intercede with Nichole on his behalf and convince her tell authorities that the October incident was more of a simple domestic violence than a full blown felonious assault. (Tr. 1666-1673)

Gregg recalled that he, Maxwell, and Nichole had a telephone conversation shortly after she testified in front of the grand jury in November, 2005. During that conversation, Nichole told them that she told the truth. (Tr. 1674) When Gregg and Maxwell spoke later, Maxwell was upset and shared his suspicions that Nichole had not told the grand jury the story Gregg had tried to convince her to tell. (Tr. 1676) Gregg testified that Maxwell said, "That bitch was going to make him kill her." (Tr. 1676) Then Maxwell asked Gregg where he could find a gun. (Tr. 1677) When Gregg found out that Nichole had been shot, he called Maxwell, who confessed that he did the shooting. (Tr. 1678-1682) Shortly after the shooting, Gregg called 911 and, at that point, anonymously reported that Mr. Maxwell was the shooter. (Tr. 1684)

Arrest of Defendant

The FBI fugitive task force eventually located and arrested Maxwell on December 16, 2005. They found him hiding in a Jeffries Avenue house, inside a crawl space. (Tr. 1311-1315) There was no one else on the premises at the time and the arresting officers did not know who owned the property. Mr. Maxwell did not resist arrest. (Tr. 1331)

The jury found Mr. Maxwell guilty of capital murder and the matter proceeded to the penalty phase. The penalty phase is specifically addressed within the Propositions of Law below.

ARGUMENT

Proposition of Law I:

> **The failure of defense counsel to fully investigate and present all mitigation to the jury and object to improper evidence and argument during the penalty phase constitutes ineffective assistance of counsel.**

Both the Federal and State Constitutions guarantee a minimum standard of proficiency of a criminally accused's counsel. The Sixth Amendment of the United States Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right...to take the assistance of counsel for his defense." In Powell v. Alabama, 287 U.S. 45 (1932), the United States Supreme Court first recognized that a defendant has a right not only to the timely appointment of counsel but also to the quality of performance above a minimal level of effectiveness. Both State and Federal courts recognized that the failure of trial counsel to properly represent his or her client might affect the legitimacy of the fact finding progress just as errors by the court or prosecution might require the reversal of a conviction.

Here, the performance of Maxwell's counsel during the penalty phase fell below the professional norm in numerous instances. Counsel failed to develop a mental retardation issue or present what was already developed in that area as a mitigator to the jury. Counsel failed to fully prepare for the penalty phase of the trial and was forced to request a continuance after the first phase verdict, which was denied. Counsel failed to develop a coherent mitigation theme. The defense presented witnesses who testified about Maxwell's good character. As a result, the prosecutor introduced prior felony convictions and prison terms to rebut the character claim. Counsel also failed to object to improper prosecutorial argument, thus allowing improper

considerations before the jury. The performance of Maxwell's counsel here was beneath the professional norm and resulted in an unreliable conclusion to the penalty phase proceedings.

Mental Retardation - Potential Atkins Claim

Prior to trial, counsel referred Maxwell for evaluation by the Court Psychiatric Clinic of the Cuyahoga County Common Pleas Court. The report summarizing that evaluation contained ample evidence of metal retardation long before trial. The intelligence test revealed a level of 68. In spite of this, defense counsel failed to investigate or develop this issue. At no point did counsel request an eligibility hearing under Atkins v. Virginia, 536 U.S. 304 (2002) or State v. Lott, 97 Ohio St.3d 303, 2002 Ohio 6625 (2002). Counsel inexplicably failed to present any evidence of intelligence level at the penalty phase hearing. Counsel's own expert found an intelligence level of 76. However, the expert apparently tested Maxwell within months of the Court Psychiatric Clinic's test. The second test should have been deemed invalid, because a second test within a short period of time will result in a higher score. Walker v True, 399 F.3d 315 (4th Cir. 2005)

Counsel failed to call the doctor who performed the original testing for the clinic as a witness in the penalty phase hearing. Counsel failed to request instruction which would have allowed an Atkins finding by the jury. Even if Maxwell was not found not to qualify the Atkins/Lott preclusion of death, low intelligence remained a viable mitigation factor. Counsel failed to introduce evidence or argue this factor.

In the October 2, 2006 report to the court, Dr. Michael H. Aronoff, Psy.D., found that Maxwell was of borderline intellectual functioning. Report page 10. This was based upon the testing performed upon the appellant on September 27, 2006.

> As the result of this, he obtained a verbal IQ score of 68 (mild retardation range), a performance IQ score of 83 (low average range), yielding a full IQ of 72 (borderline range). The 15 point discrepancy between performance and verbal IQ scores is statistically significant and suggests that the defendant is more adept at tasks requiring visual-motor rather than verbal skills. *This examiner can state within 95% confidence that the defendant's true full scale IQ score lies within the range of 68-77.*

Id, page 6.

Dr. Aronoff's report was stipulated by the parties. The trial court read into the record the portion of Aronoff's report regarding the intelligence level prior to the February 6, 2007 competency hearing. The court quoted the report, "the defendant's performance on the CAST*MR . . . in which he scored at or below the level of mentally retarded defendants later found incompetent to stand trial, . . . was significantly lower than what would be expected from his attained borderline full scale IQ score or from his prior experience with the legal system." (T. 42)

Dr. Aronoff testified at the competency hearing, not the penalty phase hearing. He testified that he administered the Wechsler Abbreviated Scale of Intelligence. The verbal IQ was 68 and the performance was 83, with a full scale IQ of 72. There was no indication malingering on the intelligence test. The doctor explained that he scored higher on the CAST*MR score because his prior experience with the legal system. (T. 136-137) He found him in the borderline mentally retarded range. Dr. Aronoff explained that the fact that he tested him at the age of 40 did not affect the fact that it must have been a lifelong problem. The situation would not have changed from a young age unless Maxwell had suffered from a stroke or some sort of head trauma. (T. 138) There was no evidence that the Cleveland City Schools has ever tested Maxwell for his intelligence level. (T. 138)

Nonetheless, defense counsel did not call Dr. Aronoff as a mitigation witnesses in the penalty phase hearing less than a month later.

Dr. Alice Cook testified about the IQ level at the competency hearing. She found that he could not be found to be mentally retarded because the records did not disclose that he was retarded prior to age 18. (T. 88-89) She did acknowledge that Maxwell could have "slipped through the cracks and not been diagnosed by that school system." (In response to court question, T. 89) "Probably in the 60s it would have been much more likely when special ed. was not as developed," but not as likely in the 80s. (T. 90) Finally, the doctor indicated that even if the IQ level were accurate, it would not have effected his ability to be restored to competency. (T. 91)

Dr. Sandra McPherson found and testified that Maxwell had a full scale IQ of 84, with a verbal index of 77 which placed Maxwell in the borderline range. (T. 2165) His performance IQ was found to be 95, which was within average functioning. She acknowledged in her report of February 26, 2007, and her testimony that she had reviewed the records from the competency reports. (T. 2183)

Nonetheless, nowhere in her report or testimony does she acknowledge the prior intelligence testing or the results. Why she had Maxwell take a second test so soon after the previous intelligence testing is also not known. Counsel should have instructed her not to conduct such testing for two reasons. First, a recent testing potentially excluding Maxwell for death eligibility had recently been conducted. There was no need to re-test. Second, and more importantly, a second testing so soon after the original would not be accurate, to the detriment of the client. This so-called Flynn Effect was not addressed by the defense. The jury was thus left with a false impression of Maxwell's intelligence level.

Flynn Effect

Psychologists have noted that an intelligence test administered within a relatively short time of another such a test will often produce an increased score, as will age in general. See Searching for Justice: The Discovery of IQ Gains Over Time. Flynn, James R. American Psychologist. 1999 Jan Vol 54(1) 5-20. *See also* Practice effects on the WAIS-III Across Three and Six-Month Intervals. Basso, Michael R.; Carona, Francine D.; Lowery, Natasha; Axelrod, Bradley N. Clinical Neuropsychologist. 2002 Feb Vol 16(1) 57-63. This study showed that Full Scale IQ, Verbal IQ, Performance IQ, Verbal Comprehension Index, Perceptual Organization Index, and Processing Speed Index scores improved significantly across time, whereas no significant change occurred on the Working Memory Index. The degree of improvement was similar regardless of whether the inter-test interval was three or six months. *These findings suggest that prior exposure to the WAIS-III yields considerable increases in test scores.* Reliable change indices indicated that large confidence intervals might be expected. As such, the authors state, users of the WAIS-III should interpret reevaluations across these intervals cautiously.

Other courts nationally are wrestling with the issue in the wake of Atkins. In Williams v. Campbell, (S.D. Ala. 2007), 2007 WL 1098516, *47 the federal district court addressed the issue in attempting to determine how to proceed on an Atkins claim.

> First, of course, there may be additional historical IQ scores, as the petitioner hints. (Doc. 20 at 4). Second, there may be reasons why the record IQ scores are unreliable, including without limitation problems with the testing methodology and the so-called "Flynn effect;28742;28742," which the petitioner maintains has currency here. (Doc. 11 at 49-51). *See generally Walker v. True,* 399 F.3d at 322 (describing the Flynn effect; 28770; 28770 and instructing the district court on remand to consider the persuasiveness of the petitioner's evidence of it).

Although this Court has not directly addressed the Flynn effect, lower appellate courts have done so. See State v. Burke, (Ohio App. 10 Dist. 2005), 2005 Ohio 7020, *12 -14, *appeal not allowed* by, 109 Ohio St.3d 1506, 2005 Ohio 2998; for an extensive review of the principle. See also State v. Murphy, (Ohio App. 3 Dist. 2005), 2005 Ohio 423, discretionary appeal not allowed, 2005 Ohio 3154.

Other jurisdictions addressing the issue in the wake of Atkins include In re Hicks, 375 F.3d 1237, 1242 -1243 (11th Cir. (FL) 2004);and People v. Superior Court (of Tulare County {Vidal}), 28 Cal.Rptr.3d 529 (Cal. App. 5 Dist. 2004) (overruled on other grounds) [*review granted and opinion superseded by People v. Superior Court (Vidal)*, 116 P.3d 478, 32 Cal.Rptr.3d 4 (Cal. Jul 27, 2005)] (Cal. App. 5 Dist. 2004)].

Mental Retardation Standards

In 2002, the United States Supreme Court ruled in Atkins v. Virginia, 536 U.S. 304 (2002) that executing a mentally retarded person violates the proscription against cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution.

This Court in State v. Lott, 97 Ohio St.3d 303, 2002 Ohio 6625 (2002), provided three criteria for evaluating a capital defendant's claim that he is, in the words of the United States Supreme Court in *Atkins*, "so impaired as to fall within the range of mentally retarded offenders [against] who[se] [execution] there [has emerged] a national consensus." The defendant must demonstrate by a preponderance of the evidence (1) that he suffers from "significantly subaverage intellectual functioning," (2) that he has experienced "significant limitations in two or more adaptive skills, such as communication, self-care, and self-direction," and (3) that these manifestations of mental retardation appeared before the age of 18.

Because trial counsel failed to fully develop the issue for trial, it is not contended here that the evidence establishes that Maxwell is an Atkins/Lott excludable. However, by improperly providing a second test, by failing to move for exclusion based upon Atkins/Lott, by failing to call Dr. Aronoff as a witness in mitigation, by failing to request proper jury instructions or argue low intelligence alone as a mitigation factor, counsel's performance undermines the reliability of the jury's decision.

Although the record does not establish if Maxwell was mentally retarded before the age of eighteen, it strongly suggests that he would have been at the same level or less at that age. The record does reveal that he tested 68 at age 40. Intelligence tends to elevate over time. True, supra. Dr. Aronoff testified at the competency hearing that "the only possible confounding variable could be if somebody suffered a stroke or somebody had some sort of a head trauma, then it could be acutely but mental retardation of itself is a life-long deficit." (T. 138)

Counsel Responsible for Preparing Expert or Controlling Expert

It was up to trial counsel to advise their expert as to the state of the evidence. Skaggs v. Parker, 235 F.3d 261, 271 - 272 (6th Cir. 2000) (finding counsel ineffective for reliance upon inept psychological expert) It appears that Dr. McPherson knew of the intelligence issue, as she referred to the clinic report in her testimony, but she did not address the discrepancy between her findings and that of Dr. Aronoff. Bloom v. Calderon, 132 F.3d 1267, 1278 (9th Cir. 1997) (finding counsel ineffective for failing to provide to psychologist sufficient background information relating to defendant). If counsel was not aware of the Flynn effect, and relied upon an expert who was not qualified or made a major error, it remains the responsibility of counsel to not introduce such testimony to the court and jury. Bradshaw v. Richey, 498 F.3d 344 (6th Cir.

2007) (Counsel retained unqualified arson investigator, met very infrequently, subjected him to budget, no in depth examination by expert, expert agreed with state's expert and was subpoenaed by State, counsel did not resist subpoena). Combs v. Coyle, 205 F.3d 269, 287-88 (6th Cir. 2000) (Defense expert testified at guilt-innocence defendant was intoxicated, judgment impaired, but acted with intent; this was critical to defense theory (p. 288). Counsel ineffective for not knowing what expert would testify to and not preparing him - testimony contradicted defense theory).

Counsel here hired an expert and allowed her to defeat a death eligibility issue without even attempting to develop the issue. The original finding was made by a neutral court clinic. There was no need for a second testing. The appointed psychologist improperly provided Maxwell a second testing contrary to accepted professional norms to Maxwell's detriment. Even if he had not met Lott standards, low intelligence should have been argued and presented as a significant mitigator. The failure to do so leaves the reliability of the sentencing procedure in grave doubt.

Failure to Prepare for Mitigation Hearing

It is clear that counsel failed to be prepared for the penalty phase hearing. It is the practice of death penalty counsel that mitigation be prepare by jury selection. ABA Guideline 10.11 This Court has held that even a one day continuance is not an abuse of discretion. State v. Coleman II, 45 Ohio St. 3d 298 (1989). Counsel need be aware of this Court's holdings on such issues.

Counsel filed a motion for a continuance of the penalty phase on February 27, 2007, the day that the penalty phase was scheduled to begin, requesting additional time "to prepare a

defense for the mitigation phase of trial." Counsel noted that since the verdict of February 23, 2007, counsel did not have "adequate time to prepare a meaningful mitigation defense." It was noted that "this is especially true as the Defendant continues to suffer from mental illness and counsel cannot properly communicate with the Defendant as the result of this . . ."

The problem is that the record does not reflect this assertion. There was no development of a record to support the mental illness which prevented communication with the attorneys. Maxwell had complained about not being seen enough and filed a pro se motion for new counsel. This issue was apparently ironed out, as Maxwell withdrew his motion.

It does appear from the record that counsel was not prepared. The only witnesses called were family members who testified only that Maxwell was non-violent, a good father and a hard worker. This testimony was problematic in two ways. First, it opened the door for the prosecutor to introduce in rebuttal Mr. Maxwell's past convictions for violent offenses. Second, none of the evidence necessary to set the foundation for the psychologist's testimony was developed through these or any other witnesses.

An example of this, in addition to not developing or arguing low intelligence or retardation as a mitigating factor, was the failure to develop the alcohol dependency. Dr. Aronoff's report and that of Dr. McPherson noted diagnoses of alcohol dependency. (T. 2176) Yet, none of the family members were asked about Maxwell's drinking. The prosecutor challenged Dr. McPherson about her assessment during her testimony. She acknowledged that the diagnosis arose out of Maxwell's self-reporting. (T.2189) This was argued effectively by the prosecutor in his closing argument as to why to question this assessment. (T. 2231)

The lack of mitigation investigation prior to trial was apparent from testimony during the

February 6, 2007 competency hearing. Dr. Cook addressed school records that she had obtained from the Cleveland school district. Defense counsel acknowledged that they had never seen the records before. The court was surprised, asking, "Mr. Rein, your litigation has not procured your client's school records?" (T. 103) The report revealed only Maxwell's grades and no other information. (T. 104)

Low Intelligence Requires Significant Weight

Even if, after a full hearing, Maxwell would not have been found to be death excluded under Atkins/Lott, the low intelligence should have been argued as a substantial mitigator. This court has long recognized that low intelligence mitigates the appropriateness of the death penalty. State v. Evans, 63 Ohio St. 3d 231 (1992); State v. Murphy, 65 Ohio St. 3d 554 (1992).
In State v. Thomas 97 Ohio St.3d 309(2002), this Court held that a defendant's intellectual deficiencies and possible brain dysfunction do not qualify as a mental disease or defect under R.C. 2929.04(B)(3). See State v. Gumm (1995), 73 Ohio St.3d 413, 432. However, it was also noted that a defendant's limited intellect is entitled to *significant weight* in mitigation under R.C. 2929.04(B)(7). Here, it was emphasized that the consideration of a defendant's intellectual deficiencies under the (B)(7) (catchall) rather than (B)(3) (mental disease) did not lessen the importance attributed to the evidence during the weighing process. State v. Otte (1996), 74 Ohio St.3d 555, 567 (in weighing the mitigation potential of addiction under [B][7], it did "not matter under which statutory category it was considered").

Additional Penalty Phase Errors

a. Residual Doubt Not Applicable in Ohio

Counsel argued residual doubt as a mitigator, even though it is not recognized in this

state. State v. McGuire (1997), 80 Ohio St.3d 390. It was the only mitigator argued by counsel in summation. None of the factors present in the record and addressed in Proposition XVI below were argued to the jury by counsel as a basis for a sentence less than death. Instead, counsel argued residual doubt and that Maxwell was not on a plane with such renown killers as Charles Manson, Son of Sam, Ted Bundy, John Wayne Gacy and Jeffrey Dahmer. (T. 2226-2227) The prosecutor properly objected to this line of argument, which was not a proper frame of reference and advanced no theory of mitigation based upon the evidence presented in either phase of the trial.

b. No such thing as mitigation certification or expert

Counsel asked Dr. McPherson if she had been certified as a mitigation specialist. Although the witness answered yes, there is no such thing as a certification in mitigation. Counsel asked the court if Dr. McPherson could be admitted as an expert witness in the area of mitigation. Again, such a designation does not exist. The court understandably sustained the state's objection. (T. 2157) The question undermined the credibility of the witness. The jury was left with the appearance that she was not qualified as an expert, at least for the purposes of introducing mitigation evidence.

c. Failure to object to aggravation by lack of mitigation.

Defense counsel did not appear to understand the concept of mitigation or how R.C. 2929.04(B) fits into the constitutional mandates. Constitutionally, a statute cannot limit the presentation of mitigation or what the jury may consider to be mitigation. Ohio's statute specifically enumerates six examples of factors the legislature deemed to be mitigation. Subsection B(7) merely acknowledges that the statute could not limit what was to be considered

by the jury or what could be presented to the jury for its consideration. It is not a "catch-all" section, which somehow implies that mitigation under B(7) cannot be seen with the same importance as 1-6 of that section of the statute. State v. DePew, 38 Ohio St. 3d 275 (1988)

Defense counsel failed to object when the prosecutor asked Dr. McPherson if she had "listed some mitigation factors for the jury to consider," in her report. He then asked if these factors fell within the "catch-all" provision. (T. 2182) Again, this is improper. The psychologist presents evidence the defense argues to be mitigation. The jury and/or judge decides whether it is mitigation, that is, if it is to be presented any weight. By first arguing that Dr. McPherson was a mitigation expert and then asking her what factors she found, counsel limited the jury's consideration of the evidence it could treat as mitigation. Counsel themselves, as has been noted, argued only residual doubt in its closing summation.

The prosecutor took advantage of this position. Family members argued that Maxwell was a peaceful and loving family man. The prosecutor was able to bring out that he had been released from prison in 1990. (T. 2187) Then he went back to prison. (T. 2188) He was released from prison in 1998, having done well in his last stay. Maxwell also had a domestic violence offense in 2003. (T. 2194, 2195)

Perhaps more damaging was the following exchange between the prosecutor and the witness.

Q: you gave a battery of tests to Mr. Maxwell, correct?

A: we did, yes.

Q: One of the mitigation, specific mitigation factors is mental disease?

A: Correct.

Q: you didn't find any kind of mental disease that would qualify for *that* mitigating factor, did you?

A: that is correct. I did not find mental disease.

Q: You consider the other mitigation factors, correct?

A: Yes.

Q: *And the ones that you came up with are the only ones that you could come up with based upon your review of the records and interviews, correct?*

A: That's correct.

(T. 2191) (Emphasis added)

Without objection, the prosecutor improperly limited the jury's consideration of mitigation, implying that the jury could consider only those factors found by the defense witness in question. This is constitutionally inviolate.

d. Failure to object and preserve.

Counsel also failed to object to the prosecutor's argument that the ability to adapt to prison was not mitigation. (T. 2214) Skipper v. South Carolina, 476 U.S. 1 (1986).

Counsel failed to obtain a neurologist or properly request a neurologist to assist in the development of mitigation. Both Sandra McPherson and John Fabian noted the need for the additional expertise. Finally, counsel failed to object to the trial court's use of the term "recommendation" throughout voir dire death qualification. (The court did *not* use the term in his death penalty instructions to the jury for the penalty phase.) (T. 2241))

Death Penalty Standard for Performance of Counsel

In Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003), the Supreme Court

reaffirmed the principle that a reviewing court must consider the quality and extent of the investigation that underlies a 'strategic decision'. The court stated:

> As we established in Strickland, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."

Id. at 33. Accordingly, "strategic decisions" should not be "*post hoc* rationalizations," rather they should be an "accurate description of [counsel's] deliberations" prior to making their decisions. Id. at 31.

The failure to provide effective assistance is a fundamental constitutional error which undermines the entire adversary process. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. Zerbst, 304 U.S. 458 (1938).

> When determining whether counsel was ineffective, the reviewing court must: First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. ***This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.***

Strickland, 466 U.S. at 687 (Emphasis added); Terry Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1515 (2000). The Terry Williams decision, at footnote 17, reemphasized that the "prejudice" component of the Strickland test focuses on the whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. Strickland, 466 U.S. at 687. The focus is not on whether there is certainty that the result would have been different.

The Sixth Circuit has also acknowledged that Wiggins' analysis applies to counsel's

failure to investigate. In Frazier v. Huffman, 343 F.3d 780, 794-795 (6th Cir. 2003), *certiorari denied*, Huffman v. Frazier, 541 U.S. 1095, 2004 U.S. LEXIS 4151 (U.S., 2004), that Court issued a writ where defense counsel failed to investigate a brain defect that may have directly effected defendant's actions. This Court determined that:

> Under Strickland, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690-91. This court has commented when evaluating facts similar to those here that "the inadequacy of the attorney's investigation . . . was manifest." Campbell v. Coyle, 260 F.3d 531, 553 (6th Cir. 2001) Our conclusion is bolstered by the Supreme Court's recent decision in the capital case of Wiggins v. Smith, 123 S. Ct. 2527 (2003).
>
> * * *
>
> In Wiggins, as in the present case, "any reasonably competent attorney would have realized that pursuing these leads"—in Wiggins's case, allusions to his horrible childhood; was necessary . . . In sum, no reason at all has been adduced to justify the failure of Frazier's trial counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on an argument of residual doubt. The state court did not articulate one. Nor can we fathom one. Absent any reason to explain or justify such a trial strategy, we conclude that the state court's determination that Frazier's trial counsel had performed in a competent manner during the penalty phase was not simply erroneous, but unreasonable. See Wiggins, 123 S. Ct. at 2538 (rejecting as unreasonable a state court's determination that trial counsel performed adequately where, although no trial strategy could be articulated to justify counsel's unreasonable failure to investigate and present evidence of their client's terrible childhood, the state court "merely assumed that the investigation was adequate"). . .

Likewise, the record in Maxwell's case reveals no strategic reason for not fully investigating or presenting the mitigation available. If there is a lesson to be learned from Williams, Wiggins and Frazier, it is, when it comes to mitigation, it is an unreasonable strategy for defense counsel to place all their eggs in one basket. Counsel must investigate all available mitigation and present it to the jury.

Proposition of Law II:

> **A trial court may not accept trial counsel's acquiescence to allow the prosecutor to materially amend the indictment as to an essential element of the offense without directly engaging in a colloquy with the defendant to ensure the waiver was knowingly, intelligently and voluntarily entered.**

One may not amend a capital indictment by changing the nature of the specification without personally inquiring of the defendant and securing a knowing, intelligent and voluntary written waiver of his right to indictment by the grand jury. Here, defense counsel allowed the state to materially amend a capital specification without properly advising Maxwell. The trial court also failed to engage in a proper dialogue with Maxwell to secure a proper waiver of his state constitutional right to a grand jury. The amended indictment in this case violated Crim R. 7 and the Fifth, Sixth and Fourteenth Amendments of the Federal Constitution as well as Art. I, Sec. 10 of the Ohio Constitution.

Ohio Crim. R. 7(A) states the following:

> A felony that may be punished by death or life imprisonment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against the defendant and the defendant's right to indictment, *the defendant may waive that right in writing and in open court.*
>
> Where an indictment is waived, the offense may be prosecuted by information, unless an indictment is filed within fourteen days after the date of the waiver. If an information or indictment is not filed within fourteen days after the date of the waiver, the defendant shall be discharged and the complaint dismissed.

***

Criminal R 7(D) states the following:

> The court may at any time before, during or after trial amend the indictment, information, complaint or bill of particulars, in respect to any defect, imperfection, omission in form or substance, or of any variance with the evidence, *provided no*

change is made in the name or identity of the crime charged. ***

(Emphasis added)

In State v. Headley (1983), 6 Ohio St.3d 475, this Court ruled:

> Section 10 of Article I of the Ohio Constitution provides that "...no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury..." This provision guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment of the grand jury. (Citations omitted)

Headley, 6 Ohio St.3d at 477 (emphasis added)

In this, a capital case, the prosecutor orally moved to amend the indictment, in particular, the capital specification. (T. 11-12) The prosecutor stated that there was a "typographical" error in that the death specification states that:

> The Grand Jurors further find and specify the offender committed the offense presented above for the purpose of escaping punishment for another offense committed by him, to wit—it says rape. This is a typographical error. It should read felonious assault.... (T. 11)

Defense counsel acknowledged the right to have the case taken back to the grand jury, said he explained this to his client and then did not object to the amendment. (T. 12). The court made no inquiry of the appellant whatsoever and granted the prosecutor's motion to amend the indictment. (T. 12)

The trial court did not comply with Crim R 7(A) because it failed to obtain a written or oral waiver from the appellant. In fact, the court never personally addressed the appellant to ensure that his counsel had discussed the matter with him.

Crim R 7(D) was violated in that the amended indictment changed the name and identity of the death specification from Rape to Felonious Assault. Felonious Assault is not a lesser

included offense of Rape. See State v. Deem, (1988), 40 Ohio St.3d 205. Consequently, the trial court was without authority to amend the indictment.

A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. See Schneckloth v. Bustamonte, 412 U.S. 218, 241 (1973). Courts indulge in every reasonable presumption against a waiver of fundamental rights and may not presume acquiescence in the loss of fundamental rights. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Both the federal and the Ohio Constitutions guarantee one charged with a capital offense the right to have the case presented to a grand jury. It is difficult to understand this alleged typographical error on death specification, no less, could have occurred. Rape and Felonious Assault are vastly different crimes. It was plain error under Crim R 52 for the court to accept such an amendment. The Ohio's Criminal Rules and both Constitutions require a capital indictment returned by the Grand Jury. Crim. R. 7(D) further prohibits an amendment of an indictment if the name or identity of the crime is changed. Here, the death specification was changed from Rape to Felonious Assault.

It is understood that this specification was merged into the retaliation specification and not presented to the jury during the penalty phase. However, evidence of the injuries from the felonious assault was presented to the jury during the penalty phase of trial over defense objection. Such evidence was inadmissible. Also, the state would have been limited in its presentation of evidence in the first phase had they obtained a new indictment through the grand jury. This Court has recognized that there is a carry-over effect to unfairly prejudicial evidence

from the first phase to the second phase. State v. Thompson, 33 Ohio St.3d 1 (1987)

The appellant's conviction for the escape specification and sentence must be vacated.

Proposition of Law III:

> **A child witness under the age of ten years must be found incompetent to testify unless the record affirmatively establishes that the witness is able to distinguish right from wrong and the truth from a lie.**

In presenting its case against Mr. Maxwell, the prosecution relied upon the eyewitness testimony of five year-old Cheyenne Maxwell. Cheyenne was present when his mother, Nichole McCorkle, was killed. She was three years old at the time of the incident. Her testimony was critical to the prosecution's case. After conducting a hearing on the issue of Cheyenne's competency, the trial court erroneously found that the state overcame the presumption of incompetence for a child under ten and found the witness to be competent. The evidence does not support the finding.

Competency Standard

In determining the competence of a child witness, the trial court must consider the child's ability to receive, recall, and communicate accurate impressions of fact, understand truth and falsity, and appreciate the responsibility to tell the truth. State v. Frazier (1991), 61 Ohio St. 3d 247, syllabus. The proponent of the child witness' testimony bears the burden of proving that the witness is capable of receiving just impressions and relating them truthfully. State v. Clark (1994), 71 Ohio St.3d 466, 496. The prosecution failed that obligation in this case.

It is recognized that because the trial court has the opportunity to observe the child's

appearance, manner of responding to questions, general demeanor and ability to relate facts accurately and truthfully, its determination will not be reversed absent an abuse of discretion. Frazier, 61 Ohio St. 3d at 250-251. See, also, State v. Allard (1996), 75 Ohio St. 3d 482, 496.

Present Case

On February 12, 2007, the trial court conducted a competency hearing for Cheyenne Maxwell, the appellant's daughter. (T. 809) She was five at the time of the hearing. (T. 810) She was attending pre-school at the time of hearing. She knew her brother's name and that of her teacher. (T. 811)

When asked if she knew the difference between the truth and a lie, she answered as follows:

Q: And what's the difference?

A: The difference, when you don't tell the truth - -

Q: Uh-huh?

A: - - you could get in trouble.

Q: Okay. And if you tell the truth, what happens? Is it good to tell the truth?

A: Yes.

Q: Okay. What happens if you tell a lie?

A: You will get in trouble.

(T. 812)

The above is the total sum of questioning related to the witnesses ability to understand the significance of her oath. The questions were leading. The answers could easily be coached without any assurance that the child understood the import of her answers. In fact, Cheyenne

testified that she had been able to practice what she was going to say at the hearing; lots of times. (T. 820, 821) She did not know what it meant to take an oath. (T. 821)

The remainder of the competency hearing testimony addressed her ability to relate with accuracy details of her current living situation, such as identifying pictures of her house, and the names of the characters on the Sponge Bob Squarepants cartoon show. (T. 813, 814, 815-16) She also recited what had happened the night of the shooting.(T. 823)

The court found her to be competent over defense objection. (T. 824)

Evid.R. 601(A) provides:

> Every person is competent to be a witness except * * * children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

It is this latter aspect that is particularly failing in this case. There was no indication that Cheyenne understood the ramifications of telling a lie in court, except that she would get in trouble. Due to the number of times she practiced her testimony, ("lots" T. 820, 821) it would be surprising if this answer was not practiced. The mere repeating that she would get into trouble if she lied is insufficient to establish her competency. She made no reference to the consequences of lying under oath, either for herself or justice in general.

The record does not reflect any attempt by of the parties or the trial court to ascertain Cheyenne's understanding of an oath or the child's understanding of upholding that oath, except that defense counsel elicited that Cheyenne did not know the meaning of the term "oath." (T. 821) There was no fear that she would be subject to any type of punishment for lying, except the she would get in trouble. There was no religious connotation to this answer. What "trouble" meant was not explored. The record does not reflect the child understood her responsibility to

tell the truth. For these reasons, the state failed to overcome its burden of establishing that the children were competent. The presumption of incompetence was not overcome in the hearing prior to trial.

This Court has been quite specific in establishing what a proponent must show to demonstrate that a child understands the significance of her testimony under oath. In determining whether a child under ten is competent to testify, the trial court must take into consideration (1) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child's ability to recollect those impressions or observations, (3) the child's ability to communicate what was observed, ***(4) the child's understanding of truth and falsity and (5) the child's appreciation of his or her responsibility to be truthful."*** State v. Frazier , supra, syllabus. (Emphasis added)

Evid.R. 601(A) contemplates several characteristics. In State v. Said (1994), 71 Ohio St.3d 473, 644 N.E.2d 337, this Court broke these characteristics into three elements. First, the individual must have the ability to receive accurate impressions of fact. Second, the individual must be able to accurately recollect those impressions. *Third, the individual must be able to relate those impressions truthfully.* (Emphasis added) Id.

See also State v. Wallick, 153 Ohio App.3d 748, 2003-Ohio-4534.

It is understood that children need not testify with the clarity and sophistication of adults. State v. Millow (June 15, 2001), Hamilton App. Nos. C-000524, 000510. But Cheyenne demonstrated an inability to understand the concept of an oath. Under the circumstances, the trial court abused its discretion in finding her competent to testify.

Ohio's competency standard created a liberty interest. The trial court determination that

five-year old Cheyenne Maxwell was competent is in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Proposition of Law IV:

> **The failure to raise and preserve meritorious issues during a capital trial results in the denial of a defendant's right to effective assistance of counsel.**

In the present case, counsel failed in their duty to represent the appellant in accordance with the professional norm of capital litigators. This includes the duty to be familiar with the legal principles of capital litigation. There is no such thing as a "trial lawyer" as opposed to "appeals lawyer" in capital litigation. As a defendant may be executed as the result of his counsel not knowing, understanding and implementing constitutional principles in the defense of his client, the ABA Guidelines require such knowledge as basic to the capital defense standard of performance. For the purposes of the standard for the effective assistance of capital defense counsel, the ABA Guidelines are the Sixth Amendment. Its standards have been adopted by the Supreme Court of the United States as the standard for the performance of capital defense counsel. Rompilla v. Beard, 545 U.S. 374 (2005)

Specifically, ABA Guideline 5.1(B)(2)(a), under the subsection of Qualifications of Counsel, require that appointed counsel demonstrate:

> substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases.

Complementing the above guideline is Guideline 10.8, the Duty to Assert Legal Claims.

This guideline reads in relevant part:

A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines should:

1. Consider all legal claims potentially available; and

2. Thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; . . .

B. Counsel who decide to assert a particular legal claim should:

1. Present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; . . .

C. Counsel at all stages of the case should keep under consideration the possible advantages to the client of :

1. Asserting legal claims whose basis has only recently become known or available to counsel. . .

It is clear that defense counsel in this case failed to raise and preserve legal issues as required by the Guidelines in the first phase or culpability phase of the Maxwell's trial.

Voir Dire Process

a. Batson violation by defense counsel.

In Batson v. Kentucky, 476 U.S. 79 (1986), this Court held that the Equal Protection Clause of the Fourteenth Amendment governs the exercise of peremptory challenges by a prosecutor in a criminal trial. The Court explained that although a defendant has "no right to a 'petit jury composed in whole or in part of persons of his own race,'" id., at 85, quoting Strauder v. West Virginia, 100 U.S. 303, 305, (1880), the "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria," 476 U.S. at 85-86.

Since Batson, the Supreme Court has reaffirmed repeatedly its commitment to jury selection procedures that are fair and nondiscriminatory. The Court has recognized that whether the trial is criminal or civil, *potential jurors*, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice. See Powers v. Ohio, 499 U.S. 400 (1991).

In J.E.B. v. Alabama ex rel T.B. 511 U. S. 127 (1994) the Supreme Court held that under the equal protection clause of the Federal Constitution's Fourteenth Amendment prohibited the exclusion of jurors merely because of their gender, that is state-actor litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges or conflict with a state's legitimate interest in using such challenges in the state's effort to secure a fair and impartial jury.

When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women. Because these stereotypes have wreaked injustice in so many other spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." Powers v. Ohio, 499 U.S. at 412. The potential for cynicism is particularly acute in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or paternity. Discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the "deck has been stacked" in favor of one side. *See* Id., at 413 ("The verdict will not be accepted or understood [as fair] if the jury is chosen by unlawful means at the outset").

The Court has emphasized that individual jurors themselves have a right to nondiscriminatory jury selection procedures. Id., J.E.B. v. Alabama at 140-141. The Court observed that discrimination in jury selection reached beyond the defendant on trial, and noted that "by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror" as well. Batson. at 87.

In the instant case, it was the defense that violated the jurors' Equal Protection rights to sit on a jury. While the Court has yet to speak specifically of the defendant rather than the state violating Batson principles, the defendant's counsel is a state-actor litigant as referred to in J.E.B v. Alabama. The defense used five out of six peremptory challenges on women. Three of these women were black women. Of the five prospective jurors, there appears to be gender neutral reasons from the record for possibly three of these jurors, although no challenge was made by the state so specific gender neutral reasons were provided by the defense. Ironically, it was defense counsel who complained of the discriminatory nature of the jury because only one black males would sit on the final jury. (T.725)

The defense used peremptory challenges on the following jurors.

No. 18 Juanita Gibson

No. 23 Gibson Gray

No. 25 Stephens

No. 26 Dardzinski

No. 15 Torrero

Although there were no objections to the challenges by the prosecution or judge, it is not difficult to discern from the record the basis for some of the above challenges. Ms. Gibson was a

victim of a sex offense whose case the Cuyahoga County Prosecutors Office represented. (T. 390-400) The defense had challenged her for cause. Ms. Gibson-Gray had suffered from depression. She had been in and out of the hospital for mental disease. (T. 269-272)

Ms. Stephens was also a victim of domestic violence. (T. 444-457) She had been a victim of domestic violence some time before the trial. The father of her first child had been violent with her because she wanted to leave him. He ultimately smacked her in the face. She did report the matter to the prosecutor's office. There had been a second issue with the man six months before trial (T. 449) The exercise defense peremptories on these jurors can be based upon gender neutral reasons.

Ms. Darzinski had said on her questionnaire that she was firmly convinced of the need for capital punishment. She believed that it was necessary because people committed crimes when they were released. (T. 462) Although the defense may have exercised its peremptory on the juror because of her pro-capital punishment answer on her questionnaire, the record is not clear.

Ms. Torrero was the chapter president of the Polish Legion of American Veterans. (T. 369) When asked about the death penalty, she answered that she really did not know. (T. 371) Upon further questioning, she answered that she could follow the law and impose the death penalty in a properly proven case. (T. 372)

The use of peremptory challenges clearly establishes a prima facie case that the jurors were dismissed merely because they were women. Upon examining the specific questioning, the basis for a defense exercise of the challenge can be determined for three or possibly four jurors. The record is not clear as to the fifth exercise of the challenge.

The federal Constitution forbids striking even a single prospective juror for a

discriminatory purpose. Snyder v. Louisiana, __ U.S. ___, 2008 U.S. LEXIS 2708, 11; United States v. Lane, 866 F.2d 103, 105 (CA4 1989). A court must decide a Batson claim in three steps. First, the opponent of the peremptory strike must make a prima facie case of racial discrimination. Second, if the trial court finds that the opponent has fulfilled this requirement, then the proponent of the strike must come forward with a racially neutral explanation for the strike. Id. at 96-98. The "explanation need not rise to the level justifying exercise of a challenge for cause." Id. at 97. Third, if the proponent puts forward a racially neutral explanation, the trial court must decide, on the basis of all the circumstances, whether the opponent has proved purposeful racial discrimination. Id. at 98

In Miller-El v. Dretke, 545 U.S. 231 (2005) the Court made it clear that in considering a Batson objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted. 545 U.S., at 239

In the recently decided Snyder v. Louisiana, supra, the United States Supreme Court reaffirmed that any Batson violation determination can only be made after a review of the entire record. A simple judicial determination not based upon inquiry is insufficient to ensure that the Batson dictates have not been violated. In Snyder, the defense challenged a trial court finding that the prosecutor did not violate Batson. The prosecutor argued among other things that the juror, Brooks, looked nervous. On review, the Louisiana Supreme Court disagreed and found a violation.

The Supreme Court of the United States affirmed, noting that the record did not show that the trial judge actually made a determination concerning Juror Brooks' demeanor. The trial judge was given two explanations for the strike. Rather than making a specific finding on the

record concerning Mr. Brooks' demeanor, the trial judge simply allowed the challenge without explanation. It was possible that the judge did not have any impression one way or the other concerning Brooks' demeanor. Brooks was not challenged until the day after he was questioned, and by that time dozens of other jurors had been questioned. Thus, the Court reasoned, the trial judge may not have recalled Mr. Brooks' demeanor. Or, the trial judge may have found it unnecessary to consider Mr. Brooks' demeanor, instead basing his ruling completely on the second proffered justification for the strike. For these reasons, the Court would not presume that the trial judge credited the prosecutor's assertion that Mr. Brooks was nervous.
Snyder at 13-14.

Similarly, here, there is no record as to why defense struck the females. The pattern of striking females was clearly established. Perhaps counsel did not want females on the jury as this case involved domestic violence. Thus, as noted above in the case of some of the jurors, defense counsel may have had mixed motives for the exercise of peremptory challenges. The jurors were excused properly if they were direct victims themselves or had had direct contact with the prosecutors in a representative capacity. Jurors were dismissed improperly if it was because they were women. There may have been mixed motives, dismissal for one gender neutral reason and second non-gender reason. The Snyder decision raised the issue of mixed motives but did not resolve it. The mixed-motives issue has previously been largely ignored. *But see* Russell D. Covey, *The Unbearable Lightness of Batson*: Mixed Motives and Discrimination in Jury Selection, 66 MD. L. REV. 279 (2007). This issue appears to be headed for more litigation in the Supreme Court.

However, where the record reflects, as here, that for even one reason the main purpose of

the dismissal is that the prospective juror was female, the jurors' right to sit in addition to the appellant's right to have her sit under the Fourteenth Amendment have been violated.

A review of the evidence reveals numerous males who also "favored" the death penalty. Thus, the use of a peremptory challenge on a female merely because she did not have difficulty with the death penalty is insufficient rationale under Snyder.

It should be noted that, ironically, defense counsel did object when the prosecution failed to use a peremptory challenge on three occasions that resulted in only one black male reaching the final twelve jurors. By passing, a second black male did not reach the final panel of twelve. (T. 725) In fact, it was the defense that exercised three peremptories on three African-American women, the aforementioned jurors Gibson, Gibson-Gray, and Stephens, all black females. The single African-American exercise by the state resulted in a race neutral reason. (T. 726-727)

Additional Voir Dire Omissions

In addition, defense counsel failed to life qualify a single juror. Morgan v. Illinois (1992), 504 U.S. 719. Under Morgan, jurors unable to consider factors in mitigation as a reason not to sentence a defendant to death are not qualified to sit on a death panel. Counsel for Maxwell did not explore this with any juror, including those who had no hesitancy with a death verdict in theory.

Counsel failed to object to the trial court's use of the term "recommendation" used by the parties and the judge throughout the jury selection including the individualized voir dire. Caldwell v. Mississippi (1985), 472 U.S. 320, 340.

Counsel failed to object to victim-impact evidence coming before the jury in the culpability determination phase. (T. 787-788, 793, 796, 797, 845, 846, 862, 877, 1475) (See

Proposition of Law X)

Proposition of Law V:

> **Where a party to a lawsuit displays a *prima facie* pattern of bias in its exercise of peremptory challenges against women, it is incumbent upon the trial judge to determine whether gender neutral reasons for the challenge exists.**

This issue is closely related to the previous Proposition of Law. The defense used peremptory challenges on jurors No. 18, Juanita Gibson; No. 23 Gibson Gray; No. 25 Stephens; No. 26 Dardzinski; and, No. 15 Torrero. All of these jurors were female. The court did not review the record for or inquire of defense counsel to determine whether they had a gender neutral reason to justify challenging these jurors. J.E.B. v. Alabama ex rel T.B. 511 U. S. 127 (1994).

In Batson v. Kentucky (1986), 476 U.S. 79, the United States Supreme Court recognized that the Equal Protection Clause of the Fourteenth Amendment, United States Constitution, precludes purposeful discrimination by the state in the exercise of its peremptory challenges so as to exclude members of minority groups from service on petit juries. See id. at 89. Gender was later included as a suspect class for the purposes of Batson challenges. J.E.B., supra.

The United States Supreme Court, in Batson, explicitly "rejected the evidentiary formulation * * * which required a defendant * * * to demonstrate the systematic exclusion of a group of jurors * * *." State v. Pratt, 1987 Ohio App. LEXIS 8622 (Sept. 9, 1987), Hamilton App. No C-860436, unreported. The existence of a pattern of discriminatory strikes is not a prerequisite to a prima facie case or to a finding of actual discrimination by the trial court. State

v. White (1999) 85 Ohio St. 3d 433, 436. The fact that other female jurors remained on the jury does not exonerate the discriminatory exercise of a peremptory challenge.

Thus, although the pattern does exist in this case, the improper usage of even a single peremptory challenge violates that juror's right to sit and the appellant's right to have that juror sit. A juror has a right to not be subjected to sexism in his or her right to sit as a juror. A defendant has a right to have a jury not subjected to discrimination in its selection. Neither party has the right to improperly exercise a peremptory challenge. If neither party objects, is the juror's right to equal protection waived in his or her ability to be seated as a juror? It should be the responsibility of the judge to ensure this procedure is conducted in a non-discriminatory manner and protect the citizen's right to sit as a juror.

Proposition of Law VI:

The trial court's refusal to dismiss biased jurors from the panel deprives the defendant of his protections under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

During the jury selection, the defense moved for the trial court to dismiss juror Juanita Gibson for cause. The defense moved for cause on Juror 18, Gibson, because she had been a victim of a sex offense. The Cuyahoga County prosecutors office prosecuted her assailant and had worked closely with her in that regard. (T. 390-400)

Ms. Gibson had been the victim of a sexual assault. The assault had occurred about five years before Maxwell's trial. She reported the attack to the police. The offender was prosecuted. He had entered a guilty plea and had been sentenced to one year in prison. He was serving his time during the jury selection process because the offender had remained at large and the plea had not occurred until a relatively short time before the trial. (T. 392-393)

The defense moved for cause. This was due to her recent close relationship with the Cuyahoga County prosecutor's office. (T. 400) They had, in effect, represented her in a very emotional matter that had been resolved only within the previous year. The judge overruled the request because the juror had stated that the previous experience would not influence her decision-making in Maxwell's trial. (T. 399) The defense renewed its objection to Ms. Gibson before exercising a peremptory challenge to remove her. (T. 717)

Impaired Juror

A prospective juror should be excused for cause whenever the juror holds a particular belief or opinion that will prevent or substantially impair the performance of his duties as a juror. U.S. v. Salamone, 800 F.2d 1216, (3rd Cir. 1986). Once actual prejudice is shown, the court must

grant a challenge for cause. U.S. v. Daly, 716 F.2d 1499 (9th Cir. 1983). Any claim of an erroneous ruling denying a challenge for cause in reality reduces the number of peremptory challenges that are available thereby constitutes reversible error. U.S. v. Nell. 526 F. 2d 1223 (5th Cir. 1976),

The failure to strike this prospective juror for cause forced the appellant to use a peremptory challenge on this venire person. As a result, the appellant was forced to take another objectionable juror.

The appellant recognizes that determination of impartiality of a prospective juror is committed to the trial judge's discretion and that decision will not be overturned absent an abuse of discretion. U.S. v Apodaca, 666 F. 2d 89, 94 (5th Cir. 1982); and State v. White (1998), 82 Ohio St.3d 16,20, 1998 Ohio 363. Further, the appellate court must give deference to the trial judge, who is able to see and hear the juror. Wainwright v. Witt (1985), 469 U.S. 412, 426. Even viewing the instant case under such a deferential lense, however, it is plain that the prospective juror showed actual bias that demanded she be excused. She was admittedly substantially impaired in her ability to perform her duties as a juror. Adams v. Texas (1980), 448 U.S. 38, 45. The failure to dismiss the juror constitutes error requiring this case to be reversed.

Ms. Gibson, the juror in question did say that she could be fair and impartial. However, that is not the end of the matter. A court may and should dismiss a juror for cause even where that juror ultimately says he or she can be impartial. White v. Mitchell, 431 F.3d 517 (6th Cir. 2005).

> . . . the appropriate question on review of a juror bias issue is "did a juror swear that [s]he could set aside any opinion [s]he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Id.*

The risk that a juror, who was a sex assault victim, may ultimately find the prosecutor's case more credible because of her previous relationship with that office rather than solely on the facts of the case, is too great of a risk for the court to have allowed.

Pursuant to R.C. 2313.43, the validity of a challenge to a juror for cause "shall be determined by the court and be sustained *if the court has any doubt as to the juror's being entirely unbiased.*" (Emphasis added) It is within the court's discretion to determine the juror's ability to be impartial. State v. White, supra, 20; citing State v. Williams (1983), 6 Ohio St.3d 281, 288.

Here, in spite of the assurance from the juror that she could be impartial, due to her past relationship with the prosecutor's office, the court could not be without doubt that at some point in the trial the juror in question could not be entirely unbiased.

Proposition of Law VII:

Evidence of a near instantaneous decision to purposely kill another is insufficient to sustain a conviction of prior calculation and design.

The United States Supreme Court set forth the standard for sufficiency review in Jackson v. Virginia (1979), 443 U.S. 307. The reviewing court is to view all the evidence in the light most favorable to the prosecution. In doing so, the court must then determine whether any reasonable trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. The State must prove each and every element of the offense charged by evidence beyond a reasonable doubt in order to sustain a conviction. State v. Jenks (1991), 61 Ohio St. 3d 259.

Present Case

The evidence concerning "prior calculation and design" does not support the convictions in this case. There was testimony that Ms. McCorkle testified before the Cuyahoga County Grand Jury on Wednesday November 23, 2005. According to John Gregg, a key state witness and a friend of Maxwell, he and Maxwell had discussed with the victim her potential testimony. According to Mr. Gregg, he and the appellant wanted the victim to change her testimony before the Grand Jury so that the appellant would not be indicted for a felonious assault or at least not a felonious assault with a firearm. In short, the victim was supposed to testify that it was only a domestic violence case. (T. 1665-1672)

According to Mr. Gregg, the appellant telephoned him the night of November 23, 2005 the day before Thanksgiving, as Mr. Gregg was driving from northern Ohio to southern Ohio. (T. 1673) The appellant told him that he had been trying to reach the victim by phone but could not. Mr. Gregg then participated in a three way phone conversation with the victim and the

appellant. (T.1674) According to Mr. Gregg, the victim said she told the grand jury the truth. (T. 1674)

Then, in a conversation between Gregg and the appellant, the appellant was upset and stated that "the bitch" was going to make him kill her. (T. 1676) The appellant then asked Gregg where he could get a handgun. Mr. Gregg suggested he may want a rifle so he could do it from a distance. Gregg indicated he did not know where he could get a gun. (T. 1677)

Nothing happened for the next four days. On November 27, Gregg got word that the victim was killed and telephoned the appellant to ask him if he did it. According to Gregg, the appellant admitted the killing and *told him the story about it.* (T. 1679)

The appellant admitted, according to Gregg, that he followed the victim as she went to a bar. The appellant waited outside and saw the victim leave with another man. Everyone went to her house a few miles away and the appellant saw her give this other man a kiss goodnight. (T. 1680) The other man left her at her house without entering. Sitting outside the house, the appellant telephoned the victim to see if he could come inside. She said that was ok. (T. 1680)

The appellant went inside and answered the house telephone at least twice and it was the male Nichole was with earlier. (T. 1681) Unbeknownst to the appellant or the victim, the other male called one of Nichole's sisters to alert her that appellant was at her house. On one telephone call, the appellant told the male that the "bitch is sucking my dick" and hung up. (T. 1681) Shortly thereafter, the appellant opened the door and fired one shot at the victim's sister who arrived on the scene and then shot the victim two times. (T. 1682)

Gregg testified that he then hung up and called 911. The 911 tape was played for the jury. (T. 1684)

The above evidence, if believed, is insufficient to sustain a conviction for prior calculation and design. This evidence is indicative of a lover's triangle and the appellant erupting at the sight of his woman going out for drinks with another man, giving him a kiss goodnight, receiving phone calls from him and then McCorkle's sister showed up to confront appellant about being with her. This is a classic spontaneous eruption of events rather than a calculated and planned killing.

Prior Calculation and Design

This Court summed up the analysis it undertakes when reviewing a prior calculation and design challenge in Ohio v. Jackson (2001) 92 Ohio St.3d 436. "There is no bright-line test to determine whether prior calculation and design is present. Ohio v. Taylor (1997), 78 Ohio St.3d 15, 20. Instead, each case must be decided on a case-by-case basis. Id." With this in mind, the history of this element will be examined below to determine how the courts have addressed this issue on a case-by-case basis.

This Court addressed the question in Ohio v. Cotton (1978), 56 Ohio St.2d 8. This Court held in Cotton that prior calculation and design is a *more stringent* element than the "deliberate and premeditated malice" which was required under prior law.

In Cotton, the defendant and his wife were confronted in a store with a shoplifting accusation. The police were called. Upon their arrival, the defendants fled. The police pursued. A gun battle ensued and an officer was shot. The chase continued involving the defendant and another officer. The defendant eluded the second officer and returned to where the wounded officer was crawling. The defendant then deliberately shot the officer again, killing him.

The Cotton Court held that the evidence revealed the presence of sufficient time and

opportunity between the appearance of the police officers on the scene and the fatal shot to constitute prior calculation and design. The defendant's purposeful return to the wounded officer, after having fled that vicinity for a period of time, justified the conviction on the disputed element.

In Ohio v. Toth (1977), 52 Ohio St.2d 206, it was held that acts done on the spur of the moment do not demonstrate the elements necessary to prove aggravated murder. In Toth, the defendant met three women in a bar. The girls left because he began to bother one of their group. They proceeded to a second bar. The defendant approached them again at this bar. The group of women then left to proceed to another establishment.

A witness later saw the defendant working on his car outside of the second bar. The defendant told the witness that he would "waste" those responsible for the damage to his car. That same evening, the defendant saw the women at the second bar. The women denied damaging his car. They asked him to leave them alone. Shortly thereafter the defendant reached into his pants and pulled out a gun. He fired one shot and missed. He then grabbed one of the women and shot her. She died of the injury.

This Court found that the evidence was sufficient to show the planning and scheming required to result in a conviction of aggravated murder. The Court noted that the defendant had two opportunities to alter his course of action upon confronting the women at the bar. His failure to do so was consistent with prior calculation and design.

Ohio Cases Where Evidence Deemed Insufficient for Prior Calculation and Design

Contrary cases are available. In Ohio v.Reed (1981), 65 Ohio St.2d 117, this Court held that evidence of prior calculation and design was insufficient to support aggravated murder

convictions.

The defendant in Reed stood in a convenient store parking lot talking on the telephone. Two police officers thought he looked suspicious. They followed the defendant's car. They stopped the car. One of the officers had his gun drawn when he approached Reed and the other occupants in the car. Reed exited the car and shot at one of the officers three times and twice at the other officer.

The only evidence of prior calculation and design was a statement Reed made to a person in an auto body repair class with him approximately a month before the incident. He said "if a cop gets in my way (during a robbery) I would blow him away." The comment was general in nature and not relevant to the killing. The above evidence did not constitute prior calculation and design. The evidence was sufficient only for establishing a purposeful killing.

In Ohio v. Davis (1982), 8 Ohio App.3d 205, the Eighth District Court of Appeals held that a momentary premeditation could not sustain the element of prior calculation and design. In Davis, the defendant went to a tavern and got into an argument with the doorman. The doorman had stopped the defendant because he did not have an identification card. The owner of the tavern intervened. During the confrontation, the defendant pulled out a gun and killed the owner and wounded the doorman. The court found that the evidence revealed that the defendant did not arrive at the tavern with the intent of shooting either the owner or the doorman. Therefore, the incident had developed precipitously and there could be no finding of prior calculation and design.

This Court seemed to recognize the problems with the blurred distinction between purposeful and prior calculation and design in Ohio v. Coley (2001) 93 Ohio St.3d 253. In

Coley, the Court recognized the importance of the difference.

> Yet " 'prior calculation and design' is a more stringent element than the 'deliberate and premeditated malice' * * * required under prior law." State v. Cotton (1978), 56 Ohio St.2d 8, 10 O.O.3d 4, 381 N.E.2d 190, paragraph one of the syllabus. "Instantaneous deliberation is not sufficient * * *." Id., paragraph two of the syllabus. " '[P]rior calculation and design' requires 'a scheme designed to implement the calculated decision to kill.' " State v. D'Ambrosio (1993), 67 Ohio St.3d 185, 196, 616 N.E.2d 909, 918, quoting State v. Cotton, 56 Ohio St.2d at 11, 10 O.O.3d at 6, 381 N.E.2d at 193.

In Coley the defendant kidnapped a woman from the street in front of her home and drove her to a dead-end alley. As the record failed to reveal a reason to drive her to the out-of-the-way location except to kill her, the facts were deemed to support a prior calculation and design finding. The facts were sufficient to show that Coley "adopted a plan to kill." Ohio v. Coley, Id.

At least one Ohio finding has been reversed on this issue for not following Ohio precedent. This Court's finding that prior calculation and design evidence was sufficient in Ohio v. Taylor, supra, was reversed in federal court in Taylor v. Mitchell, 296 F. Supp. 2d 784 (N.D. Ohio 2003).

Maxwell's case is a far cry from the scenario addressed in Cotton. The driving force here was Maxwell's jealously, which ultimately erupted into violence after receiving the phone calls from Nichole's friend from earlier that night. There was not scheme or planning in the homicide. Emotions from a domestic relations ran wild and ended in tragedy. The offense committed was murder at best, not aggravated murder with prior calculation and design.

Proposition of Law VIII:

When circumstantial evidence that retaliation was the motive for a homicide is superceded by a greater, more contemporary motive, the evidence is insufficient to support an R.C. 2929.04(A(8) finding by the jury.

As with the previous Proposition, the prosecutor failed to produce sufficient evidence of a "retaliation" killing to sustain a conviction for the R.C. 2929.04(A)(8) specification. The evidence establishes that the appellant was upset that Nichole McCorkle was socializing and drinking with another man. On addition, the appellant observed her kiss the man goodnight. Once inside the house with her permission, Maxwell fielded two phone calls from the other man and made a derogatory comment. Then, unexpectedly, McCorkle's sister showed up demanding that Maxwell leave. Only after all of this does the shooting take place.

The confluence of events resulted in McCorkle's tragic homicide. However, there is insufficient evidence of "retaliation" as defined under Ohio law. The "retaliation" specification under R.C. 2929.04(A)(8) requires that the victim was "purposely killed in retaliation for the victim's testimony in any criminal proceeding." Here, the evidence shows that the appellant was upset with Ms. McCorkle for socializing with another man and kissing him goodnight.

Whether the evidence is sufficient to support a conviction is reviewed in a light most favorable to the prosecution. Jackson v. Virginia, 443 U.S. 307. Such a review requires the court to determine whether any reasonable trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. The State must prove each and every element of the offense charged by evidence beyond a reasonable doubt in order to sustain a conviction. State v. Jenks (1991), 61 Ohio St. 3d 259.

The purpose of the homicide was one of the oldest motives known, jealousy in a romance

gone bad, not retaliation for grand jury testimony. If Maxwell was angry about the grand jury testimony, he failed to act on it. Four days later he was confronted by the dual prospects of losing Nichole to another man, and losing access to his daughter. There is no evidence that at the time of the shooting Nichole's grand jury appearance was on his mind.

The appellant adopts the argument addressed in the Seventh Assignment of Error and incorporates it here in addition to the above.

Proposition of Law IX:

> **Testimony before a grand jury is not testimony in a "criminal proceeding" as defined in R.C. 2929.04(A)(8) until the indictment is returned and filed in the Clerk's office under Crim. R. 55 and Crim. R. 6 or a no bill is returned and filed.**

In this case, the indictment for Felonious Assault was not filed with the Clerk's office until the day after the homicide. Under the Criminal Rules, the commencement of that criminal action took place after the victim died.

The commencement of a criminal action is defined under Crim. R. 55(A). The Rule states

> The clerk shall keep a criminal appearance docket. Upon the commencement of a criminal action the clerk shall assign each action a number
>
> ***
>
> At the time the action is commenced the clerk shall enter in the appearance docket the names, except as provided in Rule 6(E), of the parties in full, the names of counsel and index the action by the name of each defendant.
>
> ***
>
> An action is commenced for purposes of this rule by the earlier of, (a) the filing of a complaint, uniform traffic ticket, citation, indictment or information with the clerk, or (b) the receipt by the clerk of the court of common pleas of a bind over order under Rule 5(B)(4)(a).

Under Crim Rule 6(E) and (F), Grand Jury proceedings are secret and the indictment may only be found upon the concurrence of a sufficient number of grand jury members and the grand jury foreman must sign the indictment, return it to the common pleas judge and have it filed with the clerk of court. The clerk shall then file the indictment upon the appearance docket as provided in Crim R 55.

Under R.C. 2901.13(E):

A prosecution is commenced on the date an indictment is returned or an

> information filed, or on the date a lawful arrest without a warrant is made, or on the date a warrant, summons, citation, or other process is issued, whichever occurs first. A prosecution is not commenced by the return of an indictment or the filing of the information unless reasonable diligence is exercised to issue and execute process on the same. A prosecution is not commenced upon issuance of a warrant, summons, citation or other process, unless reasonable diligence is exercised to execute the same.

Under R.C. 2929.04(A)(8), the only death specification in this case, the state had to prove that the victim was purposely killed "in retaliation for the victim's testimony in any criminal proceeding."

Without question, the victim testified before the grand jury on Wednesday November 23. Also without question, the indictment was not filed until Monday, the day after the homicide. The appellant submits that the "criminal proceeding" against him did not commence until the indictment was filed with the clerk's office. He was never arrested or cited in any manner before the Grand Jury testimony. The only evidence that Maxwell knew of the grand jury proceedings came from John Gregg who recounted that he and Maxwell talked about it.Given Mr. Gregg's criminal background and propensity to lie as reflected in his perjury conviction, this evidence is hardly convincing.

In a different context, i.e., determining the statute of limitations for a civil malicious prosecution lawsuit, this Court recently stated:

> We will therefore assume, without deciding, for purposes of this case that the criminal process was commenced against Froleich when the evidence against her was presented to the grand jury.

Froelich v. Ohio Department of Mental Health, 114 Ohio St.3d 286, 2007 Ohio 4161, Para. 11.

The Ohio Department of Mental Health argued before this Court that a "prosecution" is not instituted when evidence is merely presented to a grand jury. Froelich at para. 10. The

Court's "assumption" in Froelich, which was reached in the absence of any analysis on the issue can not apply here in the context of a death specification.

R.C. 2929.04(A)(8) was meant to apply to criminal proceedings that the public was aware of. Criminal proceedings are public. There are no secret or non-public criminal proceedings in Ohio. By definition, grand jury proceedings are secret. Crim. R. 6. If the victim had been killed for testifying at a preliminary hearing, then the death specification would apply. However, given the secretive and one-sided nature of grand jury proceedings, one can not reasonably say they are "criminal proceedings." In light of Crim R. 6, Crim. R. 55 and R.C. 2901.13(E), criminal proceedings begin with the filing of an indictment or as otherwise defined by Ohio law.

Proposition of Law X:

Victim-impact evidence is irrelevant to the determination of guilt or non-guilt.

Victim-impact in the first phase or culpability phase of a capital trial is strictly prohibited. If the evidence adduced is relevant and necessary to prove guilt, that state may introduce such dual effect evidence. Even then, the evidence must pass the weighing requirement of Evid. R. 403. However, where the sole purpose of the evidence is to elicit sympathy for the victim or victims family, such testimony must be precluded.

Michelle Kenney, the decedent's sister testified about the family history. The house that Nichole had recently bought was described in detail. (T. 787-788) She discussed how her father, Hines Kenney was not in her life for a number of years because he was incarcerated. He returned in 2005 to live in Nichole's home. Their father did very well because he was staying with Nichole. (T.793) Michelle testified that she spoke to her sister "every single day." (T. 796, 797)

After the shooting, she testified about seeing her sister in the emergency room laying on an ambulance Gurney with multiple tubes in her, including a hose in her head. She recalled having to leave the room because of all the blood. She testified about when her sister was pronounced dead. (T. 845) She also discussed how the family had to wrestle with the decision of whether to pull the plug on her sister. But, Nichole died before that decision had to be made. (T. 846)

Likewise, Lauretta Kenney, another of the decedent's sisters, testified how she had spoken to her sister four to five times a day and how close she was with her sister as they grew up together. (T. 877)

Five year old Cheyenne Maxwell was called as a state witness. She is the appellant's

daughter. She was three years old at the time of the shooting. She testified about what she saw that day. The prosecutor unnecessarily had the daughter identify a picture of her mother before the jury. (T. 862) Although Ms. Maxwell might properly testify about seeing the shooting, the identification of her mother was not necessary to establish guilt. The powerful, emotional effect of such identification does not need to be explained here. (T. 862, State's Exhibit 5)

Deputy Coroner, Joseph Felo, testified about the debilitating pain the decedent must have suffered from one of the gunshot wounds. (T. 1475)

The rule against victim-impact evidence being used to determine guilt in this state dates back to State v. White (1968), 15 Ohio St.2d 146, syllabus paragraph 2. In White, the Ohio Supreme Court held that reliance on evidence of the victim's background or family by the state in its argument for the death penalty is improper and constitutes reversible error if relied upon in arriving at judgment. Because Ohio's rule barring victim impact evidence is based on independent state grounds, it survives the limitations of Payne v. Tennessee (1991), 501 U.S. 808.

The Supreme Court of the United States in Payne backtracked from earlier rulings forbidding any victim impact evidence under the Eighth Amendment to the United States Constitution. Payne should not be interpreted as a blanket allowance of victim-impact evidence. The Court ruled that victim impact evidence was admissible for the limited purpose of determining whether the death penalty was appropriate. Id. at 827. It should be noted that the Court expressly left open Fourteenth Amendment due process attacks as opposed to the earlier prohibitions which were based upon the Eighth Amendment.

For this reason, in State v. Fautenberry (1995), 72 Ohio St.435, 440, the Supreme Court

of Ohio ruled that, "True victim-impact evidence pursuant to the terms of R.C. 2930.13, 2930.14 and 2947.051, shall be considered by the trial court prior to imposing sentence upon a defendant, *not during the guilt phase of the proceedings*," (emphasis added). Fautenberry noted that if the victim impact evidence depicts both the circumstances surrounding the crime and the impact that the crime had on the victim's family, it could be admissible in both the guilt and penalty phase. *Id.* However, when the victim impact evidence impacts only on the affect of the crime on the victim's family and not on the circumstances surrounding the commission of the crime, it is not admissible during the guilt phase of the trial.

In the case at bar, the witnesses to the homicide were family members, including the appellant's daughter and Nichole's family. The individual testimony of the victims as to their actions during the incident and what they perceived at the time of the incident is irrefutably relevant. However, the ramifications to them after the fact are not. The fact that many suffered psychological ill-effects is not relevant to an element of any charged offense. Such improper evidence is precluded by statute in the penalty phase in Ohio. State v. Post (1987), 32 Ohio St.3d 380; State v. Herring (2002), 94 Ohio St.3d 246. This prohibition may not be circumvented by introducing it in the culpability determining phase.

The introduction of the improper evidence was in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

Proposition of Law XI:

> **The prosecutor may not argue victim-impact considerations or that the lack of mitigating factors under R.C 2929.04(B) as a basis for the jury to consider death as the appropriate sentence.**

The prosecutor is under an obligation to govern impartially. The United States Supreme Court emphasized the special responsibility and status of the government's attorney in Berger v. United States (1935), 295 U.S. 78. Justice Sutherland wrote that the obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. Berger, at 88. Impartiality forms the basis of the integrity of our justice system. A court must be careful not to allow the state representative's desire to win a particular case erode this essential foundation.

Because the jury is especially vulnerable to prosecutorial influence during the closing argument, misconduct at that point may necessitate a reversal of a subsequent conviction. The men and women who compose the jury trust that the prosecutor is conducting the trial properly. Thus, the prosecutor is in a position of great influence. As the Berger decision states:

> It is fair to say that the average jury in a greater or less degree, has confidence that these obligations, which so painfully set upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger at 633.

As the Sixth Circuit has observed, "the principles set forth in Berger forbid the government's injection of improper or prejudicial material that deprives an accused of his or her right to a fair trial." United States v. Solivan, 937 F.2d 1146, 1151 (6th Cir. 1991). Unfortunately, the prosecutors in this case failed to heed the admonition of Justice Sutherland in

Berger, as is demonstrated below.

During the penalty phase the prosecutor argued the specific mitigation factors. The defense objection was sustained. Nevertheless, the prosecutor continued down this line of questioning with Dr. McPherson. This was addressed in Proposition of Law I.

During closing argument, the prosecutor stated:

> I know it's been devastating for the families, especially Nichole's family and what they've gone through but the retaliation for the witness strikes . . .

The defense objection was overruled. (T. 2213)

The prosecutor argued that the ability to adapt to prison was not a factor that lessens the appropriateness of the death penalty. This is simply incorrect. Skipper v. South Carolina, 476 U.S. 1 (1986) The refusal to consider and give effect to this or any mitigation factor is erroneous. Penry v. Lynaugh, 492 U.S. 302 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982).

> What mitigation factors have you heard? He's capable of conforming to prison life? That's a mitigating factor? Is that - - really? You assign the weight that you think each of these deserve.

(T. 2214) The prosecutor is permitted to argue that a mitigation factor should be assigned little or no weight. He is not permitted to argue that it should not be considered a mitigation factor.

Finally, the prosecutor argued the lack of a particular mitigation factor to be aggravating.

> We didn't hear bad childhood, abusive situations, you know, wanting for anything in life. We didn't hear it. We heard he had support. We heard he was raised correctly. He went to church. You know, the judge - - the doctor said no mental defect or disease. Did you hear any remorse? I mean, these are things that you

have to consider, folks.

(T. 2216)

The above argument artificially skews the weighing process by adding artificial weight in aggravation. The prosecutor may argue why introduced mitigation evidence should not be provided much weight. Maxwell did express remorse in his unsworn statement. He may not argue that death is appropriate because of the lack of mitigation on factors not argued by the defendant. Depew, supra, State v.Fears 86 Ohio St.3d 329 (1999)

The improper argument was in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

Proposition of Law XII:

A trial court must grant defense experts to develop mitigation where counsel has established the need for such expert.

Counsel moved pre trial for the appointment of a neurologist. There was considerable evidence to establish the need for this expert assistance. The defense had requested an independent psychological evaluation. On February 6, 2007 the court conducted a competency hearing. The defense had obtained an independent psychological examination from the court. The court inquired on the date of the hearing as to why it had not received that report from Dr. John Fabian, a licenced clinical psychologist. (T. 44) Defense counsel indicated that the report could not be completed because of the medical history of a head injury Maxwell had suffered during which he had been unconscious for some time. (T. 45) Dr. Fabian had requested neurological testing. The request was filed January 19, 2007. (T. 46)

Counsel also reported at the February 6, 2007 hearing that counsel had not been able to have a meaningful conversation with Maxwell. Counsel reported that they had been "begging him to come up with some sort of meaningful defense or anything along those lines." (T. 47)

The court asked why the testing had not been conducted. The defense responded that Dr. Fabian was not qualified to conduct that testing himself. Counsel explained that was the reason for the independent neurologist request. (T. 48) The court did not understand why a neurological examination was necessary to complete the examination. The court read from Dr. Alice Cook's report from the Northcoast Behavioral Health Care Center that there was not sign of a major mental illness or defect. (T. 49-51)

The problem here is that the court addressed this issue only in the context of competency

and did not consider the effect that the brain injury opinion may have on mitigation evidence and considerations.

At the February 6, 2007 competency hearing, Dr. Cook testified that she had determined that Maxwell had been in a motorcycle accident. But he had not been hospitalized. (T. 85) She acknowledged that many people choose not to go to the hospital even if the accident rendered them unconscious. (T. 86)

During the penalty phase, Dr. Sandra McPherson testified as to the strong likelihood that Maxwell had suffered from brain damage. She found an anomoly in her intelligence scoring. She thought that there may be some organic brain damage. (T. 2177) McPherson referred to Maxwell's history of blackouts from alcohol and head injuries. (T. 2167)

Right to Expert Funding

Maxwell's entitlement to a court-funded expert in this life-or-death proceeding finds further support by analogy to this Court's decision requiring lower courts to appoint psychological experts for defendants in sexual predator hearings conducted pursuant to O.R.C. § 2950.09 when such an expert is "reasonably necessary" to adjudicate the issue of the offender's future dangerousness. State v. Eppinger, 2001-Ohio-247, 91 Ohio St. 3d 158, 743 N.E. 2d 881 (2001). Eppinger reached this conclusion based on the statutory language relevant to funding an expert for an offender in a hearing the outcome of which does not mean the difference between life and death. Here, Maxwell was statutorily entitled to counsel, O.R.C. § 2953.21(I); Petitioner's interest flows directly from the constitutional provision against cruel and unusual punishment, not merely from statutory language, Atkins, 536 U.S. 304.

The Eppinger Court said that an expert would be required in those cases where the

offender's repeated sexual offense give no clear basis to determine future dangerousness, observing that:

> This court has already recognized that these requirements [for deciding whether to affix the "sexual predator" label on an offender] have grave consequences. "At a sexual offender classification hearing, decisions are made regarding classification, registration, and notification that will have a profound impact on a defendant's life." State v. Gowdy (2000), 88 Ohio St. 3d 387, 398, 727 N.E. 2nd 759, 589."

Id. 162. By comparison, what could be of graver consequence than deciding whether a death sentence on Maxwell? Maxwell should be entitled to at least as many resources as an offender fighting to avoid a "sexual predator" label. No matter how difficult the consequences of such a label, they pale in comparison to a death sentence. See Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five Justices recognized a distinct "life" interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests); Woodson v. North Carolina, 428 U.S. 280 (1976) (more process is due in death penalty cases).

In Eppinger, this Court recognized that the "sexual predator" hearing is a contested, adversarial proceeding; in Lott, the Court said that the petitioner must have an opportunity to present additional evidence on a disputed factual issue. Lott clearly contemplates an adversarial proceeding, not an inquisitional one where an expert "for the court" renders a "neutral" opinion. The court must equip a defendant with the type of expert necessary to fairly and zealously present his evidence to this Court. Compare Ake v. Oklahoma, 470 U.S. 68 (1985) (when reasonably necessary, trial courts must fund a defense expert on the issue of insanity). For the reasons recognized in Penson v. Ohio, 488 U.S. 75 (1988), the adjudication of Maxwell's mental health claims must be an adversarial proceeding in order to ensure fair and accurate results:

> The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested

> principle that truth – as well as fairness – is " 'best discovered by powerful statements on both sides of the question.' " Kaufman, Does the Judge Have a Right to Qualified Counsel?, 61 A.B.A.J. 569, 569 (1975) (quoting Lord Eldon); see also Cronic, 466 U.S., at 655, 104 S.Ct., at 2044; Polk County v. Dodson, 454 U.S. 312, 318-319, 102 S.Ct. 445, 449-50, 70 L.Ed.2d 509 (1981).

Id. at 84. See Ake v. Oklahoma, 470 U.S. 68, 77 (1985) ("We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process .... fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system." (internal quotations and citations omitted)).

Ohio has established statutory, procedural, and case law precedents governing the provision of experts to trial-level capital defendants in an attempt to effectuate these constitutional rights. See State v. Mason, 82 Ohio St. 3d 144, 694 N.E.2d 932 (1998), syllabus; State v. Jenkins, 15 Ohio St. 3d 164 (1984), syl. para. 4; Ohio Rev. Code § 2929.024; C.P. Sup. R. 20 § IV(D). Under these authorities, funding for the experts should have been provided.

In Frazier v. Huffman, 343 F.3d 780 at 794-795, *certiorari denied* , Huffman v. Frazier, 159 L. Ed. 2d 261, 2004 U.S. LEXIS 4151 (U.S. 2004), the Sixth Circuit issued a writ where defense counsel failed to investigate a brain defect that may have directly effected the actions of the defendant. The brain injury occurred as the result of a 1987 fall from a ladder. Affidavits from post-conviction experts indicated that Frazier suffered from a functional brain impairment. According to one, Frazier has a "significant history for head trauma" to the "frontal lobe" of his brain, which is "the site of impulse control, social judgment and reasoning." Frazier himself has described "a change in decision-making abilities after his head trauma." These reports also suggest that a correlation could exist between this injury and Frazier's criminal conduct. The

state has not challenged the contention that Frazier's trial counsel could have developed this same information had they conducted a reasonable investigation.

The Sixth Circuit could "conceive of no rational trial strategy that would justify the failure of Frazier's counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on the hope that the jury would spare his life due to any "residual doubt" about his guilt." Id. 794. This failure was not due to counsel's ignorance of Frazier's brain injury. The Ohio Court of Appeals acknowledged that trial counsel were actually aware of Frazier's brain impairment because they saw his medical records, yet counsel failed to investigate the matter or present any evidence regarding the same.

> . . . In sum, no reason at all has been adduced to justify the failure of Frazier's trial counsel to investigate and present evidence of his brain impairment, and to instead rely exclusively on an argument of residual doubt. The state court did not articulate one. Nor can we fathom one. Absent any reason to explain or justify such a trial strategy, we conclude that the state court's determination that Frazier's trial counsel had performed in a competent manner during the penalty phase was not simply erroneous, but unreasonable. See Wiggins, 123 S. Ct. at 2538 (rejecting as unreasonable a state court's determination that trial counsel performed adequately where, although no trial strategy could be articulated to justify counsel's unreasonable failure to investigate and present evidence of their client's terrible childhood, the state court "merely assumed that the investigation was adequate"). . .

Id. 797.

This is exactly the situation here. Only in this case, after being apprised of the possible defect, counsel did request a neurologist to assist in the diagnosis. Being denied by the court, counsel argued essentially residual doubt. The result of the denial of the appointment of an expert was court assisted ineffective assistance of counsel. The failure to grant funding to hire a neurologist was in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

Proposition of Law XIII:

> **The public safety exception to the requirements of Miranda does not apply when one is arrested in a private home with no other occupants and the home has been secured.**

The appellant filed a Motion to Suppress statements made by the appellant to law enforcement officials when he was arrested in a private home on December 16, 2005. A hearing was conducted and one witness testified. The facts are not in dispute. FBI Agent Riddlebarger testified that he was a member of a special unit that arrested the appellant pursuant to an arrest warrant. (T. 192-228) Det. Riddlebarger never saw a copy of the warrant, which was apparently obtained on October 11, 2005. (T. 214, 216)

The special unit went to a Cleveland address where they forcibly entered a private home looking for the appellant. The officers secured the entire house looking for the appellant or weapons. They searched from the basement to the top floor which contained two bedrooms. The house was empty. As the officers were about to leave one officer noticed a crawl space behind a bed in one of the upstairs bedrooms. A search of this crawl space immediately resulted in the arrest of the appellant who was seated inside. Two officers pulled the appellant out, immediately handcuffed him and asked him whether he was armed. Maxwell stated that he did not have a gun anymore. He was handcuffed *before* he was asked about the weapon. (T. 204, 205, 222)

Miranda Requirements

The Supreme Court decision in Miranda v. Arizona, 384 U.S. 436 (1966), created a presumption of a coercive atmosphere in custodial interrogation. The Court decided that where there is custodial interrogation and government involvement, there is a conclusive presumption. As a result, any statement that a suspect in that environment gives is presumed to be coerced.

Any statement that is coerced cannot then be used against that suspect.

That presumption of coerciveness is only overcome if two requirements are met. First, a suspect must be apprised of certain rights. Then the suspect must issue a valid waiver of those rights. If both of those requirements are not met, any statement or confession from a suspect in custodial interrogation is presumed coerced in violation of the suspect's rights.

No Miranda warnings were given per the policy of this special unit. There is no question that the appellant was in custody and handcuffed when he was interrogated.

The State argued and the trial court agreed that Miranda warnings were not necessary due to the public safety exception found in New York v. Quarles, 467 U.S. 649 (1984)(T. 227). In Quarles, the Supreme Court of the United States held that a statement in direct contravention of Miranda could nonetheless be admissible when the threat to public safety *necessitated* immediate questioning. In Quarles, the officer's question about the location of a gun to a suspect arrested in a supermarket wearing an empty shoulder holster reasonably prompted by public safety.

The critical difference between this case and Quarles is that this arrest took place in a private home that had been completely secured by the police. (T. 224) In fact, the police almost failed to check the crawl space and leave. However, one officer suggested checking the crawl space and in checking the space they found the unarmed appellant.

In Quarles, the court explained a "public safety" exception to Miranda. Here, there is not the danger to the public that resulted in the Quarles decision. To the contrary, this is an empty private home that had been completely secured before the appellant was arrested. This evidence was introduced against Maxwell at trial. (T. 1320)

Where public safety is not an issue or where the defendant has been procured prior to

questioning, the Quarles exception does not apply. U.S. v. DeSumma, 272 F. 3d 176, 178 (3d Cir. 2001) (Public safety exception does not apply where defendant was handcuffed and padded down before police asked him about the weapons); U.S. v. Mobley, 40 F. 3d 688, 693 (4th Cir. 1994) (response to police question about the presence of weapons in the house without *Miranda* warnings not admissible because the defendant was not dangerous to police or public when arrested naked, handcuffed, and removed from otherwise secure house for questioning)

The failure to Mirandize the appellant renders his statements that he got rid of the gun he once had and/or he did not have the gun anymore inadmissible at his trial.

Proposition of Law XIV:

> **The out of court statement of the decedent via a three way telephone call is inadmissible hearsay and the appellant's right to confrontation under the Sixth and Fourteenth Amendments of the federal Constitution was violated.**

One of the State's key witnesses was John Gregg. (T. 1647-1756) Mr. Gregg testified to a telephone conversation he allegedly had with the appellant the night of November 23 while Mr. Gregg was driving to southern Ohio for Thanksgiving. According to Mr. Gregg, the appellant called him and was concerned about what the victim testified to at the Grand Jury. After some discussion between Gregg and the appellant, the victim was called and a three way call was initiated with Gregg listening to the conversation between the appellant and the victim.

Mr. Gregg testified, over objection, (T. 1675) that the victim told the appellant "she was very sincere when she said it–but she said I told the truth. I had to tell the truth."

This statement by the victim to the appellant is classic hearsay and crucial to the state's case. This is the linchpin piece of evidence used to prove the Retaliation specification that cause the appellant to suffer a death sentence. It is not harmless.

Obviously, the appellant was not able to cross examine the victim concerning the statement. The only evidence of the statement comes from Gregg.

<u>Confrontation Clause</u>

The Sixth Amendment to the United States Constitution and Section 10, Article I, Ohio Constitution both guarantee all criminal defendants the right to confront the witnesses against them. The United States Supreme Court has observed:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement

for the kind of fair trial which is this country's constitutional goal.

Pointer v. Texas (1965), 380 U.S. 400, 405. As a general proposition, the right to confrontation requires face-to-face confrontation and cross-examination, Douglas v. Alabama (1965), 380 U.S. 415, 418. Such confrontation allows for:

> a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States (1895), 156 U.S. 237, 242-243. Confrontation further,

> (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the ``greatest legal engine ever invented for the discovery of the truth''; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility. (citations omitted)

California v. Green (1970), 399 U.S. 149, 158. For all of these reasons, the absence of confrontation calls into question the ultimate "integrity of the fact-finding process." Chambers v. Mississippi (1973), 410 U.S. 284, 295.

"'The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.'" State v. Madrigal (2000), 87 Ohio St.3d 378, 384, quoting Maryland v. Craig (1990), 497 U.S. 836, 845. Although the hearsay rules and the Confrontation Clause are generally designed to protect similar ideals, the two are not equivalent. Idaho v. Wright (1990), 497 U.S. 805. In other words, the Confrontation Clause may bar the admission of evidence that would otherwise be admissible under an exception to the hearsay rule.

Id.

Any alleged statements by the appellant are arguably statements against interests and either not hearsay or are exceptions to the hearsay rule. It is important to note that the trial court had conducted a hearing and determined that statements made by the victim did not meet the exception found in Evid R 804(B)(6). (T. 943-1025). Specifically, the court found Mr. Gregg to not be a credible witness. (T. 1019-1025) The Court found the State had failed to meet its burden, by a preponderance of the evidence, that the victim was killed to keep her from testifying or attending court. (T. 1025) As a consequence, the State was not allowed to introduce a statement made by the victim to Detective Sardon made on October 10, 2005. (Court's Ex. E)(T. 1021)

Thus, the statement is pure hearsay. The court here made a specific finding that there was no independent indicia of reliability. Mr. Gregg is not a credible witness, therefore, the statement allegedly made by her in this three way telephone conversation is not admissible. The judge determined through his questioning of Mr. Gregg that the appellant admitted the killing but never said why he killed the victim. (T. 1023-24)

The judge determined that Mr. Gregg was a "mentally ill individual," a "tax fraud" and "fewer witnesses that come before Common Pleas Court that have less credibility than one John Gregg. As a matter of fact if Mr. Gregg came in here and told me my name was David Matia [the trial judge] I would first have to check my birth certificate and my driver's license to confirm that." (T. 1022)

The admission of the victim's alleged statement in this alleged three way telephone call is hearsay, prejudicial hearsay and violates the Sixth and Fourteenth Amendments of the federal

Constitution. A new trial is in order. In the alternative, the Retaliation death specification must be vacated.

Proposition of Law XV:

The admission of the autopsy report and testimony from a doctor who did not perform the autopsy violates the Sixth and Fourteenth Amendments of the federal Constitution.

In this case, the doctor who testified about the autopsy did not perform the autopsy and was not present when the autopsy was performed. (T. 1442-1496) Nonetheless, he was allowed to testify over appellant's objection (T. 1442-1496) and the autopsy report was admitted over appellant's objection in light of this Court's recent decision of State v. Craig, 110 Ohio St.3d 306 (2006), 2006 Ohio 4571. (T. 1838)

The U.S. Supreme Court has granted cert on March 17, 2008 in Melendez-Diaz v. Massachusetts, Case No. 07-591 on the issue of the prosecutor offering a crime lab report in violation of Crawford v. Washington, 531 U.S. 36 (2004) and the Sixth and Fourteenth Amendments. The question is whether the lab report, or in this case, the autopsy report is testimonial in nature. If it is, the admission of its contents through someone other than the person who prepared the document is a violation of Maxwell's right to confrontation.

Given the Court's decision to grant a writ of certiorari in Melendez-Diaz, the appellant contends that the testimony of a doctor who did not perform or witness the autopsy or draft the autopsy report can not testify concerning the autopsy or the autopsy report over objection under Crawford and the Sixth and Fourteenth Amendments of the federal Constitution. In this case, the

doctor who performed the autopsy had moved to Texas. There was no showing that he was unavailable to testify. A new trial is in order.

Proposition of Law XVI:

> **In a capital trial, the only evidence that a penalty phase jury may consider from the culpability phase of trial is that which is relevant a proven aggravating circumstance or mitigation for the defendant.**

The trial court is charged with the responsibility of determining the admissibility of evidence. Evid. Rule 104(A); State v. Heinish, 50 Ohio St.3d 231(1990). It is error for the court to allow into evidence matters introduced in the first phase of trial but are irrelevant in the second phase of trial. In State v. Campbell, 90 Ohio St.3d 320 (2000), this Court held:

> Although we have recognized that R.C. 2929.03(D)(1) permits reintroduction of much or all of the guilt-phase evidence, State v. Woodard (1993), 68 Ohio St.3d 70, 78, 623 N.E.2d 75, 81, we have also recognized that some guilt-phase evidence should be excluded as irrelevant to the penalty determination. State v. Getsy (1998), 84 Ohio St.3d 180, 201, 702 N.E.2d 866, 887. Thus, a trial court's admission of all guilt-phase evidence en bloc is error, for "it is the trial court's responsibility, during the penalty phase, to identify and admit only the evidence relevant to that phase." State v. Lindsey (2000), 87 Ohio St.3d 479, 485, 721 N.E.2d 995, 1003.

Present Case

The state introduced one of the autopsy photographs at the close of the penalty phase over defense objection. Exhibit 100. The court found that it showed that she was purposely killed. (T. 2203) The jury had already found that she had purposely been killed. Any relevance of the photograph was far outweighed by the unfair prejudice of the jury viewing the photo in sentencing considerations.

Additionally, the state introduced exhibits 71, 72, 73, 75 and 76 for penalty phase consideration. Exhibit 71 was a picture of the victim when alive. This is clearly intended for improper victim-impact evidence. The jury had seen the photo in the first phase. There was no need for a second viewing. The remaining photos were of the injuries the victim sustained from the felonious assault charge over a decade earlier. Any relevance of these photos of her injuries were far outweighed by the unfair victim-impact evidence. The introduce of the improper exhibits were in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

Proposition of Law XVII:

> **The death penalty may not be sustained where the cumulative errors occurring in the trial deprived the defendant of a fair consideration of the appropriateness of the death penalty.**

The combination of errors by the trial court, the prosecution and the ineffectiveness of the defense counsel deprived the appellant of a fair trial. The errors, if not individually, combined to cause the trial to be constitutionally infirm. State v. DeMarco (1987), 31 Ohio St.3d 191. Errors of state law which deny a petitioner's Fourteenth Amendment right of a fundamentally fair trial will support habeas corpus relief. Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir. 1988). Federal courts usually assess the merits of state trial errors asserted in a habeas petition that they may properly hear separately. Individual errors at trial held by a federal court not to deprive a petitioner of due process may, when aggregated, reveal a trial setting in which cumulative errors do deprive the petitioner of due process. Walker v. Engle, 703 F.2d 959, 968 (6th Cir.), cert. denied, 464 U.S. 951, and cert. denied 464 U.S. 962 (1983).

Here the errors in trial cumulatively deprived Maxwell of a fair sentencing hearing. The defense failed to develop and present mental health issues. Counsel presented a witness whose testimony contradicted to the appellant's detriment the independent opinion of a Court Psychiatric Clinic psychologist. Counsel failed to fully present and/or argue available mitigation. (Propositions of Law I, XVIII) Counsel failed to life-qualify jurors or object to improper argument of the prosecution. (Propositions of Law I, X, XI)

These errors, as addressed in the Proposition of Laws in this brief, combined to violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Proposition of Law XVIII:

A sentence of death is inappropriate where the aggravating factors proven at trial do not outweigh the mitigation beyond a reasonable doubt.

In general, the focus in the mitigation phase of the trial should be on the circumstances of the crime and the character of the individual defendant, Proffitt v. Florida (1976), 428 U.S. 242. Individualized consideration of mitigating factors is required. Lockett v. Ohio (1978), 434 U.S. 586.

The appellant has the burden of going forward with evidence of facts in mitigation pursuant to R.C. §2929.03(D)(2). Most importantly, mitigation in favor of imposition of a life sentence of imprisonment must be established by a preponderance of the evidence. State v. Jenkins (1984), 15 Ohio St.3d 164; State v. Stumpf (1987), 32 Ohio St.3d 95.

In this instance the jury recommended the imposition of the death penalty. Pursuant to R.C. §2929.03(F), the trial judge independently determined that the aggravating circumstances of which the appellant was found guilty outweighed beyond a reasonable doubt the evidence in mitigation as set forth in R.C. §2929.04(B). A review of the relevant evidence indicates that the aggravating factors do not, beyond a reasonable doubt, outweigh the mitigation present in this case.

Although defense counsel failed to properly prepare and present the mitigation available for jury consideration, (see Proposition of Law I) the record still establishes sufficient mitigation to at least be in equipoise with the single aggravating factor. The state failed to establish beyond a reasonable doubt that this aggravator outweighed the mitigation available.

The state argued, and the jury found, the Maxwell had killed McCorkle because of her

testimony in a criminal proceeding. R.C. 2929.04(A)(8). This, as with all aggravating factors, is a factor worthy of serious consideration. However, there are considerations here that suggest this aggravator should be given less weight than in other situations. This is not to say that the offense was not serious. Even without the capital specification the offense could have resulted in a sentence of life without parole. The consideration that would seem to make this a less serious A(8) case is that at best, this was a mixed motive case.

As was argued in Proposition of Laws VII and VIII, the reason for the shooting was jealousy rather than anger or retaliation over her testimony. After learning that Nichole had testified at the grand jury, Maxwell took no action. Instead, the action seemed to have been prompted by her socializing with another male, rather than her testimony, or perhaps both.

The homicide occurred four days later after the grand jury appearance. On November 27, John Gregg received word that the Nichole had been killed. He telephoned appellant to ask him if he did it. According to Gregg, the appellant said that he followed the victim as she went to a bar. The appellant waited outside and saw the victim leave with another man. He followed them to her house a few miles away. Maxwell saw her give this other man a kiss goodnight. (T. 1680) The other man left her at her house without entering. Sitting outside the house, the appellant telephoned the victim to ask to see her. She agreed. (T. 1680)

The appellant went inside to talk to her. While there, the phone rang at least twice. Maxwell answered. It was the male Nichole has seen earlier. (T. 1681) Unbeknownst to the appellant or the victim, the other male had called one of the victim's sister's to alert her that appellant was at her house. On one telephone call, the appellant angrily stated something crude to the male and and hung up. (T. 1681) Shortly thereafter, the appellant opened the door and

fired one shot at the victim's sister who arrived on the scene and then shot the victim two times. (T. 1682)

Thus, it was the romantic entanglement and Nichole's sister's arriving at the scene that precipitated the shooting. Nothing was said by the appellant in regard to her testimony the night of the offense to Gregg or anyone at the home.

Mitigating Factors

The mental health problems have been addressed above. By any standard, he suffered from a low intelligence level. State v. Otte (1996), 74 Ohio St.3d 555, 567. In addition, there may have been some organic brain damage. (T. 2178) Dr. McPherson testified that Maxwell had some kind of cognitive disorder which would cause him to act out in stressful situations such as a flawed relationship. However, this could be controlled as he had the ability to make the adjustment in a prison setting. (T. 2178) Maxwell had previously been released from prison with an exemplary report for behavior. (T. 2188)

Testimony during the penalty phase established that he had drug problem and alcohol dependant. (T. 2176, 2189) He had prior convictions for drugs (T. 2077)

Mr. Maxwell was a good worker. He learned to operate heavy machinery. (T. 2083, 2088) Roscoe Horne was the working owner of a construction company. Maxwell worked for him. Horne described Maxwell as a very trustworthy person and very hard worker (T. 2098-2100) He was described as loving towards his family and a compassionate person. (T. 2119, 2121, 2122, 2135) He often did things for others(T. 2093, 2100, 2101-2107) This included assisting others with records to obtain employment. (T. 2143) He has a love for animals and was particularly good as training horses. (T. 2120, 2142)

He was also seen as someone who was nice and often taken advantage of by others. (T. 2073)

In his unsworn statement, Maxwell told the jury that he was sorry for the pain he had caused the victims family and his own family. "I wouldn't want nobody's family to go through this." (T. 2146) He said the incident resulted because he feared he would not be able to see his daughter and that he wanted his father, Cheyenne's grandfather, to be part of her life. (T. 2146)

Based upon the above the following recognized mitigation factors are present.

1. Low itelligence. State v. Otte (1996), 74 Ohio St.3d 555.
2. Ability to adapt to prison. South Carolina v. Skipper, 487 US 1 (1986); State v. Simko, 71 Ohio St. 3d 483 (1994)
3. Steady employment/work skills. State v. Fox, 69 Ohio St. 3d 183 (1994); State v. Issa (2001), 93 Ohio St.3d 49
4. Love and support of his family. State v. Smith (2000), 87 Ohio St.3d 424
5. Alcohol dependency. State v. Tibbetts, 92 Ohio St.3d 146 (2001)
6. Remorse. State v. Rojas, 64 Ohio St. 3d 131 (1992)

As the statutory aggravating factors found by the jury did not outweigh the mitigating factors beyond a reasonable doubt, the sentence of death is violative of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Proposition of Law XIV:

The death penalty is unconstitutional as presently administered in Ohio.

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:

A. 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, about half of Ohio's death row inmates are African-American. (See Death Penalty Statistics, maintained by the Office of the Ohio Public Defender, as of Jan. 24, 2000). While few Caucasians are sentenced to death for killing African-Americans, over thirty African-Americans sit on Ohio's death row for killing a Caucasian.

Ohio's statistical disparity is 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, Ohio Rev. Code §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 II, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring); Utah v. Pierre, 572 P.2d 1338 (Utah 1977) (Maughan, J., concurring

and dissenting). 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). The United States Supreme Court has recognized that the fundamental right to "life" deserves the highest protection possible under the Fourteenth Amendment's protection of "life, liberty and property." Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five Justices recognized a distinct "life" interest protected by the Due Process Clause in all stages of a capital case, above and beyond protected liberty and property interests). Death is different; for that reason more process is due, not less. See Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). To imperil this protected, fundamental life interest, the State must show that it is the "least restrictive means" to a "compelling governmental end." O'Neal, 339 N.E.2d at 678.

Despite the most exhaustive research by noted experts in the field, there is no convincing evidence that the death penalty is a deterrent superior to lesser punishment. "In fact, the most convincing studies point in the opposite direction." Id. at 682. Studies in Ohio, more particularly, have similarly failed to show any deterrent effect by imposition of the death penalty. Over twenty years ago, a study spanning fifty (50) years of executions in Ohio found no evidence that executions have any discernible negative effect on homicide rates. Ohio Legisl. Serv. Comm'n., Capital Punishment (1961). See also Bailey, The Deterrent Effect of the Death Penalty for Murder in Ohio. A Time-Series Analysis, 28 Cleve. St. L. Rev. 51, 68, 70 (1979). The Supreme Court of Ohio has not addressed the issue of lack of evidence supporting deterrence in its previous decisions upholding the death penalty.

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.

B. 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.

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.

C. Induced ineffective assistance of counsel and denial of an impartial jury

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

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

First, under the operation of the current statute, if counsel argues to the jury a defense which loses at the guilt phase of the trial, in effect he is forced to simultaneously destroy Defendant's credibility prior to the start of the trial's sentencing phase. By invoking the defendant's right to strenuously argue for his innocence in the first phase, a loss for the defense in the first phase means that counsel will have significantly reduced the credibility desperately

needed to successfully argue for a life sentence.

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

The State's claim that it has an interest in having a single jury for both phases of the trial and that this should surmount the Defendant's right to a fair and impartial trial phase jury is also belied by the Attorney General's recent efforts in the Ohio legislature (through H.B. 585 and S.B. 258, introduced early 1996) to require that a second jury be selected for purposes of resentencing trials when a capital defendant's death sentence is overturned on appeal. The Attorney General's present claim that this two-jury practice would be workable and inexpensive flies in the face of the State's earlier urgings against just such a two-jury practice at the initial trial. The State cannot have it both ways, and the capital criminal justice system must not force defendants into trial before a less than impartial jury. No Ohio court has yet considered the impact that the State's contradictory positions have on the fairness of the present capital scheme.

Under Ohio's death penalty statutory scheme, an intolerable risk exists that a defendant's life may be put in the hands of a hostile venire, which in effect creates uncertainty in the reliability of the determination reached. Such a risk cannot be tolerated in a capital case. Beck v.

Alabama, 447 U.S. 625, 638 (1980). Therefore, the statute must be struck down as an unconstitutional violation of Defendant's right to an impartial jury under the State and Federal constitutions.

D. Lack of individualized sentencing

The Ohio statutes are unconstitutional because they require proof of aggravating circumstances in the trial phase of the bifurcated proceeding. The Supreme Court of the United States has approved schemes that separate the consideration of aggravating circumstances from the determination of guilt. Those schemes provide an individualized determination and narrow the category of defendants eligible for the death penalty. See Zant v. Stephens, 462 U.S. 862 (1983); Barclay v. Florida, 463 U.S. 939 (1983). Ohio's statutory scheme cannot provide for those constitutional safeguards.

The jury must be free to determine whether death is the appropriate punishment for a defendant. Requiring proof of the aggravating circumstances simultaneously with proof of guilt effectively prohibits a sufficiently individualized determination in sentencing as required by post-Furman cases. See Woodson, 428 U.S. at 961. This is especially prejudicial because this is accomplished without consideration of any mitigating factors.

E. 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 the Supreme Court's decision in Lockett, this infirmity has not been cured and Ohio's statute remains unconstitutional.

F. 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. Ohio Rev. Code §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.

G. The definition of mitigating factors in Ohio Rev. Code §2929.04(B)(7) violates the reliability component of the Eighth Amendment

"Any other factors that are relevant to the issue of whether the offender should be sentenced to death" may be introduced as mitigation under Ohio Rev. Code §2929.04(B)(7) (emphasis added). The court's charge and the definition in Ohio Rev. Code §2929.04(B)(7) are unconstitutional. Both permit the sentencer to convert (B)(7) mitigation into reasons for imposing death.

The Eighth Amendment requires that the class of death eligible offenders be narrowly and rationally guided by state law. McCleskey v. Kemp, 481 U.S. 279, 305 (1987). In Ohio, the factors that make a defendant death-eligible are detailed in Ohio Rev. Code §2929.04(A). The

(B)(7) definition eviscerates the narrowing achieved by Ohio Rev. Code §2929.04(A) because it literally invites the sentencer to consider any factor relevant to imposing death. That language creates a "reasonable likelihood" that the sentencer will view proffered (B)(7) mitigation as a nonstatutory aggravator, rather than evidence that weighs against a death sentence. See Stringer v. Black, 503 U.S. 222, 231-235 (1992); Boyde v. California, 494 U.S. 370, 380-81 (1990).

The (B)(7) definition also precludes the jury from giving mitigating evidence its full consideration and effect. The intent was to allow the jury to consider all relevant evidence supporting a life sentence. See Lockett v. Ohio, 438 U.S. 586; see also O.R.C §2929.04(C). Poor wording frustrates the General Assembly's intent. The definition shifts the focus of the (B)(7) mitigating evidence to reasons to impose a death sentence. Because (B)(7) mitigating evidence can be construed as an aggravating factor, it is stripped of its full mitigating effect. To satisfy the Eighth Amendment, each actor in the capital sentencing scheme must be able to give consideration and full mitigating effect to all relevant mitigating evidence offered by the defendant. Penry v. Lynaugh, 492 U.S. 302; Eddings v. Oklahoma, 455 U.S. 104; Lockett, 438 U.S. 586. See Graham v. Collins, 506 U.S. 461, 510 (1993) (Souter, J. dissenting).

H. Ohio Rev. Code §2929.04(A)(7) is constitutionally invalid when used to aggravate Ohio Rev. Code §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 Ohio Rev. Code §2929.04(A)(7) fails to genuinely narrow the class of individuals eligible for the death penalty.

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

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

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

The killer who kills with prior calculation and design is treated less severely, which is

also nonsensical because his blameworthiness or moral guilt is higher, and the argued ability to deter him less. From a retributive stance, this is the most culpable of mental states. 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 the Supreme Court of Ohio has interpreted Ohio Rev. Code §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. The Ohio Supreme 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, the Supreme Court of Ohio'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 (1941). 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.

I. Ohio Rev. Code §§2929.03(D)(1) and 2929.04 are unconstitutionally vague

Ohio Rev. Code §2929.03(D)(1)'s reference to "the nature and circumstances of the aggravating circumstance" incorporates the nature and 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 Ohio Rev. Code §2929.04(B). Ohio Rev. Code §2929.03(D)(1) makes Ohio's death penalty weighing scheme unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor as an aggravator.

To avoid arbitrariness in capital sentencing, states must limit and channel the sentencer's discretion with clear and specific guidance. 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); 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 Ohio Rev. Code §2929.04(A)(1)-(8) are both.

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

become part and parcel of the aggravating circumstance.

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

Ohio Rev. Code §2929.03(D)(1) is also unconstitutional on its face because it makes the selection factors in aggravation in Ohio Rev. Code §2929.04(A)(1)-(8) "too vague." See Walton, 497 U.S. at 654 . Ohio Rev. Code §2929.04(A)(1)-(8) gives clear guidance as to the selection factors that may be weighed against the defendant's mitigation. However, Ohio Rev. Code §2929.03(D)(1) eviscerates the narrowing achieved. By referring to the "nature and circumstances of the aggravating circumstance," Ohio Rev. Code §2929.03(D)(1) gives the sentencer "open-ended discretion" to impose the death penalty. 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 Ohio Rev. Code §2929.04(A). See Stringer, 503 U.S. at 232.

J. Inadequate 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. Ohio Rev. Code §2929.021 requires only minimal information on these cases. Additional data is necessary to make an adequate comparison in these cases. This prohibits adequate appellate review.

Adequate appellate review is a precondition to the constitutionality of a state death penalty system. 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.

The comparison method is also constitutionally flawed. Review of cases where the death penalty was imposed satisfies the proportionality review required by Ohio Rev. Code §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.

In Supreme Court of Ohio decisions, only other death sentences will be considered. State v. Zuern, 32 Ohio St. 3d 56, 64-65, 512 N.E.2d 585, 593-594 (1987); State v. Steffen, 31 Ohio St. 3d 111, 509 N.E.2d 383 (1987); State v. Stumpf, 32 Ohio St. 3d 95, 512 N.E.2d 598 (1987).

The Court now disavows any ability to assure equal treatment of all capital defendants. Zuern, 32 Ohio St. 3d at 64, 512 N.E.2d at 593. While it acknowledges "[t]he purpose of a proportionality review is therefore to insure that the death penalty is not imposed in a random freakish, arbitrary or capricious manner," the Court's present review provides no means of achieving this. Id.

The Court claims "Ohio's system well documents why particular murderers receive the death sentence, which has removed the vestiges of arbitrariness." Id. at 64, 65, 512 N.E.2d at 594. However, that documentation, provided by collection of life sentence opinions and dispositions, is never consulted by the Ohio Supreme Court. The Ohio Supreme Court refuses to consider life sentence cases, even when they are presented to them by the capital defendant/appellant. See Stumpf, 32 Ohio St. 3d at 106-107, 512 N.E.2d at 609-610. The Court simply states it need not consider these, then does not. Id.

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

In State v. Spisak, 36 Ohio St. 3d 80, 521 N.E.2d 800 (1988), the Court demonstrated the extent to which it applies the Poindexter ban on review. Upon being presented with a brief containing sixty-four (64) propositions of law and exceeding four hundred ninety-four (494) pages, the court refused to review practically all of these errors and filed a four and one-half page

opinion. Instead the court chastised appellant for vigorously exercising his rights to raise error on appeal. Id. at 82, 521 N.E.2d at 802.

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

The Ohio Supreme Court's statement that the system "well documents" why a death sentence is imposed could not be more wrong. So far as one can discern, all these collected documents reflecting why many persons received life sentences are laying in totally ignored files in the clerk's office. The Supreme Court of Ohio has no notion of whether the death case before them represents a departure from a common practice of life sentencing on the same facts since they refuse to consider their "collected documents."

The defendant agrees that the appellate courts' responsibility to assure against arbitrary sentencing does not require absolute equal treatment among capital defendants and does not require that every possibility of arbitrariness be obliterated. But, as the Supreme Court of the United States recently stated, the Eighth Amendment is offended if there is "a significant risk of arbitrary sentencing" that is unchecked. McCleskey v. Kemp, 481 U.S. 279 (1987). In McCleskey, the Court required "rationality in the system" and approved Georgia's practice of reviewing the proportionality of sentences as achieving "a reasonable level of proportionality"

among the class of eligible defendants. Id. 481 U.S. at 298. Georgia reviews life sentences, and actively compares life and death sentences. Zant, 462 U.S. at 879.

The Court's appropriateness analysis is also constitutionally infirm. Ohio Rev. Code §2929.05(A) requires appellate courts to determine the appropriateness of the death penalty in each case. The statute directs affirmance only where the court is persuaded that the aggravating circumstances outweigh the mitigating factors and that death is the appropriate sentence. Id. The 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 due process, liberty interest in Ohio Rev. Code §2929.05.

K. Mandatory death penalty and failure to require appropriateness analysis

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

In Gregg, the United States Supreme Court stated, "nothing" in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. 428 U.S. at 199. Gregg held only that, "in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." Id. Gregg requires the State to establish, according to constitutionally sufficient criteria of aggravation and constitutionally mandated procedures, that capital punishment is appropriate for the defendant. Nothing requires the State to execute defendants for whom such a finding is made. Indeed the Georgia statute, approved in Gregg as being consistent with Furman, permits the jury to make a binding recommendation of mercy even though the jury did not find any mitigating circumstances in the case. Fleming v. Georgia, 240 S.E.2d 37 (Ga. 1977); Hayes v. Georgia, 282 S.E.2d 208 (Ga. 1981). Subsequent to Lockett, the Fifth and Eleventh Circuits repeatedly reviewed and remanded cases for error in the jury instructions when the trial court failed to clearly instruct the jury that they had the option to return a life sentence even if the aggravating circumstances outweighed mitigation. Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978); Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1981); Westbrooke v. Zant, 704 F.2d 1487 (11th Cir. 1983); Tucker v. Zant, 724 F.2d 882 (11th Cir. 1984); Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982); Prejean v. Blackburn, 570 F. Supp. 985 (D. La. 1983).

Capital sentencing that is constitutionally individualized requires a mercy option. An individualized sentencing decision requires that the sentencer possess the power to choose mercy and to determine that death is not the appropriate penalty for this defendant for this crime. In

Barclay v. Florida, 463 U.S. at 950, the Court stated that the jury is free to "determine whether death is the appropriate punishment."

Absent the mercy option, the Defendant faces a death verdict resulting from Lockett-type statute, i.e., a statute that mandated a death verdict in the absence of one of three specific mitigating factors. Under current Ohio law, the sentencer lacks the option of finding a life sentence appropriate in the face of a statute which requires that when aggravating circumstances outweigh mitigating factors "it shall impose a sentence of death on the offender." Ohio Rev. Code §2929.03(D)(3).

A non-mandatory statutory scheme that affords the jury the discretion to recommend mercy in any case "avoids the risk that the death penalty will be imposed in spite of factors 'too intangible to write into a statute' which may call for a less severe penalty, and avoidance of this risk is constitutionally necessary." Conner v. Georgia, 303 S.E.2d 266, 274 (Ga. 1983). Other state courts have also required a determination of "appropriateness" beyond mere weighing of aggravating circumstances and mitigating factors. California v. Brown, 726 P.2d 516 (Cal. 1985), rev'd on other grounds, 479 U.S. 538 (1987).

In California v. Brown, 479 U.S. 538, 543 (1987), the Supreme Court repeated "the Eighth Amendment's need for reliability in the determination that death is the appropriate punishment in a specific case." In Brown, the Court agreed that jurors may be cautioned against reliance on "extraneous emotional factors," and that it was proper to instruct the jurors to disregard "mere sympathy." Id. This instruction referred to the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase. The Court's analysis clearly approved and mandated that jurors be permitted to consider mercy, i.e., sympathy tethered

or engendered by the penalty phase evidence.

The Ohio statute does not permit an appropriateness determination; a death sentence is mandated after a mere weighing. Finally, while the Supreme Court of Ohio has claimed that a "jury is not precluded from extending mercy to a defendant," State v. Zuern, 32 Ohio St. 3d 56, 64, 512 N.E.2d 585, 593 (1987), Ohio jurors are not in fact informed of this capability. In fact, the Supreme Court of Ohio has permitted penalty phase jury instructions in direct contradiction to this extension of mercy capability. The Ohio "no-sympathy" instructions to juries do not in any way distinguish between "mere" sympathy (untethered), and that sympathy tied to the evidence presented in penalty phase, and therefore commit the very violation of the Eighth Amendment which the California instruction had narrowly avoided.

While the Supreme Court of Ohio claims extending mercy is permissible in Ohio, and acknowledges that "[s]entencing discretion is an absolute requirement of any constitutionally acceptable capital punishment statute," id. at 65, 512 N.E.2d at 594, there is in fact no such indication on the statute's face, and no state court assurance that jurors are so informed. Bald, unsupported assertions of compliance with the constitution are inadequate.

L. Ohio's "beyond a reasonable doubt" standard

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

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

the mitigating factors.

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

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

The proof beyond a reasonable doubt standard is required in criminal cases "to safeguard men from dubious and unjust convictions." In re Winship, 397 U.S. 358, 363 (1970). The petitioner in Winship was a juvenile facing a possible six years imprisonment. Crucial to the Court's decision was its assessment of the importance of the defendant's right not to be deprived of his liberty. Proof beyond a reasonable doubt was demanded in recognition that "the accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the convictions." Id. Only this standard of proof adequately commanded "the respect and confidence of the community in applications of the criminal law." Id. at 364.

In a capital case, far more than liberty and stigmatization are at issue. The defendant's interest in his life must be placed on the scales. Only then can an appropriate balancing of the interests be performed; only then can one know whether the "situation demands" a particular procedural safeguard. Given the magnitude of the interests at stake in a capital case and the necessity that the community "not be left in doubt whether innocent men are being condemned" a high standard is required which reduces the margin of error "as much as humanly possible," Id.; Eddings, 455 U.S. at 878. This is all the more so when a petitioner's "life" interest (protected by the "life, liberty and property" language in the Due Process Clause) is at stake in the proceeding. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five Justices recognized a distinct "life" interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests). The most stringent standard of proof that is "humanly possible" is proof beyond all doubt.

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

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

Ohio law provides standard jury instructions of "reasonable doubt" and "proof beyond a reasonable doubt" as the applicable burden of proof in capital cases. Ohio Rev. Code §2901.05(D). However, Ohio's definition actually articulates the standard for the lower burden of proof by a preponderance of the evidence; thus unconstitutionally diluting Defendant's rights to a fair trial. See Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118 (1954); Holland v. United States, 348 U.S. 121 (1954); Scurry v. United States, 347 F.2d 468, 470 (D.C. Cir. 1965) (... [I]mportant affairs is the traditional test for clear and convincing evidence ... The jury ... is prohibited from convicting unless it can say beyond a reasonable doubt that defendant is guilty as charged. ... To equate the two in the juror's mind is to deny the defendant the benefit of a reasonable doubt.). State v. Crenshaw, 51 Ohio App. 2d 63, 65, 366 N.E.2d 84, 84-85 (1977); cf. State v. Nabozny, 54 Ohio St. 2d 195, 375 N.E.2d 784 (1978), vacated on other grounds, Nabozny v. Ohio, 439 U.S. 811 (1978); State v. Seneff, 70 Ohio App. 2d 171, 435 N.E.2d 680 (1980).

The Ohio reasonable doubt instructions fail to satisfy the requirement of reliability in a capital case. Even in Winship, when considering the reasonable doubt standard, the Court stated that the fact finder must be convinced of guilt "with utmost certainty," and that the court must impress on the trier of fact the necessity of reaching a subjective state of certitude. Winship, 397 U.S. at 363, 364. Ohio's definition of a reasonable doubt is inadequate to meet even these standards.

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

The language of Ohio Rev. Code §§2929.04(D)(2) contemplates a balancing process

focusing upon the mitigating factors present in the case as compared to the offender's "guilt" with respect to the aggravating specifications.

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

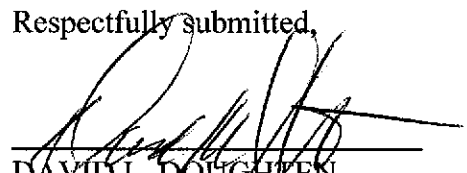
m. Conclusion

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. Furthermore, subjecting Maxwell to the prospect of capital punishment violates international law and the Supremacy Clause of the United States Constitution.

CONCLUSION

Pursuant to the preceding Propositions of Law , the defendant-appellant, Charles Maxwell, respectfully requests that this Honorable Court reverse the conviction in this matter and remand for a new trial. In the alternative, pursuant to Proposition of Law VII, the appellant respectfully requests reverse his conviction of Aggravated Murder and enter a conviction for Murder pursuant to R.C. §2903.02. Pursuant to Propositions of Law , it is requested that this Court reverse the sentence of death and remand his case for a new sentencing hearing.

Respectfully submitted,

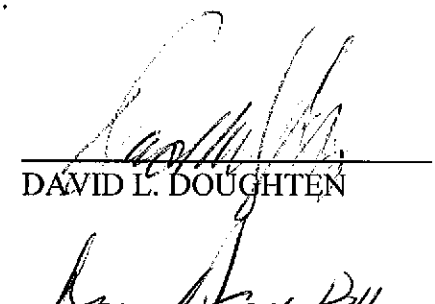


DAVID L. DOUGHTEN

JOHN P. PARKER
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Merit Brief was served upon William D. Mason, Esq., Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 28 day of March, 2008.



DAVID L. DOUGHTEN

JOHN P. PARKER
Counsel for Appellant

APPENDIX

IN THE SUPREME COURT OF OHIO

No._____ 07-0755

State of Ohio	:	
Appellee	:	DEATH PENALTY APPEAL
vs.	:	Cuyahoga County Common Pleas CR 475400
Charles Maxwell	:	
Appellant	:	

Now comes the defendant/appellant, Charles Maxwell, by and through undersigned counsel, and hereby gives notice that he will appeal, on questions of law and fact, the judgment and sentence as rendered by the trial court on March 23, 2007.

This appeal is taken pursuant to S. Ct. Prac. R. II, Section 1, (C)(1) and is filed as a matter of right.

Respectfully submitted,

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FILED
APR 26 2007
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

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Counsel for Appellant

Proof of Service

A copy of the foregoing Notice of Appeal was served on William Mason, Cuyahoga County Prosector, 1200 Ontario Street, Justice Center-9th Floor, Cleveland, Ohio 44113 this 23 Day of April 2007.

John P. Parker

Attachment not scanned

STATE OF OHIO)SS: IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY,) CASE NO. CR-475400

FILED
2007 MAR 23 A 11: 14
GERALD E. FUERST
CLERK OF COURTS
CUYAHOGA COUNTY

STATE OF OHIO)
Plaintiff)
)
vs.) **OPINION OF THE COURT**
) **FINDINGS OF FACT AND**
CHARLES MAXWELL) **CONCLUSIONS OF LAW**
) **REGARDING IMPOSITION OF**
Defendant) **DEATH PENALTY**
)
)

ON FEBRUARY 23, 2007, CHARLES MAXWELL WAS FOUND GUILTY OF THE AGGRAVATED MURDER OF NICHOLE McCORKLE ALONG WITH A RETALIATION FOR TESTIMONY SPECIFICATION AND A MURDER TO ESCAPE ACCOUNTING FOR CRIME SPECIFICATION IN COUNT ONE FOLLOWING A JURY TRIAL. THE JURY ALSO FOUND THE DEFENDANT GUILTY OF THE THREE YEAR FIREARM SPECIFICATION ALSO INCLUDED IN COUNT ONE. ADDITIONALLY, THE JURY FOUND MR. MAXWELL GUILTY OF COUNT SEVEN, RETALIATION AND THE THREE YEAR FIREARM SPECIFICATION ATTACHED THERETO. COUNT 8, HAVING A WEAPON WHILE UNDER DISABILITY WAS BIRFURCATED AND TRIED TO THE BENCH. THE COURT FOUND MR. MAXWELL GUILTY OF COUNT 8 ON FEBRUARY 23, 2007.

THE JURY ACQUITTED MR. MAXWELL OF COUNT SIX, ATTEMPTED MURDER, THE ALLEDGED TARGET BEING LAURETTA KENNEY, THE SISTER OF THE VICTIM IN COUNT ONE. AT THE CLOSE OF THE STATE'S CASE IN CHIEF, THE COURT

GRANTED THE DEFENDANT'S RULE 29 MOTION TO ACQUIT AND DISMISSED COUNTS TWO THROUGH FIVE AND THE FELONY MURDER SPECIFICATION CONTAINED IN COUNT ONE.

PROCEDURAL HISTORY

CHARLES MAXWELL WAS INDICTED BY THE CUYAHOGA COUNTY GRAND JURY WITH AGGRAVATED MURDER IN COUNT ONE OF THE INDICTMENT COUPLED WITH SEVERAL SPECIFICATIONS INCLUDING A RETALIATION FOR TESTIMONY SPECIFICATION AND MURDER TO ESCAPE ACCOUNTING FOR CRIME SPECIFICATION. THESE CHARGES AROSE OUT OF THE NOVEMBER 27, 2005 MURDER OF NICHOLE MCCORKLE.

NICHOLE MCCORKLE WAS THE LONGTIME GIRLFRIEND OF THE DEFENDANT CHARLES MAXWELL AS WELL AS THE MOTHER OF HIS CHILD, CHEYENNE MAXWELL.

THE DEFENDAND PLEAD NOT GUILTY AT HIS ARRAIGNMENT AND THE CASE PROCEEDED TO A JURY TRIAL BEGINNING ON FEBRUARY 7, 2007. THE JURY RETURNED A VERDICT OF GUILTY TO AGGRAVATED MURDER IN COUNT ONE AND GUILTY TO TWO OF THE SPECIFICATIONS THAT ACCOMPANIED THAT COUNT.

THE SENTENCING PHASE COMMENCED ON FEBRUARY 27, 2007. THE TWO

SPECIFICATIONS MERGED AND THE JURY ONLY CONSIDERED THE RETALIATION FOR TESTIMONY SPECIFICATION, THAT CHARLES MAXWELL DID PURPOSELY KILL NICHOLE MCCORKLE IN RETALIATION FOR HER TESTIMONY IN A CRIMINAL PROCEEDING.

IN THE RETALIATION FOR TESTIMONY SPECIFICATION THE STATE PRESENTED EVIDENCE WHICH CONVINCED THE JURY BEYOND A REASONABLE DOUBT THAT CHARLES MAXWELL PURPOSELY KILLED NICHOLE MCCORKLE WITH PRIOR CALCULATION AND DESIGN AS A RESULT OF HER ACTIONS IN TESTIFYING AGAINST HIM IN FRONT OF A CUYAHOGA COUNTY GRAND JURY.

NICHOLE MCCORKLE'S TESTIMONY TO THE GRAND JURY OF CUYAHOGA COUNTY OCCURRED ON NOVEMBER 23, 2005. SHE WAS KILLED BY CHARLES MAXWELL FOUR DAYS LATER ON NOVEMBER 27, 2005. AS A RESULT OF THE GRAND JURY TESTIMONY OF MS. McCORKLE, MR. MAXWELL WAS INDICTED BY THE GRAND JURY FOR THE CRIMES OF FELONIOUS ASSAULT, DOMESTIC VIOLENCE AND ABDUCTION IN CASE NUMBER 473919. THAT CASE REMAINS PENDING ON THIS COURT'S DOCKET. IT SHOULD ALSO BE NOTED THAT THE INDICTMENT RETURNED BY THE GRAND JURY IN CASE NUMBER 473919 WAS RETURNED AFTER THE MURDER.

PURSUANT TO R.C. 2929.04(B), AT THE SENTENCING HEARING, THE JURY WAS INSTRUCTED TO WEIGH WHETHER THE AGGRAVATING CIRCUMSTANCE CONTAINED IN THE RETALIATION FOR TESTIMONY SPECIFICATION OUTWEIGHED BEYOND A REASONABLE DOUBT THE MITIGATING FACTORS .

THE JURY DID FIND BEYOND A REASONABLE DOUBT THAT THE STATE HAD PROVED THAT THE AGGRAVATING CIRCUMSTANCE OF RETALIATION FOR TESTIMONY OUTWEIGHED THE MITIGATING FACTORS.. THE JURY RETURNED A VERDICT RECOMMENDING THE SENTENCE OF DEATH. THE JURY'S RECOMMENDATION WAS RETURNED ON FEBRUARY 28, 2007.

SENTENCING ON THIS CASE WAS ORIGINALLY SET FOR MARCH 15, 2007. THE COURT CONTINUED SENTENCING TO TODAY, MARCH 21, 2007 IN ORDER TO PROVIDE THE DEFENSE AN OPPORTUNITY TO REVIEW THE TRANSCRIPT OF THE SENTENCING PHASE OF TRIAL AND TO PREPARE A SENTENCING MEMORANDUM OUTLINING WHAT THEY BELIEVE TO BE THE MITIGATING FACTORS THAT THIS COURT SHOULD CONSIDER.

PRIOR TO IMPOSING SENTENCE, THE LAW REQUIRES THAT THE COURT CONDUCT ITS OWN INDEPENDENT ANALYSIS AND MAKE ITS OWN FINDING AS TO WHETHER THE AGGRAVATING CIRCUMSTANCE IN THIS CASE OUTWEIGHS THE MITIGATING FACTORS BEYOND A REASONABLE DOUBT. THE COURT MUST CONSIDER THE EVIDENCE PRESENTED AS TO THE AGGRAVATING CIRCUMSTANCE, WHICH TRANSFORMED THIS OFFENSE OF AGGRAVATED MURDER FROM A CASE IN WHICH DEATH WAS NOT A POTENTIAL PENALTY TO ONE WHERE DEATH IS A POSSIBLE PENALTY. THE AGGRAVATING CIRCUMSTANCE MUST THEN BE WEIGHED AGAINST MITIGATING FACTORS ABOUT THE INDIVIDUAL

THE AGGRAVATING CIRCUMSTANCE WHICH IS TO BE WEIGHED AGAINST THE

MITIGATING FACTORS IS THAT CHARLES MAXWELL PURPOSELY KILLED NICHOLE MCCORKEL IN RETALIATION FOR HER TESTIMONY IN A CRIMINAL PROCEEDING.

FINDINGS

THE EVIDENCE AT THE TRIAL PHASE DEMONSTRATED THAT ON OR ABOUT OCTOBER 7, 2005. CHARLES MAXWELL ALLEDGEDLY ASSAULTED NICHOLE MCCORKLE. THE ASSAULT INVOLVED SERIOUS PHYSICAL HARM REQUIRING SEVERAL STITCHES AND A SHORT HOSPITALIZATION. AS A RESULT OF MS. McCORKLE'S TESTIMONY AGAINST HIM TO THE CUYAHOGA COUNTY GRAND JURY, CHARLES MAXWELL PURPOSELY AND BY PRIOR CALCULATION AND DESIGN KILLED NICHOLE MCCORKLE IN RETALIATION FOR HER TESTIMONY.

HAVING INDEPENDENTLY REVIEWED THE EVIDENCE THIS COURT FINDS THAT NICHOLE MCCORKLE TESTIFIED BEFORE A CUYAHOGA COUNTY GRAND JURY ON NOVEMBER 23, 2005. THIS COURT ALSO FINDS BEYOND A REASONABLE DOUBT THAT CHARLES MAXWELL WAS AWARE OF NICHOLE MCCORKLE'S TESTIMONY AGAINST HIM. THIS COURT FURTHER FINDS THAT CHARLES MAXWELL RETALIATED AGAINST NICHOLE MCCORKLE AS A RESULT OF HER GRAND JURY TESTIMONY.

AGGRAVATING CIRCUMSTANCE

THE RETALIATION FOR TESTIMONY AGGRAVATING CIRCUMSTANCE IS A WEIGHTY ONE. IN CONSIDERING HOW MUCH PRESSURE THIS SPECIFICATION

PUTS ON THE SCALES OF JUSTICE ONE HAS TO CONSIDER THE POTENTIAL CHILLING EFFECT RETALIATION HAS ON THE CRIMINAL JUSTICE SYSTEM. OUR SYSTEM OF JUSTICE IS DEPENDANT UPON VICTIMS AND WITNESSES CONFRONTING THE ACCUSED IN OPEN COURT. RETALIATORY ACTS CHILL THE WILLINGNESS OF VICTIMS TO PARTICIPATE IN OUR SYSTEM OF JUSTICE.

THE CIVILIZED SOCIETY WHICH WE ENJOY IN THE UNITED STATES AND THE STATE OF OHIO IS DEPENDANT UPON OUR JUSTICE SYSTEM. OUR CRIMINAL JUSTICE SYSTEM WOULD NOT EXIST IF WITNESSES DID NOT COME FORWARD TO SEEK JUSTICE AND CONFRONT THE INDICTED.

WITHOUT A STONG JUSTICE SYSTEM, THE RULE OF LAW WOULD NOT EXIST. CIVILIZED DEMOCRACIES ARE DEPENDANT UPON THE RULE OF LAW. WITHOUT THE RULE OF LAW, SOCIETY WOULD BE UNRECOGNIZEABLE FROM THE ONE WE LIVE IN TODAY AND HAVE ENJOYED FOR OVER 230 YEARS.

MR. MAXWELL'S AGGRAVATED MURDER OF NICOLE McCORKLE WAS A CRIME AGAINST HER BUT ALSO AN ATTACK ON THE RULE OF LAW.

SCOPE OF INDEPENDENT REVIEW

IN THE COURSE OF THIS COURT'S INDEPENDENT REVIEW OF THE MITIGATING FACTORS, THE COURT REVIEWED THE FOLLOWING:

1. THE DEFENDANT'S SENTENCING MEMORANDUM
2. THE PSYCHOLOGICAL REPORT PREPARED BY MITIGATION EXPERT, SANDRA B. McPHERSON, PhD. DATED 2/26/07
3. THE COMPENTENCY RESTORATION REPORT OF ALICE COOK, Ph.D.,

CLINICAL PSYCHOLOGIST WITH NORTHCOAST BEHAVIORAL HELATHCARE CLEVELAND CAMPUS, DATED NOV. 15, 2006.

4. THE COURT PSYCHIATRIC CLINIC REPORT OF MICHAEL ARONOFF, Ph.D. DATED OCTOBER 2, 2006.

5. THE ENTIRE TRANSCRIPT OF THE SENTENCING PHASE PROCEEDINGS, INCLUDING THE TESTIMONY OF WILLIAM STEWARD, HERBERT NELSON, VERONICA NELSON, ROSCOE HORNE, RAYMOND McNEAR, THERESA McNEAR, SHARON GROVES, ANDY MAXWELL, ERNESTINE BREWER, THE DEFENDANT'S MOTHER, THE UNSWORN STATEMENT OF CHARLES MAXWELL AND THE TESTIMONY OF MITIGATION EXPERT SANDRA McPHERSON

6. ALL OF THE TRANSCRIBED TESTIMONY OF JOHN GREGG, INCLUDING TRIAL TESTIMONY IN THIS CASE THAT THE JURY DID NOT HEAR. THE SENTENCING TRANSCRIPT OF JOHN GREGG ON CRIMINAL CASE #476741 AND MR. GREGG'S DEPOSITION GIVEN IN THE CIVIL CASE OUT OF WHICH HIS CRIMINAL INSURANCE FRAUD CASE AROSE.

7. THE COURT ALSO INDEPENDANTLY REVIEWED THE UNSIGNED STATEMENT OF MR. GREGG GIVEN TO CLEVELAND POLICE DET. IGNATIUS SOWA DATED NOVEMBER 30, 2005, AND THE SIGNED STATEMENT OF JOHN GREGG GIVEN TO DET. SOWA DATED NOV. 21, 2006.

THE ABOVE LIST REPRESENTS A SIGNIFICANT PART OF THIS COURT'S INDEPENDENT REVIEW, BUT IS NOT TO BE CONSIDERED AS EXCLUDING OTHER ITEMS FROM THIS COURT'S CONSIDERATION.

MITIGATORY FACTORS

R.C. 2929.04(B) LISTS THE MITIGATING FACTORS A JURY AND JUDGE SHOULD CONSIDER IN THE WEIGHING PROCESS. SIX SPECIFIC FACTORS ARE LISTED FOR CONSIDERATION AND A SEVENTH FACTOR, COMMONLY KNOW AS THE 'CATCHALL" IS ALSO LISTED FOR CONSIDERATION.

THE DEFENSE'S SENTENCING MEMORANDUM LISTS THE FOLLOWING AS MITIGATORY FACTORS FOR THE COURT'S CONSIDERATION:

1. R.C.2929.04(B)(1) WHETHER THE VICTIM INDUCED THE OFFENSE;
2. R.C. 2929(B)(2) THAT IT WAS UNLIKELY THAT THE OFFENSE WOULD HAVE BEEN COMMITTED BUT FOR THE FACT THAT THE OFFENDER WAS UNDER DURESS, COERCION OR STRONG PROVOCATION;
3. REMORSE;
4. LOVE AND SUPPORT OF FAMILY;
5. THE DEFENDANT'S WORK ETHIC;
6. THE DEFENDANT'S LACK OF SIGNIFICANT CRIMINAL HISTORY;
7. THE DEFENDANT'S CONFORMANCE WHILE INCARCERATED;
8. RESIDUAL DOUBT.

THE COURT ALSO CONSIDERED HIS LOWER ACADEMIC ABILITY AS A MITIGATING FACTOR.

IN THIS COURT'S WEIGHING PROCESS, AS MITIGATION, THIS COURT FINDS

THAT CHARLES MAXWELL HAD A FAIRLY BENIGN CHILDHOOD. HE WAS BORN IN ARKANSAS AND MOVED TO CLEVELAND WHILE IN GRADE SCHOOL. HIS MOTHER MARRIED THOMAS BREWER WHO BECAME MR. MAXWELL'S STEFFATHER.

MR. STEWARD, THE DEFENDANT'S BROTHER, TESTIFIED THAT MR. BREWER WORKED AT LINCOLN ELECTRIC AND WAS "QUITE THE PROVIDER."

MR. MAXWELL WAS AND REMAINS WELL REGARDED BY HIS FAMILY AND FRIENDS. MR. MAXWELL IS A HIGH SCHOOL GRADUATE AND RECEIVED SOME VOCATIONAL TRAINING AFTER HIGH SCHOOL. WHILE HE WAS NOT A STELLAR STUDENT HE DID MANAGE TO GRADUATE AND WAS MAINSTREAMED THROUGHOUT HIS ACADEMIC CAREER. HE DEVELOPED GOOD SKILLS IN OPERATING HEAVY MACHINERY WHICH HE INCORPORATED INTO HIS WORK LIFE.

HERBERT NELSON, MR. MAXWELL'S 1ST COUSIN TESTIFIED THAT MR. MAXWELL WAS A "REALLY GOOD WORKER." MR. NELSON OWNED A TREE SERVICE COMPANY AND THE DEFENDANT WORKED WITH HIM ON OCCASION.

ROSCOE HORNE ALSO TESTIFIED AS TO MR. MAXWELL'S GOOD WORK ETHIC. HIS TESTIMONY ESTABLISHED THAT THE DEFENDANT IS WILLING TO WORK HARD TO HELP FRIENDS AND FAMILY MEMBERS WHEN THEY WERE IN NEED OF ASSISTANCE.

OTHER TESTIMONY WAS RECEIVED THAT MR. MAXWELL ENJOYS FISHING AND HORSES, TWO HOBBIES NOT COMMONLY ASSOCIATED WITH MEN OF VIOLENCE. MR. MAXWELL ALSO TRIED TO INTRODUCE OTHERS TO THE

PLEASURES OF HIS HOBBIES.

THE COURT ALSO CONSIDERED HIS PRIOR CRIMINAL HISTORY AS POTENTIALLY MITIGATORY. IN 1990 MR. MAXWELL WAS SENTENCED TO ONE AND ONE HALF YEARS FOR DRUG TRAFFICKING. THIS WAS THE DEFENDANT'S ONLY PRIOR FELONY, COMMITTED OVER 16 YEARS AGO. DR. McPHERSON TESTIFIED THAT SHE HAD REVIEWED MR. MAXWELL'S PRISON RECORDS FROM THAT INCARCERATION. SHE FOUND THAT THE PAROLE BOARD HAD INDICATED THAT THE DEFENDANT WAS AN EXEMPLARY CANDIDATE FOR RELEASE.

MR. MAXWELL'S GOOD COMPLIANCE WHILE INCARCERATED WAS AGAIN DEMONSTRATED TO DR. ALICE COOK AND IS CONTAINED IN HER COMPETENCY REPORT.

HIS COMPLIANT NATURE AS A PRISONER IS PERHAPS THE WEIGHTIEST MITIGATORY FACTOR THIS COURT HAS CONSIDERED.

IN MY INDEPENDENT WEIGHING PROCESS, I DO NOT AGREE WITH THE DEFENSE'S CONTENTION THAT NICHOLE McCORKLE'S BEHAVIOR ON THE NIGHT OF THE MURDER HAD ANYTHING TO DO WITH MR. MAXWELL'S ACTIONS. I SPECIFICALLY FIND THAT SHE DID NOT INDUCE THE OFFENSE. FURTHER I FIND THAT THE AGGRAVATED MURDER COMMITTED BY MR. MAXWELL WAS NOT DONE WHILE THE DEFENDANT WAS ACTING UNDER DURESS, COERCION OR STRONG PROVOCATION. THEREFORE, I FIND THAT THE MITIGATORY FACTORS LISTED IN R.C. 2929.04(B) (1) AND (2) DO NOT APPLY.. ADDITIONALLY, IT SHOULD BE NOTED THAT THE DEFENSE DID NOT REQUEST THE COURT TO INSTRUCT THE

JURY TO CONSIDER THESE TWO MITIGATORY FACTORS.

THE ONLY MITIGATORY FACTORS THE JURY WAS REQUESTED TO CONSIDER WERE THOSE IN THE CATCHALL PROVISION LISTED IN R.C. 2929.04(B) (7). I HAVE ALREADY ADDRESSED MOST OF THOSE.

I FIND THAT MR. MAXWELL'S LIFE, WHILE LAUDABLE IN SOME AREAS, INCLUDING HIM BEING A HIGH SCHOOL GRADUATE, HARD WORKER, AND LOVED BY HIS FAMILY, WAS LACKING IN DEPTH.

MR. MAXWELL NEVER HELD A JOB OF ANY REGULAR STRUCTURE OR DURATION. WHEN ASKED BY FRIENDS AND FAMILY FOR ASSISTANCE, HE WAS THERE; HOWEVER, THE EVIDENCE DID NOT DEMOSTRATE THAT HE WAS A REGULAR PROVIDER FOR HIS FAMILY, INCLUDING HIS DAUGHTER CHEYENNE AND THE VICTIM, NICHOLE McCORKLE.

THE COURT CONCLUDES THAT THE MITIGATORY FACTORS OF MR. MAXWELL'S EDUCATIONAL ATTAINMENT AND WORK ETHIC ARE WITHOUT SIGNIFICANT WEIGHT TO TILT THE SCALES AGAINST THE WEIGHT OF THE AGGRAVATING CIRCUMSTANCE.

LASTLY, THIS COURT HAS CONSIDERED THE ISSUE OF RESIDUAL DOUBT. THOUGH NOT CONSIDERED BY THE JURY, THE COURT FELT IT APPROPRIATE TO COMPARE MR. GREGG'S TWO STATEMENTS. THE LAW CASTS A SUSPICIOUS EYE TOWARD THE TESTIMONY OF THOSE WHO'S TESTIMONY IS ACCOMPANIED BY A *QUID PRO QUO* FROM THE STATE. LET US BE CLEAR HERE, MR. GREGG DID RECEIVE A DEAL FROM THE STATE OF OHIO IN EXCHANGE FOR HIS TESTIMONY

AGAINST MR. MAXWELL. WITHOUT MR. GREGG'S TESTIMONY, THE STATE WOULD HAVE HAD A VERY DIFFICULT TIME PROVING THE AGGRAVATING CIRCUMSTANCE OF RETALIATION.

I HAVE NOT BEEN SHY IN EXPRESSING MY OPINION OF MR. GREGG AS AN INDIVIDUAL. HIS TESTIMONY SHOULD BE VIEWED WITH A VERY JAUNDICED EYE. HE IS A FELON AND A PERJUROR.

I REVIEWED GREGG'S TESTIMONY IN HIS CIVIL CASE AGAINST McDONALDS. IT IS CLEAR THAT HE WAS FAST AND LOOSE WITH THE TRUTH DURING THAT DEPOSITION. SPECIFICALLY, HE IMPLIED THAT MR. MAXWELL WAS A STRANGER TO HIM AT THE TIME OF HIS ALLEDGED FALL IN THE McDONALDS RESTAURANT. THE DEFENSE ATTORNEY DURING DEPOSITION ASKED MR. GREGG WHETHER HE KNEW OF THE TELEPHONE NUMBER OF MR. MAXWELL (THEN CONSIDERED AN INDEPENDENT WITNESS TO MR. GREGG'S SLIP AN FALL). MR. GREGG TESTIFIED UNDER OATH THAT DID NOT KNOW IT, BUT THAT IT COULD BE OBTAINED THROUGH HIS ATTORNEY.

IT SHOULD BE NOTED THAT GREGG TESTIFIED IN THIS TRIAL THAT MAXWELL WAS HIS BEST FRIEND AT THAT TIME AND THAT HE SPOKE TO HIM BY TELEPHONE DAILY. HE CLEARLY LIED DURING HIS CIVIL DEPOSITION.

IN ORDER TO CONFRONT THE ISSUE OF RESIDUAL DOUBT, THIS COURT REVIEWED GREGG'S SIGNED STATEMENT DATED NOV. 21, 2006 WITH HIS UNSIGNED STATEMENT DATED NOV. 30, 2005 AND "GIVEN" THREE DAYS AFTER THE MURDER. THE COURT FINDS THE TWO STATEMENTS TO BE CONSISTENT.

ON NOEMBER 30, 2005, MR. GREGG WAS NOT UNDER INDICTMENT FOR INSURANCE FRAUD IN CRIMINAL CASE 476741. ADDITIONALLY, HE HAD NO REASON TO SUSPECT THAT HE WOULD BE INDICTED AS THE COMTEMPT PENALTY IMPOSED BY JUDGE TIMOTHY McGINTY IN THE McDONALDS CIVIL CASE HAD BEEN REVERSED BY THE COURT OF APPEALS. IN SHORT, HE HAD NO MOTIVATION TO LIE. PARTICULARLY, HE HAD NO MOTIVATION TO LIE ABOUT SOMETHING THAT WOULD SUBJECT HIS BEST FRIEND TO A MURDER INDICTMENT.

WHY HE CHOSE NOT TO SIGN THE STATEMENT IS A MYSTERY KNOWN ONLY TO MR. GREGG. AT TRIAL, GREGG TESTIFIED THAT HE DID NOT SIGN THE STATEMENT, AS HE "GOT SCARED." PERHAPS THIS IS TRUE. PERHAPS THE REALITY THAT HE WOULD BE THE CHIEF WITNESS AGAINST HIS BEST FRIEND IN AN AGGRAVATED MURDER TRIAL WAS MORE THAN HE WANTED TO ACKNOWLEDGE AT THE TIME.

WHAT IS CLEAR IS THAT THE TWO STATEMENTS ATTRIBUTABLE TO MR. GREGG ARE CONSISTENT WITH EACH OTHER. ADDITIONALLY, NO EVIDENCE WAS SUGGESTED OR INTRODUCED SHOWING THAT DET. SOWA HAD ANY MOTIVATION TO ASSIST MR. GREGG IN STATING ANYTHING OTHER THEN TRUTHFUL TESTIMONY.

THE JURY FOUND BEYOND A REASONABLE DOUBT THAT MR. MAXWELL'S PURPOSEFUL MURDER WAS IN RETALIATION FOR THE VICTIM'S TESTIMONY. THE FINDING WAS BASED UPON THE TESTIMONY OF JOHN GREGG.

THIS COURT HOLDS NO RESIDUAL DOUBT THAT THE JURY LOST ITS WAY IN REACHING THEIR VERDICT. THE COURT WILL NOT DISTURB THEIR DECISION NOR WILL THIS COURT PLACE THE SUBJECT OF RESIDUAL DOUBT ON THE SCALE TO BE WEIGHED AGAINST THE AGGRAVATING CIRCUMSTANCE.

AGAIN, THIS COURT FINDS THAT MR. MAXWELL IS LIKELY TO LIVE A COMPLIANT LIFE IN PRISON IF A LIFE SENTENCE WOULD BE IMPOSED. THE COURT FINDS THAT THIS IS THE HEAVIEST MITIGATORY FACTOR.

IN PLACING THE MITIGATORY FACTOR OF PRISONER COMPLIANCE ON THE SAME SIDE OF THE SCALE AS THE MITIGATORY FACTORS OF FAMILY SUPPORT, WORK ETHIC, LOVE FOR HIS CHILD AND ANY REMORSE HE HAS PROFESSED, THIS COURT FINDS THAT THEY COME UP LIGHT.

CONCLUSION

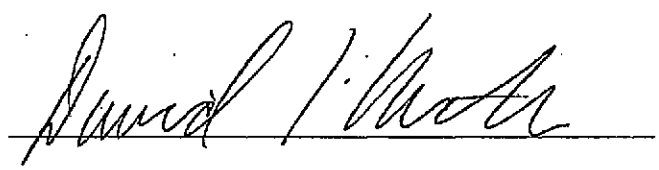
THE COURT FINDS, BEYOND A REASONABLE DOUBT, THAT THE AGGRAVATING CIRCUMSTANCE OF RETALIATION FOR TESTIMONY OUTWEIGHTS THE MITIGATING FACTORS.

THE CRIME COMMITTED IN THIS CASE WAS MORE THAN JUST A CRIME AGAINST NICHOLE McCORKLE. THIS WAS A CRIME AGAINST ORGANIZED SOCIETY. MR. MAXWELL COMMITTED AGGRAVATED MURDER TO QUELCH THE TESTIMONY OF A WITNESS. SUCH CRIMES HAVE A CHILLING EFFECT ON THE JUSTICE SYSTEM AND THE RULE OF LAW. THIS AGGRAVATING CIRCUMSTANCE WEIGHS HEAVILY IN THIS COURT'S EYES AND OUTWEIGHS THE MITIGATORY FACTORS PRESENTED ABOUT MR. MAXWELL'S BENIGN BUT UNIMPRESSIVE LIFE.

THIS COURT WILL FOLLOW THE JURY'S RECOMMENDATION AND IMPOSE A SENTENCE OF DEATH PLUS THREE YEARS FOR THE FIREARM SPECIFICATION ON COUNT ONE. I FIND BEYOND A REASONABLE DOUBT AFTER AN INDEPENDENT ANALYSIS THAT THE AGGRAVATING CIRCUMSTANCE OUTWEIGHTS THE MITIGATING FACTORS.

ON COUNT 7, RETALIATION, AND ON COUNT 8, HAVING A WEAPON WHILE UNDER A DISABILITY, THE DEFENDANT IS SENTENCED TO FIVE YEARS IN PRISON, PLUS THREE YEARS ON THE FIREARM SPECIFICATION ON COUNT 7. ALL COUNTS SHALL RUN CONCURANTLY AND THE FIREARM SPECIFICATIONS SHALL MERGE INTO ONE THREE YEAR TERM. THE DEFENDANT SHALL ALSO RECEIVE CREDIT FOR TIME SERVED TO THE EXTENT APPLICABLE.

IT IS SO ORDERED.



JUDGE DAVID T. MATIA

3.22.07

CERTIFICATE OF SERVICE

A copy of the foregoing **Opinion of the Court Findings of Fact and Conclusions of Law Regarding Imposition of Death Penalty** has been sent by regular U.S. mail this 22nd day of March, 2007 to:

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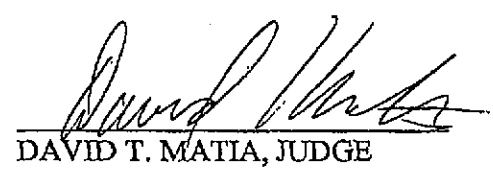

DAVID T. MATIA, JUDGE

§ 2901.13. Limitation of criminal prosecutions

(A) (1) Except as provided in division (A)(2) or (3) of this section or as otherwise provided in this section, a prosecution shall be barred unless it is commenced within the following periods after an offense is committed:

(a) For a felony, six years;

(b) For a misdemeanor other than a minor misdemeanor, two years;

(c) For a minor misdemeanor, six months.

(2) There is no period of limitation for the prosecution of a violation of section 2903.01 or 2903.02 of the Revised Code.

(3) Except as otherwise provided in divisions (B) to (H) of this section, a prosecution of any of the following offenses shall be barred unless it is commenced within twenty years after the offense is committed:

(a) A violation of **section 2903.03**, **2903.04**, **2905.01**, **2907.02**, **2907.03**, **2907.04**, **2907.05**, **2907.21**, **2909.02**, **2909.22**, **2909.23**, **2909.24**, **2909.26**, **2909.27**, **2909.28**, **2909.29**, **2911.01**, **2911.02**, **2911.11**, **2911.12**, or **2917.02 of the Revised Code**, a violation of **section 2903.11** or **2903.12 of the Revised Code** if the victim is a peace officer, a violation of **section 2903.13 of the Revised Code** that is a felony, or a violation of former **section 2907.12 of the Revised Code**;

(b) A conspiracy to commit, attempt to commit, or complicity in committing a violation set forth in division (A)(3)(a) of this section.

(B) If the period of limitation provided in division (A)(1) or (3) of this section has expired, prosecution shall be commenced for an offense of which an element is fraud or breach of a fiduciary duty, within one year after discovery of the offense either by an aggrieved person, or by the aggrieved person's legal representative who is not a party to the offense.

(C) If the period of limitation provided in division (A)(1) or (3) of this section has expired, prosecution shall be commenced for an offense involving misconduct in office by a public servant as defined in **section 2921.01 of the Revised Code**, at any time while the accused remains a public servant, or within two years thereafter.

(D) An offense is committed when every element of the offense occurs. In the case of an offense of which an element is a continuing course of conduct, the period of limitation does not begin to run until such course of conduct or the accused's accountability for it terminates, whichever occurs first.

(E) A prosecution is commenced on the date an indictment is returned or an information filed, or on the date a lawful arrest without a warrant is made, or on the date a warrant, summons, citation, or other process is issued, whichever occurs first. A prosecution is not commenced by the return of an indictment or the filing of an information unless reasonable diligence is exercised to issue and execute process on the same. A prosecution is not commenced upon issuance of a warrant, summons, citation, or other process, unless reasonable diligence is exercised to execute the same.

(F) The period of limitation shall not run during any time when the corpus delicti remains undiscovered.

2903.01 Aggravated murder; specific intent to cause death

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

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

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

HISTORY: 1981 S 1, eff. 10-19-81
1972 H 511

UNCODIFIED LAW

1981 S 1, § 3, eff. 10-19-81, reads: Any person who is charged with aggravated murder and who is alleged to have committed the aggravated murder prior to the effective date of this act shall, upon conviction, and regardless of any charge or conviction of a specification of an aggravating circumstance, be sentenced to life imprisonment with parole eligibility after serving fifteen full years imprisonment. The person shall not be eligible for diminution of the time that is required to be served before parole eligibility under section 2967.19 of the Revised Code. Any such person shall, upon resentencing after the person's sentence of death is vacated, be sentenced to life imprisonment with parole eligibility after serving fifteen years imprisonment.

2903.02 Murder

(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

(C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

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

HISTORY: 1998 H 5, eff. 6-30-98
1996 S 239, eff. 9-6-96; 1972 H 511, eff. 1-1-74

2929.03 Imposing sentence for a capital offense; procedures; proof of relevant factors; alternative sentences

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

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

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

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

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

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

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

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

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

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

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

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

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

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

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

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

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

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

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

2929.04 Criteria for imposing death or imprisonment for a capital offense

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

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

(2) The offense was committed for hire.

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

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

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

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

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

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

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

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

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

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

(4) The youth of the offender;

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

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

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

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

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

HISTORY: 1981 S 1, eff. 10-19-81
1972 H 511

2929.05 Appeals; procedures

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

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

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

(C) Whenever sentence of death is imposed pursuant to section 2929.022 or 2929.03 of the Revised Code, the court of common pleas that sentenced the offender shall, upon motion of the offender and after conducting a hearing on the motion, vacate the sentence if all of the following apply:

(1) The offender alleges in the motion and presents evidence at the hearing that the offender was not eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced;

(2) The offender did not present evidence at trial pursuant to section 2929.023 of the Revised Code that the offender was not eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced;

(3) The motion was filed at any time after the sentence was imposed in the case and prior to execution of the sentence;

(4) At the hearing conducted on the motion, the prosecution does not prove beyond a reasonable doubt that the offender was eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced.

HISTORY: 1995 S 4, eff. 9-21-95
1981 S 1, eff. 10-19-81

Crim R 5 Initial appearance, preliminary hearing

(A) Procedure upon initial appearance

When a defendant first appears before a judge or magistrate, the judge or magistrate shall permit the accused or his counsel to read the complaint or a copy thereof, and shall inform the defendant:

(1) Of the nature of the charge against him;

(2) That he has a right to counsel and the right to a reasonable continuance in the proceedings to secure counsel, and, pursuant to Crim. R. 44, the right to have counsel assigned without cost to himself if he is unable to employ counsel;

(3) That he need make no statement and any statement made may be used against him;

(4) Of his right to a preliminary hearing in a felony case, when his initial appearance is not pursuant to indictment;

(5) Of his right, where appropriate, to jury trial and the necessity to make demand therefor in petty offense cases.

In addition, if the defendant has not been admitted to bail for a bailable offense, the judge or magistrate shall admit the defendant to bail as provided in these rules.

In felony cases the defendant shall not be called upon to plead either at the initial appearance or at a preliminary hearing.

In misdemeanor cases the defendant may be called upon to plead at the initial appearance. Where the defendant enters a plea the procedure established by Crim. R. 10 and Crim. R. 11 applies.

(B) Preliminary hearing in felony cases; procedure

(1) In felony cases a defendant is entitled to a preliminary hearing unless waived in writing. If the defendant waives preliminary hearing, the judge or magistrate shall forthwith order the defendant bound over to the court of common pleas. If the defendant does not waive the preliminary hearing, the judge or magistrate shall schedule a preliminary hearing within a reasonable time, but in any event no later than ten consecutive days following arrest or service of summons if the defendant is in custody and not later than fifteen consecutive days following arrest or service of summons if he is not in custody. The preliminary hearing shall not be held, however, if the defendant is indicted. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this division may be extended. In the absence of such consent by the defendant, time limits may be extended only as required by law, or upon a showing that extraordinary circumstances exist and that delay is indispensable to the interest of justice.

(2) At the preliminary hearing the prosecuting attorney may state orally the case for the state, and shall then proceed to examine witnesses and introduce exhibits for the state. The defendant and the judge or magistrate have full right of cross-examination, and the defendant has the right of inspection of exhibits prior to their introduction. The hearing shall be conducted under the rules of evidence prevailing in criminal trial generally.

(3) At the conclusion of the presentation of the state's case, defendant may move for discharge for failure of proof, and may offer evidence on his own behalf. If the defendant is not represented by counsel, the court shall advise him, prior to the offering of evidence on behalf of the defendant:

(a) That any such evidence, if unfavorable to him in any particular, may be used against him at later trial.

(b) That he may make a statement, not under oath, regarding the charge, for the purpose of explaining the facts in evidence.

(c) That he may refuse to make any statement, and such refusal may not be used against him at trial.

(d) That any statement he makes may be used against him at trial.

(4) Upon conclusion of all the evidence and the statement, if any, of the accused, the court shall do one of the following:

(a) Find that there is probable cause to believe the crime alleged or another felony has been committed and that the defendant committed it, and bind the defendant over to the court of common pleas of the county or any other county in which venue appears.

(b) Find that there is probable cause to believe that a misdemeanor was committed and that the defendant committed it, and retain the case for trial or order the defendant to appear for trial before an appropriate court.

(c) Order the accused discharged.

(5) Any finding requiring the accused to stand trial on any charge shall be based solely on the presence of substantial credible evidence thereof. No appeal shall lie from such decision and the discharge of defendant shall not be a bar to further prosecution.

(6) In any case in which the defendant is ordered to appear for trial for any offense other than the one charged the court shall cause a complaint charging such offense to be filed.

(7) Upon the conclusion of the hearing and finding, the court or the clerk of such court, shall, within seven days, complete all notations of appearance, motions, pleas, and findings on the criminal docket of the court, and shall transmit a transcript of the appearance docket entries, together with a copy of the original complaint and affidavits, if any, filed with the complaint, the journal or docket entry of reason for changes in the charge, if any, together with the order setting bail and the bail including any bail deposit, if any, filed, to the clerk of the court in which defendant is to appear. Such transcript shall contain an itemized account of the costs accrued.

(Adopted eff. 7-1-73; amended eff. 7-1-75, 7-1-76, 7-1-82, 7-1-90)

Crim R 6 The grand jury

(A) Summoning grand juries

The judge of the court of common pleas for each county, or the administrative judge of the general division in a multi-judge court of common pleas or a judge designated by him, shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of nine members, including the foreman, plus not more than five alternates.

(B) Objections to grand jury and to grand jurors

(1) Challenges. The prosecuting attorney, or the attorney for a defendant who has been held to answer in the court of common pleas, may challenge the array of jurors or an individual juror on the ground that the grand jury or individual juror was not selected, drawn, or summoned in accordance with the statutes of this state. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified, if it appears from the record kept pursuant to subdivision (C) that seven or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(C) Foreman and deputy foreman

The court may appoint any qualified elector or one of the jurors to be foreman and one of the jurors to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall upon the return of the indictment file the record with the clerk of court, but the record shall not be made public except on order of the court. During the absence or disqualification of the foreman, the deputy foreman shall act as foreman.

(D) Who may be present

The prosecuting attorney, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(E) Secrecy of proceedings and disclosure

Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. Disclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney, interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person before such indictment is filed and the case docketed. The court may direct that an indictment shall be kept secret until the defendant is in custody or has been released pursuant to Rule 46. In that event the clerk shall seal the indictment, the indictment shall not be docketed by name until after the apprehension of the accused, and no person shall disclose the finding of the indictment except when necessary for the issuance of a warrant or summons. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

(F) Finding and return of indictment

An indictment may be found only upon the concurrence of seven or more jurors. When so found the foreman or deputy foreman shall sign the indictment as foreman or deputy foreman. The indictment shall be returned by the foreman or deputy foreman to a judge of the court of common pleas and filed with the clerk who shall endorse thereon the date of filing and enter each case upon the appearance and trial dockets. If the defendant is in custody or has been released pursuant to Rule 46 and seven jurors do not concur in finding an indictment, the foreman shall so report to the court forthwith.

(G) Discharge and excuse

A grand jury shall serve until discharged by the court. A grand jury may serve for four months, but the court upon a showing of good cause by the prosecuting attorney may order a grand jury to serve more than four months but not more than nine months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another eligible person in place of the juror excused.

(H) Alternate grand jurors

The court may order that not more than five grand jurors, in addition to the regular grand jury, be called, impanelled and sit as alternate grand jurors. Alternate grand jurors, in the order in which they are called, shall replace grand jurors who, prior to the time the grand jury votes on an indictment, are found to be unable or disqualified to perform their duties. Alternate grand jurors shall be drawn in the same manner, shall have the same qualifications, shall be subjected to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular grand jurors. Alternate grand jurors may sit with the regular grand jury, but shall not be present when the grand jury deliberates and votes.

(Adopted eff. 7-1-73)

RULE 7. THE INDICTMENT AND THE INFORMATION

(A) Use of Indictment or Information. A felony which may be punished by death or life imprisonment shall be prosecuted by indictment. All other felonies shall be prosecuted by indictment, except that after a defendant has been advised by the court of the nature of the charge against him and of his right to indictment, he may waive that right in writing and in open court.

Where an indictment is waived the offense may be prosecuted by information, unless an indictment is filed within fourteen days after the date of waiver. If an information or indictment is not filed within fourteen days after the date of waiver, the defendant shall be discharged and the complaint dismissed. This subdivision shall not prevent subsequent prosecution by information or indictment for the same offense.

A misdemeanor may be prosecuted by indictment or information in the court of common pleas, or by complaint in courts inferior to the court of common pleas. An information may be filed without leave of court.

(B) Nature and Contents. The indictment or the information shall be signed by the prosecuting attorney or signed in his name by an assistant prosecuting attorney, and shall contain a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the applicable section of the statute as long as the words of that statute charge an offense, or in any words sufficient to give the accused notice of all the elements of the offense with which he is charged. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. Each count of the indictment or information shall state the numerical designation of the statute which the defendant is alleged therein to have violated. Error in the designation or its omission shall not be ground for dismissal of the indictment or information, or for reversal of a conviction, if the error or omission did not mislead the defendant to his prejudice.

(C) Surplusage. The court on motion of the defendant or the prosecuting attorney may strike surplusage from the indictment or information.

(D) Amendment of Indictment, Information or Complaint. The court may at any time before, during, or after a trial amend the

RULE 52. HARMLESS ERROR AND PLAIN ERROR

(A) **Harmless Error.** Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Crim R 55 Records

(A) Criminal appearance docket

The clerk shall keep a criminal appearance docket. Upon the commencement of a criminal action the clerk shall assign each action a number. This number shall be placed on the first page, and every continuation page, of the appearance docket which concerns the particular action. In addition this number and the names of the parties shall be placed on the case file and every paper filed in the action.

At the time the action is commenced the clerk shall enter in the appearance docket the names, except as provided in Rule 6(E), of the parties in full, the names of counsel and index the action by the name of each defendant. Thereafter the clerk shall chronologically note in the appearance docket all: process issued and returns, pleas and motions, papers filed in the action, orders, verdicts and judgments. The notations shall be brief but shall show the date of filing and the substance of each order, verdict and judgment.

An action is commenced for purposes of this rule by the earlier of, (a) the filing of a complaint, uniform traffic ticket, citation, indictment, or information with the clerk, or (b) the receipt by the clerk of the court of common pleas of a bind over order under Rule 5(B)(4)(a).

(B) Files

All papers filed in a case shall be filed in a separate file folder and on or after July 1, 1986 shall not exceed 8 1/2 inches x 11 inches in size and without backing or cover.

(C) Other books and records

The clerk shall keep such other books and records as required by law and as the supreme court or other court may from time to time require.

(D) Applicability to courts not of record

In courts not of record the notations required by subdivision (A) shall be placed on a separate sheet or card kept in the file folder.

(Adopted eff. 7-1-73; amended eff. 7-1-85)

GUIDELINE 5.1 – QUALIFICATIONS OF DEFENSE COUNSEL

A. The Responsible Agency should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.

B. In formulating qualification standards, the Responsible Agency should insure:

1. That every attorney representing a capital defendant has:

   a. obtained a license or permission to practice in the jurisdiction;

   b. demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and

   c. satisfied the training requirements set forth in Guideline 8.1.

2. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:

   a. substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;

   b. skill in the management and conduct of complex negotiations and litigation;

   c. skill in legal research, analysis, and the drafting of litigation documents;

   d. skill in oral advocacy;

   e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

   f. skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

   g. skill in the investigation, preparation, and presentation of mitigating evidence; and

h. **skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.**

GUIDELINE 10.11 – THE DEFENSE CASE CONCERNING PENALTY

A. **As set out in Guideline 10.7(A), counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.**

B. **Trial counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between the strategy for the sentencing phase and for the guilt/innocence phase.**

C. **Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.**

D. **Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation.**

E. **Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.**

F. **In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:**

1. **Witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death;**

2. **Expert and lay witnesses along with supporting documentation (*e.g.* school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;**

3. **Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;**

4. **Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.**

5. **Demonstrative evidence, such as photos, videos, and physical objects (*e.g.*, trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.**

A. **In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel should pursue all appropriate means (*e.g.*, motions *in limine*) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration, and should make a full record in order to support any subsequent challenges.**

H. **Trial counsel should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any non-compliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules.**

I. **Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible.**

J. **If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should:**

1. **carefully consider**

   a. **what legal challenges may appropriately be made to the interview or the conditions surrounding it, and**

   b. **the legal and strategic issues implicated by the client's co-operation or non-cooperation;**

2. **insure that the client understands the significance of any statements made during such an interview ; and**

3. **attend the interview.**

K. **Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.**

L. Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.

History of Guideline

The substance of this Guideline is drawn from Guideline 11.8.3 of the original edition. The principal changes are the expansion of coverage to counsel at all stages of the proceedings, and language changes to underscore the range and importance of expert testimony in capital cases, the breadth of mitigating evidence, and counsel's duty to present arguments in mitigation.

Related Guidelines

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-8.1 ("Sentencing"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.1 (1995) ("Obligations of Counsel in Sentencing").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.2 (1995) ("Sentencing Options, Consequences and Procedures").

Commentary

Capital sentencing is unique in a variety of ways, but only one ultimately matters: the stakes are life and death.

This Commentary is written primarily from the perspective of trial counsel. But corresponding obligations rest on successor counsel. This Guideline has been broadened to include them because of the realities that in capital cases (a) more evidence tends to become available to the defense as time passes,[272] and (b) updated presentations of the defense case on penalty in accordance with Guideline 10.15.1 (E) (3) may influence decisionmakers both on the bench (*e.g.*, an appellate court considering a claim of ineffective assistance of counsel) and off it (*e.g.*, the prosecutor, the Governor).

<u>The Importance of an Integrated Defense</u>

During the investigation of the case, counsel should begin to develop a theme that can be presented consistently through both the first and second phases of the trial. Ideally, "the theory of the trial must complement, support, and lay the groundwork for the theory of

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2[70] *See supra* text accompanying note 38.

Evid R 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR UNDUE DELAY

(A) Exclusion mandatory

Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) Exclusion discretionary

Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

[Adopted eff. 7-1-80; amended eff. 7-1-96]

RULE 601. GENERAL RULE OF COMPETENCY

Every person is competent to be a witness except:

(A) Those of unsound mind, and children under ten (10) years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly and;

(B) A spouse testifying against the other spouse charged with crimes except crimes against the testifying spouse or the children of either and;

(C) An officer, while on duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.

(D) A person giving expert testimony on the issue of liability in any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care or treatment of any person, unless the person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state, and unless such person devotes three-fourths of his professional time to the active clinical practice in his field of licensure, or to its instruction in an accredited university.

(E) As otherwise provided in these rules.

AMENDMENT 5

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

The Constitution of the United States

AMENDMENT 6

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

AMENDMENT 8

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

AMENDMENT 14

Section 1

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

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

O Const I § 2 Where political power vested; special privileges

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

HISTORY: 1851 constitutional convention, adopted eff. 9-1-1851

O Const I § 9 Bailable offenses; bail, fine and punishment

All persons shall be bailable by sufficient sureties, except for capital offences where the proof is evident, or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

O Const I § 10 Rights of criminal defendants

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

HISTORY: 1912 constitutional convention, am. eff. 1-1-13
1851 constitutional convention, adopted eff. 9-1-1851

Constitution of the State of Ohio

O Const I § 16 Redress in courts

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

803(8). State v Sargent, No. CA83-06-054 (12th Dist Ct App, Clermont, 5-31-84).

A notation in an intoxilyzer log book made by a police officer is admissible as a public record, notwithstanding the exception for matters observed by a police officer, as such exception applies to subjective on-the-scene investigations, not to administrative, objective observations. State v Boyd, No. L-83-388 (6th Dist Ct App, Lucas, 3-16-84), affirmed by 16 OS(3d) 7, 16 OBR 259, 475 NE(2d) 477 (1985).

A properly authenticated computer printout from the law enforcement automated data system is admissible as a public record or report pursuant to Evid R 803(8)(a). State v Cooper, No. 43765 (8th Dist Ct App, Cuyahoga, 3-18-82).

Fact that a police investigative report contains conclusions and hearsay only goes to its weight based on its trustworthiness, not its admissibility, as regards whether it is more or less probative than testimony under oath or affidavits. In re Grow (Ohio Ct.Cl. 1983) 7 Ohio Misc.2d 26, 454 N.E.2d 618, 7 O.B.R. 175.

Evid R 804

Hearsay exceptions; declarant unavailable

(A) Definition of unavailability

"Unavailability as a witness" includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of the declarant's statement;

(4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(B) Hearsay exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

(3) Statement against interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (a) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or (b) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Statement by a deceased or incompetent person. The statement was made by a decedent or a mentally incompetent person, where (a) the estate or personal representative of the decedent's estate or the guardian or trustee of the incompetent person is a party, and (b) the statement was made before the death or the development of the incompetency, and (c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.

HISTORY: Adopted eff. 7-1-80; amended eff. 7-1-81[4], 7-1-93

[4]As originally adopted, Rule 804(B)(1) excluded preliminary hearing testimony from the former testimony exception. See 62 OS(2d) xlvii (1980). The exclusion of preliminary hearing testimony, Crim R 5(B), was based upon the Ohio Supreme Court's decision in *State v Roberts*, 55 OS(2d) 191, 378 NE(2d) 492 (1978). The Court in *Roberts* held that admitting preliminary hearing testimony in a criminal trial violated the accused's Sixth Amendment right of confrontation. See also State v Smith, 58 OS(2d) 344, 390 NE(2d) 778 (1979), vacated, 448 US 902, 100 SCt 3041, 65 LEd(2d) 1132 (1980). Just days before the Rules of Evidence became effective, the *Roberts* decision was reversed by the