

In The Supreme Court Of Ohio

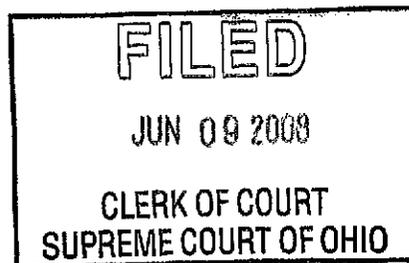
State Of Ohio, :
Appellee, :
-vs- : Case No. 2007-1741
Edward Lang, :
Appellant. : **Death Penalty Case**

On Appeal From the Court of Common Pleas
Stark County, Ohio
Case No. 2006 CR 1824A

Merit Brief of Appellant Edward Lang

John D. Ferrero - 0018590
Stark County Prosecutor

Mark Caldwell - 0030663
Assistant Prosecuting Attorney



Stark County Office Building
Stark County Prosecutor's Office
110 Central Plaza South, Suite 510
Canton, Ohio 44702-1413

Counsel For Appellee

Office of the
Ohio Public Defender

Joseph E. Wilhelm - 0055407
Chief Counsel,
Death Penalty Division
Counsel of Record

Kelly L. Culshaw - 0066394
Supervisor, Death Penalty Division

Benjamin D. Zober - 0079118
Assistant State Public Defender

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215-2998
(614)466-5394
(614)644-0708 (FAX)

Counsel For Appellant

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Statement of the Case and Facts

1. A robbery gone bad

On October 22, 2006, Edward Lang went to Tamia Horton's house. (Vol. 4, T.p. 875.) There, he spoke with his friend Antonio Walker. (Id. at 876.) Walker needed money and suggested that they rob a drug dealer he knew named Clyde (aka Jaron Burditte). (Id. at 901.) Walker knew Burditte from 2004 when they were in a halfway house together. (Id. at 876.) The plan was to arrange a meeting with Burditte. (Id. at 875.) Under the guise of a drug deal, they would rob Burditte, who Walker knew to carry a large amount of cash. (Id.) Walker had Lang call Burditte to set up a buy. (Id. at 877.)

The two went to the spot where they had arranged to meet Burditte. (Id. at 878-79.) While they waited, Lang fiddled with his gun; he tried to chamber a round and instead caused it to fall on the ground. (Id. at 883.) Walker picked it up and cleaned his own fingerprints off of it. (Id.)

1.1 Two stories diverge

Who was the actual shooter was the critical element in determining the outcome in this case. Both men recounted that Burditte drove past them but then their stories separate. Walker testified that Lang had to call him to get him to come back, while Lang said it was Walker who made the call. (Id. at 882, Dkt. 346.) The car pulled up and, according to Walker's testimony, only Lang got into the car. (Id. at 884.) Lang, in his statement to the police, said that both of them got into the car, noting that he used his sleeve to avoid leaving fingerprints. (Dkt. 346.) Burditte was not alone, his girlfriend Marnell Cheek was inside as well. Almost immediately after pulling up, both Burditte and Cheek were shot. The car rolled across the street. Donald

McNatt heard a noise and saw the car on the lawn and called 911. (Vol. 3, T.p. 830-31.) Lang told the police that Walker shot the other occupants of the car. (Id.)

1.2 The investigation

The police came and questioned Walker about the night of the murders. (Vol. 4, T.p. 889.) He told the police he did not know anything about them. (Id.) A short time later, he went to the police and gave a statement to Sgt. Kandel. (Id. at 891.) His story was similar to Lang's until Burditte arrived. He claimed that only Lang got in the car and that moments later, he heard shots from within the car. (Dkt. 346.) He claims he ran from the scene and met up with Lang at Tamia Horton's house. (Id.) He also related that Lang went upstairs to throw up and commented, "every time I do this, this same thing happens." (Id.) After he finished his statement, Walker was arrested. (Vol. 4, T.p. 891.) Walker struck a deal with the State and avoided capital charges. He pleaded guilty to complicity for aggravated murder and the accompanying gun specifications, and was sentenced to 18 to life. (Id. at 892.) John Dittmore of the City of Canton Police Department executed a warrant on Lang and found a gun and shells in the back of his car. (Id. at 956, 960.)

John Gabbard searched Burditte's car. Inside the car he found a slug, a shell, and three cell phones. (Id. at 981.) One of the phones had calls on it around the time of the murder and earlier that evening. (Id. at 983-84.) The police found the phone was used to call Teddy Seery before and after the murders. (Id. at 990.) This led the police to interview Seery.

Sergeant Kandel went to see Seery. (Id. at 931.) Initially, he denied knowing anything, but eventually gave the police a statement. (Id. at 931, 934.) In his statement, he said he learned about the murders from his friend Kevin, who knew that there had been a murder, but not how many. (Id. at 924.) A short time later Lang came over. (Id. at 926.) Lang lived in the

neighborhood where the murders took place and asked Seery what he had heard. (Id. at 927.) In his statement to police, Seery did not say that Lang confessed, but at trial, he testified that Lang then confessed. (Id. at 936.)

Lang was charged with two counts of O.R.C. § 2903.01(B) aggravated murder, each with their attached specifications, O.R.C. § 2941.145 firearm specification, O.R.C. § 2929.04(A)(5) course of conduct, O.R.C. § 2929.04(A)(7) felony murder, and one count of O.R.C. § 2911.01(A)(1) aggravated burglary with an O.R.C. § 2941.145 firearm specification. (Dkt. 3.) Anthony Koukoutas and Frank Beane were assigned as his attorneys. (Dkt. 45.)

2. Trial – sparse physical evidence

The State’s case-in chief began on July 9, 2007. At trial, Michael Short testified about the ballistics and firearms evidence. (Vol. 4, T.p. 1030.) Half of the fingerprints in the car were Burditte’s. (Id. at 1042.) None of the remaining prints belonged to Lang. (Id.) The police recovered a gun but it did not have any of Lang’s prints on it. (Id. at 1062.) Unbeknownst to the grand jury, Walker’s clothing was never tested. (Id. at 1102.) Nor did it learn that it took several months before the State tested Lang’s clothing. (Id. at 1100.) The tests performed on Lang’s pants did not reveal any gunshot residue. (Id. at 1096.)

Michele Foster testified about the DNA evidence. (Id. at 1107.) DNA was collected from Lang, Walker, Burditte, and Check. (Id. at 1112.) Although Lang’s coat had some soiling on it, there was no blood. (Id. at 1121.) Lang’s white shirt had no blood on it. (Id. at 1122.) There was blood on his red shirt, but it was his own blood. (Id. at 1122, 1124.) The DNA testing performed on the pistol concluded that Walker was not the major source of DNA. (Id. at 1129.) She could not exclude Lang as a possible minor source of the DNA. (Id.) She could not however, say that Lang was, to a “reasonable degree of scientific certainty,” the source of DNA

on the gun. (Id.) None of the individuals involved in the case could be excluded from the smaller DNA sample. (Id. at 1139.) The amount of DNA found was too small for submission to the FBI's CODIS (Combined DNA Index System) database. (Id. at 1135.) Tests were also performed on a towel and shoes recovered from Lang's car. (Id. at 1118-1119.) No traces of blood were found on these items. (Id.)

During the trial, it came to light that one of the jurors knew Cheek but lied about it during voir dire. The juror's mother was married to Cheek's brother. (Vol. 4, T.p. 940.) The juror had attended Cheek's funeral and viewed the body. (Id. at 944, 946.) Rather than immediately remove the juror, she was allowed to remain empanelled for Walker and Seery's testimony. (Id. at 866.) All parties agreed to release the juror. (Id. at 949.) The judge, counsel, and prosecutors briefly questioned the juror, who denied having spoken with any other jurors about the case.

The presentation of evidence concluded and each side gave closing arguments. The prosecution argued that Lang could be guilty as an aider and abetter. (Vol. 5, T.p. 1264, 1297-98.) In its jury instructions, the court instructed the jury on aider and abetter as well. (Id. at 1312, 1314-15, 1330, 1332-33.) The jury was also told to view Walker's testimony with grave suspicion. (Id. at 1310-12.) On July 14, 2007, the jury returned a verdict of guilty on all counts.

3. Mitigation – Compelling but unsupported

The penalty phase began on July 17, 2007. The State put on two witnesses, Lashonda Burditte and Rashu Jeffries. (Mit. T.p. 34, 39.) The defense offered only unsupported mitigation. Two witnesses testified on Lang's behalf but they did not present any documents, medical reports, or other evidence. Lang's half-sister and mother testified about his turbulent family life. His mother testified how Lang's father kidnapped and held him for two years when he was ten. (Id. at 58.) Both witnesses testified to, but did not provide any other evidence of

Lang's mental state. (Id. at 52, 63, 65.) The State pointed out that the evidence was highly dubious, biased, and that Lang's mother and sister had ample reason to lie. (Id. at 102.) He contended that without any proof, it should be dismissed as mere speculation. (Id.) Defense counsel argued that Lang's horrible childhood was a mitigating factor. (Id. at 96.) Counsel also argued that his youth was mitigating. (Id.) Defense counsel hired Dr. Smalldon as their mitigation expert but did not have him testify. Defense counsel identified their mitigation specialist who assisted them in the trial phase by the wrong name, referring to him as Krantz, instead of Crates. (Id. at 85.)

4. A life spent witnessing violence

Seeing two people shot in the back of that car was not the first time Lang witnessed violence. He had a horrendous and traumatic childhood. His life was filled with painful abuse and neglect. Lang's parents met when his father, Edward Lang Sr., was his mother Tracy Carter's landlord. (Mit. T.p. 56.) She was a single parent and could not pay her rent. (Id.) Edward Sr. traded her a place to live for sex. (Id.) Their relationship was beyond tempestuous. Edward Sr. was a drug addict and when he was high, he would beat her. (Id. at 56-57.) He hit her even while she was pregnant. (Id. at 57.) He beat her, stabbed her, and even set their apartment on fire. (Id.) Eventually, he was sent to prison. (Id.) He also had a history of child molestation and served time for it. (Id.)

Knowing what Edward Sr. was capable of, Carter sheltered her son from his father for as long as she could. (Id.) But because she never got full custody, he was still entitled to see his son. (Id. at 58.) After Lang graduated from elementary school, he went to visit his father for two weeks. (Id.) At the end of two weeks, Edward Sr. called Carter and told her that his car was broken, and he would not be able to return his son. (Id. at 58-59.) A week later, Carter

called and discovered that Edward Sr. had disconnected the phone. (Id. at 59.) She tried to find her son and even attempted to involve local law enforcement. (Id.) But he was with his father and there was no formal custody arrangement. (Id.) The police would not entertain charges of kidnapping. (Id.)

Two years later, Carter finally managed to track down her son. (Id. at 61.) Employing cloak and dagger-like subterfuge, she managed to find Lang and his father a few days after they moved to a new location. (Id.) The boy that she found there was a shadow of the son she had last seen two years earlier. (Id. at 62.) He was undernourished and emaciated; he weighed less than 90 pounds. (Id. at 62, 73.) Perhaps his most recognizable feature was his clothing. He was wearing the same clothes and shoes he left in, two years earlier. (Id. at 62.) Despite the cold winter conditions, he had no coat or warm clothes. (Id.) When Carter took him to buy new clothes she discovered that his body bore the marks of physical abuse. (Id. at 62–63.) He had bruises, a gash on his hand, and the unmistakable mark of a cigarette on his back, where someone used it as an ashtray. (Id. at 63.)

4.1 Freedom - happy at first

Once Carter got her son home, he seemed happy. (Id. at 51.) He had never been completely normal; even before his abduction, his behavior alerted his mother enough to have him taken to counseling. (Id. at 63.) The doctors diagnosed him as being depressed and prescribed various medications. (Id. at 64.) After he returned, the relief of freedom wore off and his mood soon changed. (Id. at 51-52.) He became withdrawn and quiet. (Id. at 52, 65.) He kept to himself and refused to discuss the ordeal or any of what had happened to him in his two years as a captive. (Id. at 65-66.) For the next several years, Lang was in and out of treatment centers. (Id. at 17, 66.) He made 28 visits to Sheppard Pratt, a psychiatric facility, usually

staying two weeks at a time. (Id. at 66-67.) Twice he spent 90 days at the Bridges Program. (Id.) He spent a full year at Woodburn Respiratory Treatment Center. (Id. at 67.) Even with all of this treatment, it was still inadequate to treat his needs. (Id.)

Lang did not manage to finish high school. (Id. at 75.) He dropped out in the 11th grade. (Id.) Shortly thereafter, he moved to out of his mother's house to care for his daughter, Kanela. (Id. at 75-76.) A short time later he moved to Canton. (Id. at 76.)

5. Sentence

On July 18, 2007, the jury recommended that Lang be sentenced to death for Cheek's murder. At a final sentencing held on July 25, 2007, the court sentenced Edward Lang to death. On September 20, 2007, Lang filed a notice of appeal. He is now before this Court on his direct appeal as of right.

Proposition of Law No. 1

A defendant's right to due process is violated when a juror who is related one of the victims, and has a prejudice and bias, is seated on the jury. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 5, 10.

1. Introduction

Juror 386 lied to get on the jury and continued to lie until she was excused, four witnesses into the trial. Juror 386's mother was married to Marnell Cheek's brother; Cheek was her step-aunt. She managed to get herself empanelled on Lang's jury by lying to everyone in the courtroom. Allowing her to serve on this case tainted the jury and caused unfair prejudice to Edward Lang.

It was impossible for Juror 386 to be impartial; she was too biased. Even if she had been named to the jury by honest mistake, it would have been improper. Her presence on the jury, even for a short time, made it impossible for Edward Lang to have an unbiased jury and a fair trial. That she applied insidious ruses to dupe a court of law and subvert the rule of law taints the entire proceeding and the jury even more.

Under the Sixth and Fourteenth Amendments, a defendant has a right to an unbiased and impartial jury. Morgan v. Illinois, 504 U.S. 719, 727 (1992). The United States Supreme Court has consistently affirmed the right for a careful, searching voir dire in capital cases. Id. at 730-34 (citing Ham v. South Carolina, 409 U.S. 524 (1973)). "Part of the guarantee of a defendant's rights to an impartial jury is an adequate voir dire to identify unqualified jurors." Morgan, 504 U.S. at 730. Allowing this juror to serve on the jury violated Lang's constitutional rights and denied him due process of law. The "presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." United States v. Gonzalez, 214 F.3d 1109, 1111 (9th Cir. 2000) (citations omitted); Hughes v. United States, 258 F.3d 453, 463 (6th

Cir. 2001). Allowing someone with her prejudice and insidious designs to serve on the jury, even for a moment, is an affront to the presumption of innocence, the court, the defendant, and the Constitution. Morgan, 504 U.S. at 730.

2. Voir Dire

Prior to trial, the prospective jurors filled out pre-trial publicity questionnaires. The first question asked jurors to indicate what “they may know of your own personal knowledge, concerning the shooting deaths of Jaron Burditte and Marnell Cheek, which occurred on October 22, 2006, on Sahara Avenue Northeast in Canton, Ohio.” (Dkt. 352.) Juror 386 answered this question but only indicated what she had read in the newspaper. She wrote, “[w]ell, the newspaper stated that both of them were shot execution style in the back of their heads over drugs.” (Id.) The next question asked about the substance of any conversations she may have had concerning the deaths. She responded that she had “none I was very saddened.” (Id.) For the remaining questions, she indicated that she had not learned any other information or had discussions with family or relatives and knew nothing else about the charges against Lang. (Id.)

During voir dire, the court inquired as to the pre-trial publicity as well. Other jurors indicated that they had read in the newspapers that the victims were shot in a car, possibly over drugs. Juror 386 indicated that she had heard “pretty much the same thing” and that she could put it out of her mind. (Vol. 1, T.p. 145.)

3. Problem brought to light

After the trial began and two witnesses had already testified, it came to light that Juror 386 knew Cheek personally. (Vol. 4, T.p. 865.) Cheek’s father approached the prosecutor and told him that Juror 386’s mother is married to Cheek’s brother. (Id. at 864-65.) Defense counsel also noted that Lang saw when Juror 386 entered the courtroom, she “looked out into the

audience, smiled and nodded her head.” (Id. at 864.) At the time, the attorneys were not certain of the relationship between the juror and her step-father, speculating that he may have even been her natural father. (Id. at 865.) The judge decided to question the juror at the next break, rather than before testimony began that day. (Id.)

After Walker and Seery testified, the court approached Juror 386. The juror admitted that she knew Cheek. (Id. at 940.) She also confessed that she did not tell the court before. (Id.) She claimed not to have spoken to her mother or anybody at all about the case. (Id. at 941.) She admitted that she knew several people in the back of the courtroom, including Hassie and Timmy Pryor. (Id.) She also admitted that she knew Marnell. (Id. at 942.) She also confessed that she attended Cheek’s funeral, where there was a viewing of her body. (Id. at 943-44.) She said however, that she had not talked to her mother or other relatives about the case before coming to court. (Id. at 944.) She said that nobody in the family talked about the case. (Id.) The judge noticed that Juror 386 had been “very friendly toward” Juror 387, seated next to her, but Juror 386 said that she had not talked to her at all about the case. (Id.) The judge also asked if she had spoken with any other jurors about the case and she said no. (Id. at 944-45.)

Defense counsel also questioned her. Specifically, they asked her if she learned how Cheek died when she talked with her relatives. (Id. at 945.) Juror 386 stuck to her earlier statement that she only knew “what I read in the paper.” (Id.) But the very next thing that she said was, “I don’t know how she died.” (Id.) She was still lying even after she got caught. She also claimed that no one at the viewing or in her family discussed how Cheek died. (Id.)

At that point all of the parties agreed to excuse the juror and the court dismissed her. (Id. at 948.) The judge asked her again whether she had talked to any of the other jurors and she answered in the negative. (Id. at 951.) The rest of the jury returned to the courtroom and the

judge informed them that Juror 386 may have had a personal relationship with someone involved in the case. (Id. at 953.) The judge then asked the jurors whether she had discussed the case with any of them. (Id.) None spoke up and he took the jurors' silence as indicating she did not. (Id.) The trial then resumed as normal.

4. Failure to immediately remove the juror

The court should have removed Juror 386 immediately, rather than letting her sit on the jury during the testimony of two more witnesses. She had no interest in impartiality. Juror 386 hid her bias because she wanted the jury to get retribution against Lang, who killed a relative. Allowing her to remain on the jury, even for a few witnesses, in no way served justice, and further tainted the proceeding.

The court did not immediately question or strike Juror 386 after learning about her relationship with Cheek. The State presented two more witnesses, including the co-defendant. The first witness that Juror 386 heard was Lang's co-defendant, Antonio Walker. (Id. at 868.) She also remained seated for Teddy Seery's testimony. (Id. at 921.) After Seery testified, the attorneys and the judge spoke with Juror 386 outside of the presence of the rest of the jury. (Id. at 940.)

The judge refused defense counsel's request that the juror be questioned and dismissed before the start of testimony that day. He felt there was "no risk" and that the jury was not discussing the case. (Id. at 866.) The court should not have let Juror 386 continue to serve on the jury. If she swayed the jury, it heard Walker and Seery's testimony with her influence in mind. The longer Juror 386 sat on the jury, and any influence she had over the rest of the panel went unaddressed, the greater the prejudice. She also remained empanelled, meaning that Juror

515, the alternate pressed into service. This deprived Lang of having all of his jurors fully engaged whenever possible.

5. No voir dire of the jury

Once Juror 386's lies came to light, the court should have conducted an individual voir dire of the remaining jurors. The court never held a proper hearing. Juror 386's participation in the trial carried with it prejudice against the defendant. "[I]f just one juror receives prejudicial off-the-record information the prejudicial effect spills over and is viewed as having tainted all jurors." United States v. Gaffney, 676 F. Supp. 1544, 1556 (M.D.Fla. 1987). See United States v. Delaney, 732 F.2d 639, 643 (8th Cir. 1984); United States v. Rattenni, 480 F.2d 195, 198 (2d Cir. 1973). "In cases involving outside influences on jurors, trial courts are granted broad discretion in dealing with the contact and determining whether to declare a mistrial or to replace an affected juror." State v. Phillips, 74 Ohio St. 3d 72, 89, 656 N.E.2d 643, 661 (1995). To determine the depth of the prejudice from her presence, the court is required to hold a hearing. United States v. Rugiero, 20 F.3d 1387 (6th Cir. 1994). The standard for these hearings was established in Remmer v. United States, 347 U.S. 227 (1954). At the hearing, the court must "determine the circumstances surrounding the incident and its effect on the jury." Id. at 228.

While the court spoke with Juror 386, it never investigated the rest jury to determine the extent of her prejudice. The judge did not perform a thorough, searching voir dire of the remaining jurors, once this information came to light. The full extent of the court's inquiry was questioning the jury as to whether she had spoken with them. The judge asked the jury whether the juror had discussed the case with any of them. (Vol. 4, T.p. 953.) Nobody immediately spoke up and the judge took their silence as an indication that the juror had not discussed the case with them. (Id.) Once the court realized that it could not believe anything that Juror 386

said, it should not have taken the jury's token agreement as true, either. The court needed to adopt a heightened sense of vigilance in order to identify and rectify any lingering prejudice.

It was an error for the court to not hold a full Remmer hearing. It was imperative that the court determine the depth of the juror's prejudice and the effect it had on the rest of the jury. Remmer, 347 U.S. at 228. In particular, Juror 387 was noticeably friendly with Juror 386. (Vol. 4, T.p. 944.) The court should have started its investigation there and determined what influence, if any, Juror 386 had on her fellow juror. The court should have then questioned each other juror individually. This was the only way to determine specifically what, if anything, Juror 386 said to them and the effect it may have had on their impartiality and fairness. Juror 386 did not even answer direct questions truthfully; she evaded the truth at every turn. Her caginess and prevarications should have given the court reason to view with suspicion, anything the jury said. Although the court took note of Juror 386's friendship with Juror 387, it had no way of knowing who else Juror 386 interacted with during breaks or even out of court. Also, the court needed to conduct an individual voir dire because jurors may have been concerned about being in trouble if they had spoken to Juror 386 about the case. The judge needed to recognize the possible reluctance to speak up. This is part of the reason a thorough, searching voir dire is required.

It is entirely possible that Juror 386 influenced other jurors. Because of her utter lack of directness and honesty, she would not have told the court. Denying that she spoke with other jurors would have been just one more lie. The court should have been suspicious of the jury's answers until it adequately determined that those answers were honest. A full hearing, consistent with Remmer, would have provided a more comprehensive investigation of the jury. Because it only takes one life to save a capital defendant, prejudicing even one juror could be the difference

between life and death, especially if that prejudice falls on the one juror who would have argued for life.

6. Risk of bias requires reversal

Lang is entitled to a new trial, the verdict cannot stand. Had Juror 386 answered honestly during voir dire, the defense would have immediately challenged her for cause and certainly dismissed. Lang is entitled to a new trial because honest answers from that juror would have given rise to a challenge for cause. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984). “Mistrials need be declared only when the ends of justice so require and a fair trial is no longer possible. State v. Franklin, 62 Ohio St. 3d 118, 127, 580 N.E.2d 1, 9 (1991), (citing Illinois v. Somerville, 410 U.S. 458, 462-63 (1973); Arizona v. Washington, 434 U.S. 497, 505-06 (1978)).

In this case, a juror had personal knowledge of the victims. “When a jury is composed, as this petitioner’s was, of people who are personally familiar with the consequences of a defendant’s crime, it cannot perform this function in an impartial manner.” Brecheen v. Oklahoma, 485 U.S. 909, 912 (1988). The Brecheen Court went on to equate such a jury composition with unconstitutional victim-impact statements. Id. at 912-13. If merely hearing testimony about an individual, such as victim-impact statements, can rise to a level that unfairly taints the proceeding, then in a trial with a jury composed of jurors who knew the victim, the prejudice is simply too great to overcome. Because the court did not declare a mistrial, Lang’s verdict cannot stand and must be reversed.

Juror 386 did not simply have an opinion about the case; one of the victims was her relative. She had more than an opinion, she attended the viewing of the body. (Vol. 4, T.p. 944.) During deliberation, the jurors were sequestered and during the trial, they were isolated from the

general public. The judge admonished them not to discuss the case with anyone and not to watch, read, or listen to any media coverage. The judge had the power to sequester the jurors for the duration of the trial. Parker v. State, 18 Ohio St. 88, 90, 1868 LEXIS 55, 4-5 (1868); State v. Osborne, 49 Ohio St. 2d 135, 141-42, 359 N.E.2d 78, 84 (1976) judgment vacated on other grounds, Osborne v. Ohio, 438 U.S. 911 (1978), State v. Jenkins, 15 Ohio St. 3d 164, 233, 473 N.E.2d 264, 322 (1984). Sequestration would have prevented outside influences from reaching the jury. Had a member of one of the victims' families contacted the jurors or been in their presence, it would have been grounds for a mistrial. Having a family member on the jury had the same effect; her presence was equal to that of someone contacting the jury outside of trial. There is a great risk that Juror 386 lied to the get on the jury because she wanted retribution. Based on the facts, the most reasonable inference is that she had a clear motive and lied for this purpose.

Even without Juror 386 staying on the panel, the jury remained tainted. Enough so, that it obliterates any reliability and confidence in the verdict. Once her lies came to light, it became apparent that she was wholly unbelievable. The court should not have taken seriously any of her assurances, especially that she had not spoken to other jurors. Had she not lied to the judge, lied to the prosecutors, lied to defense counsel, or lied to the defendant, it might have been possible to believe that she did not spread her malice to the other jurors. She clearly calculated her ruse. It cannot be trusted that it ended with her dismissal. She had the opportunity to infect other jurors and made a fair trial impossible. Having heard her plea and taken up her malevolent crusade, they too, would have reason to lie. There is no way to know whose ear she bent in private, whose will she wrangled outside of the court's hearing. Her friendship with Juror 387 did not escape detection. More jurors may have joined her cause and adopted her vehemence. The entire jury is suspect, having potentially acquired her prejudice. Her mark was too great, an

indelible stain that colored all of the remaining jurors with bias and partiality. Without having conducted a Remmer hearing, in particular, this Court must discount the lip service that the jurors paid to the judge's cursory examination. When such a shadow is cast over a criminal proceeding, propriety demands a new trial "to prevent the defeat of the ends of public justice." Simmons v. United States, 142 U.S. 148, 154 (1891). If the court did not grant Lang a new trial at the moment it discovered Juror 386's duplicity, this Court must grant one now.

7. Conclusion

Juror 386 should never have served in this case. She lied to the court in an attempt to circumvent the judicial system and exact her own vengeance. Not only did she have personal knowledge of the events that constituted the crime, but she had a personal relationship with one of the victims. Even without these facts coming to light, they should not have seated her on the jury. Her answers to the pretrial publicity questionnaire indicated that she had knowledge and a bias in this case. Her knowledge was undeniably greater than she let on during voir dire and even after the court confronted her. But once she was seated, it was impossible for the defendant to have a fair trial, regardless of her nefarious scheme. Lang was only sentenced to death for Cheek's murder, a verdict inconsistent with the identical facts in Burditte's case. (See Proposition of Law No. 11.) Considering the dearth of reasons that could account for the inconsistent verdicts, it is only logical to connect the relationship between Cheek and Juror 386 as a possible explanation.

A defendant is entitled to an unbiased jury. By serving on his jury, even for a short time, Juror 386 deprived Lang of a fair trial. This liar thumbed her nose at the jurisprudence and procedures that support the very foundations of our judicial system. The judge should have given Lang a new trial as soon as he discovered the lying, biased juror. At the very least, the

court should have held a hearing, consistent with Remmer, to determine the scope of the effect on the jury. Because there was no hearing, it is impossible to determine the extent of her prejudice amongst the remaining jurors. This Court must vacate Lang's convictions and remand this case for a new trial with an impartial jury.

Proposition of Law No. 2

Expert scientific testimony that is not established to a reasonable degree of scientific certainty is unreliable and inadmissible. Admission of evidence that does not meet this standard violates a defendant's rights to equal protection, due process, and his rights to confrontation and to present a defense. U.S. Const. amends. V, XIV. It also violates Ohio R. Evid. 401-403.

1. Introduction

This Court should re-visit its decision in State v. D'Ambrosio, 67 Ohio St. 3d 185, 616 N.E.2d 909 (1993). Criminal defendants are being convicted under a lower standard of admissibility than is used in civil litigation. When life or liberty is at stake, the burden should not be lowered.

Admission of unreliable scientific testimony in this case violated Lang's rights to equal protection, due process, and his rights to confrontation and to present a defense. U.S. Const. amends. V, XIV. It also violated Ohio R. Evid. 401-403. Lang's conviction as the principal offender must be reversed and this case remanded for a new trial.

2. Factual background

Michele Foster, an employee of the Canton Stark County Crime Lab, testified regarding various DNA tests conducted on evidence collected in the Burditte/Cheek murder investigations. (See generally, Vol. 4, T.p. 1107 et seq.) Relevant to this claim is Foster's testimony regarding DNA retrieved from the gun used to kill Burditte and Cheek.

Foster testified that she found low levels of DNA from two individuals on the gun. (Id. at 1128) Foster testified that she was able to exclude Antonio Walker as the major source of the DNA. (Id. at 1129) However, Foster testified that she could not exclude Lang as a possible source of the minor DNA found on the gun. (Id.) But, Foster indicated that she could not "say

to a reasonable degree of scientific certainty that” Lang was the source of the DNA on the gun. (Id.)

Foster indicated that there was only a one in 3,461 chance of finding the DNA profile. (Id.) On cross, Foster testified that her testing results could not be submitted to CODIS because the figures were so small (Combined DNA Index System). (Id. at 1135) Moreover, to offer testimony that Lang’s DNA was present on the gun to a reasonable degree of scientific certainty, “that statistic has to be more than 1 in 280 million.” (Id.)

3. Standard of Review

“[W]hen constitutionally inadmissible evidence has been admitted, a reversal is required where ‘there is a reasonable possibility that the evidence complained of might have contributed to the conviction.’” State v. Cowans, 10 Ohio St. 2d 96, 105, 227 N.E.2d 201, 207 (1967) (citing Fahy v. Connecticut, 375 U.S. 85 (1963); Chapman v. California, 386 U.S. 18 (1967)). This is true despite the overwhelming nature of any remaining admissible evidence. See id.

4. Argument

4.1 Application of Ohio Rule of Evidence 702 violates the Equal Protection Clause

Ohio Rule 702 controls the admission of expert testimony. It provides for testimony by an expert where three requirements are met, which are:

- (A) The witness’ testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
- (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
- (C) The witness’ testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

- (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
- (2) The design of the procedure, test, or experiment reliably implements the theory;
- (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

In deciding whether to admit expert testimony, this Court “must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” Daubert v. Merrell Dow Pharms., 509 U.S. 579, 589 (1993). See also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999); Terry v. Caputo, 115 Ohio St. 3d 351, 875 N.E.2d 72 (2007) (noting court adopted this gatekeeping function for Ohio trial judges in Miller v. Bike Ath. Co., 80 Ohio St. 3d 607, 687 N.E.2d 735 (1998)).

Despite the clarity of the language, Rule 702 is applied differently in Ohio when the court is dealing with experts in the capital/criminal arena versus the civil arena. In the civil arena, an expert’s opinion must be “more than mere possibility or speculation.” Butler v. Minton, 2006 Ohio App. LEXIS 4710 at *8 (Erie Ct. App. Sept. 15, 2006) (citing Ward v. Herr Foods, Inc., No. 456, 1990 Ohio App. LEXIS 3429 (Vinton Ct. App. Aug. 16, 1990); Roberts v. Mutual Mfg. & Supply Co., 16 Ohio App. 3d 324, 475 N.E.2d 797 (1984). “[E]xpert opinion regarding a causative event, including alternative causes, must be expressed in terms of probability irrespective of whether the proponent of the evidence bears the burden of persuasion with respect to the issue.” Stinson v. England, 69 Ohio St. 3d 451, 456, 633 N.E.2d 532, 538 (1994) (internal citation omitted). And, an expert cannot engage “in speculation or conjecture with respect to possible causes[.]” Id. at 457, 633 N.E.2d at 538.

In the criminal context, as early as 1988, this Court applied that same standard. State v. Benner, 40 Ohio St. 3d 301, 313-14, 533 N.E.2d 701, 714 (1988). Since D'Ambrosio, however, a lower standard has been repeatedly applied. This Court believes “the better practice, especially in criminal cases, is to let experts testify in terms of possibility.” D'Ambrosio, 67 Ohio St. 3d at 191, 616 N.E.2d at 915 (internal citations omitted).

The Equal Protection Clause of the Fourteenth Amendment protects against state action that impinges upon fundamental rights. See Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). This protection extends to the right to a fair trial, which is a fundamental right guaranteed to all criminal defendants. See Estelle v. Williams, 425 U.S. 501, 503 (1976) (citing Drope v. Missouri, 420 U.S. 162 (1975)). Encompassed within the guarantee of a fair trial is the presentation of relevant, reliable evidence.

When state action interferes with a fundamental right, this Court evaluates an equal protection challenge to that action under the strict scrutiny standard of review. San Antonio School District v. Rodriguez, 411 U.S. 1, 16 (1973). State action that “significantly interferes with the exercise of a fundamental right” must be “supported by sufficiently important state interests and [be] closely tailored to effectuate only those interests.” Zablocki v. Redhail, 434 U.S. 374, 388 (1978). To be “sufficiently important” a state interest must be “compelling.” See Shapiro v. Thompson, 394 U.S. 618, 634 (1969) *rev'd in part* Edelman v. Jordan, 415 U.S. 651 (1974). Anything less violates the Equal Protection Clause. See Zablocki, 434 U.S. at 388-91.

In Yick Wo v. Hopkins, 118 U.S. 356 (1886), the United States Supreme Court directed the release of the petitioners, finding that their detention was based on the discriminatory application of a neutral law in violation of the Equal Protection Clause. Id. at 374. In Yick Wo, legislation was enacted permitting a laundry business to be conducted in buildings made only of

certain materials, but the legislation also provided for consent to be given to operate such a business at sites not constructed of those same materials. Yick Wo complied with every requisite to ensure the protection of property from fire and to prevent injury to the public. Id. at 374. It was solely the will of the supervisors charged with administering the legislation that kept Yick Wo from carrying on his laundry business. Id. Supervisors withheld consent from Yick Wo and two hundred other Chinese subjects to operate a laundry, but gave consent to eighty others who were not Chinese subjects. Id. Despite neutral legislation, the discriminatory administration of the law denied equal protection. Id.

Over one-hundred years after Yick Wo, in Harris v. Alabama, 513 U.S. 504 (1995), the Supreme Court rejected an Eighth Amendment challenge to an Alabama law that vested sentencing authority in capital cases with the trial court, but required that the trial court consider an advisory jury verdict. In so doing, the Court noted disparities in the weight given to jury verdicts by the various trial courts, but indicated that Harris had not raised an Equal Protection challenge. Id. at 514-15. Harris should have presented an equal protection challenge to the United States Supreme Court.

Harris could have crafted an equal protection challenge reminiscent of Yick Wo, based on interference with a capital defendant's fundamental right to a fair trial, rather than racial discrimination. While trial courts were directed to weigh the jury's advisory verdict, the weight that was accorded to those verdicts varied immensely without a reasonable explanation. Harris, 513 U.S. at 514. The Alabama statute was neutral on its face, but like Yick Wo, the trial courts charged with administering the statute applied it "with a mind so unequal and oppressive as to amount to a practical denial by the state of ... equal protection of the laws[.]" Yick Wo, 118 U.S. at 373.

Neutral legislation violates the Equal Protection Clause when that legislation is applied in an unequal and oppressive manner. Id. at 373. The Constitution prohibits a law that is fair on its face, but administered “with an unequal hand.” Id. at 373-74. Ohio R. Evid. 702 is neutral on its face, delineating the criterion necessary to offer expert opinions in court. But, like Yick Wo, this Court has applied that neutral rule with an uneven hand. Id. This Court has lowered the standard of admissibility, and the reliability of evidence when lives are at stake. It is unfair and unequal to hold evidence to a higher standard when only money is at stake.

It is beyond question that the courts are state actors. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624 (1991). Courts are not advocates for a particular penalty, or a particular result. Instead, they are the neutral arbiters. Lakeside v. Oregon, 435 U.S. 333, 341-42 (1978) (“It is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial. ‘[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.’ Quercia v. United States, 289 U.S. 466, 469 (1933). Geders v. United States, 425 U.S. 80, 86 (1976)”). Like Yick Wo and Harris, applying a lesser-burden in the criminal context, which impermissibly permits the admission of unreliable evidence, renders neutral legislation unequal.

The evidence at issue here is so unreliable that the FBI will not allow it to be included in its CODIS database. The Ohio rules of evidence state that such evidence to an equally high standard. Ohio Rule of Evidence 702 was designed to ensure that, where an expert is permitted to testify, his or her opinion will be reliable. In its role as the neutral arbiter, this Court can have no legitimate interest in allowing the presentation of less than reliable, speculative evidence. Far from demonstrating a compelling interest, not even a legitimate interest can be demonstrated.

In altering the plain language of Rule 702 in criminal cases, this Court's actions, held to the highest level of scrutiny because a fundamental right is at issue, cannot pass even rational basis review. There simply is no legitimate state interest in a capital conviction that rests on unreliable expert opinions. D'Ambrosio must be overruled. The same standard applied to the admission of expert testimony in civil cases must be applied in criminal cases.

4.2 Admission Violated Right to Present a Defense and to Confrontation

The Sixth Amendment to the Constitution guarantees criminal defendants the right to confront witnesses against them. The Fourteenth Amendment to the Constitution makes this right applicable to the criminal defendants in the state court system. See Davis v. Alaska, 415 U.S. 308, 315 (1974); Olden v. Kentucky, 488 U.S. 227, 231 (1988). Encompassed within the confrontation right is the right to cross-examine witnesses and the right to present a complete defense. See Davis, 415 U.S. at 315-16; Crane v. Kentucky, 476 U.S. 683, 690 (1986); California v. Trombetta, 467 U.S. 479, 485 (1984). Cross-examination is the primary right that the Confrontation Clause secures. Davis, 415 U.S. at 316 (citing Douglas v. Alabama, 380 U.S. 415, 418 (1965)). Beyond merely delving into the witness's story, cross-examination is "the principal means of testing the believability and truth of a witness's testimony." Davis, 415 U.S. at 316-17.

Admission of this unreliable scientific evidence deprived Lang of both rights. How can a criminal defendant confront a possibility? A scientifically unreliable possibility? It was all but impossible to explain to the jury that it could not trust this evidence. "The science of human DNA is highly complex and difficult to understand, even for the well educated and patient." Brown v. Farwell, No. 07-15592, 2008 U.S. App. LEXIS 9637, *21, n.5 (9th Cir. May 5, 2008). Given the complexity of the science and the prosecution's repeated misrepresentation of what the

DNA results actually proved—nothing, because they did not reach a level that allowed Foster to testify to a reasonable degree of scientific certainty (see § 4.3 infra)—any efforts on counsel’s part to explain this to the jury were significantly minimized.

More process, not less, is required in a death penalty case. U.S. Const. amends. V, XIV. See Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). See also Evitts v. Lucey, 469 U.S. 387, 401 (1985) (“When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—an, in particular, in accord with the Due Process Clause”). Application of Rule 702 to allow the admission of evidence that does not pass scientific muster violates the Due Process Clause.

4.3 Admission of the DNA Evidence in this Case Violated Rules of Evidence 401 - 403

As with all evidence introduced at trial, an expert’s testimony must satisfy the requirements of Ohio R. Evid. 401, 402, and 403. Just because the rules of evidence provide for the admission of expert testimony, the expert is not given *carte blanche* to offer any opinion at trial. Schaffter v. Ward, 17 Ohio St. 3d 79, 81, 477 N.E.2d 1116, 1118 (1985). Only relevant evidence is admissible. Ohio R. Evid. 402. If the expert’s opinion is irrelevant, the expert cannot offer it. Moreover, despite relevancy, if the probative value of the expert’s opinion is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury, that evidence must be excluded. Ohio R. Evid. 403(A). Like every other piece of evidence admitted during trial, an expert’s testimony must survive 403 balancing. Faced with a difficult decision, one that could be incorrect, “jurors may too willingly embrace the opinion of an ‘expert.’” State v. Jones, 114 Ohio App. 3d 306, 319, 683 N.E.2d 87, 95 (1996).

See also Daubert, 509 U.S. at 595 (internal citation omitted). This reality makes it all the more important that the trial courts conduct a searching balance under Rule 403 in capital cases.

Introduction of Foster's testimony does not survive Rule 403 balancing. Its introduction misled the jury and unfairly prejudiced Lang. Foster was allowed to tell the jury that Lang's DNA was on the gun that murdered Burditte and Cheek.¹ She was allowed to do so despite the fact that she could not make this conclusion to a reasonable degree of scientific certainty. She was allowed to do so despite the fact that the reliability of her testing was so in question that the FBI would never allow her to input her results into the CODIS system.

Then, the prosecutor stood before the jury and proclaimed that this unreliable evidence proved that Edward Lang fired the gun that killed Burditte and Cheek:

Then what else tells us that Eddie Lang is the principal offender? This gun right here, tells you beyond a reasonable doubt that Eddie Lang is the principal offender.

Why? Because it is not human. It is the only thing in this trial that is not capable of being dishonest.

What do we find on it? We find DNA? What about DNA? It is unique to every individual. Yours different than mine. Mine is different than yours.

It is like a signature. It is like a fingerprint. It is our makeup. We can't alter it, and it can't be changed.

Whose DNA do we find on the gun? Not Antonio's. He is excluded from the DNA we find on it. But we find Eddie Lang's on this gun.

If it were wiped down as Eddie would have you believe, we wouldn't find DNA on it. But it wasn't wiped down.

How does it get here? By shooting it.

¹ "No match" in DNA testing terms means that "a suspect can be ruled out as the DNA source." Brown, 2008 U.S. App. LEXIS 9637 at *21, n.5 (internal citation omitted). A "match," however, does not mean the suspect's DNA is present. Instead, a "match" "affords the opportunity to calculate the probability that another person could have the same pattern of allele pairs." Id. (internal citation omitted).

Remember Mike Short? Why do you swab those areas? Because when you fire a handgun, those are the areas where you are going to deposit DNA because of the action of shooting the gun. Because you have to grip it so tight because of the recoil, that's what leaves the DNA behind.

That's what left Eddie's DNA behind in this one.

And, yep, it may be said in a little bit that it is only 1 in 3,461 people. Well, you know what? There weren't 3,461 people in that Durango. There were four people involved in this case.

We know Antonio didn't get in. We know it is not Antonio's DNA on that gun. We know it is not Jaron's DNA on that gun, and we know it is not Marnell's.

Whose is it? It is Eddie's. How does it get there? From firing the gun.

What does that prove to you? It proves, Ladies and Gentlemen, beyond a reasonable doubt that Eddie Lang, this man right here, is the actual killer.

He is the one that pulled the trigger, not once, but twice; and he is the principal offender. Because you don't get DNA on a gun unless you shoot it....

(Vol. 5, T.p. 1273-76)

That's evidence that he is guilty of aggravated robbery and the firearm specification because DNA is unique to each and every individual.

There's only one person in this case whose DNA was left behind on this gun because he fired it, and that's Eddie Lang's....

(Id. at 1276-77)

So, bang, bang, out go the lights. Eddie Lang pulls the trigger. That is a reasonable inference. Very reasonable. When you combine that inference with Eddie's DNA on the gun, because there weren't 3,461 people in that Durango. Antonio's ain't there.

(Id. at 1298-99)

You got DNA on the gun. That's not exclusive, but it matches Eddie Lang's....

(Id. at 1301)

DNA evidence, Teddy Seery, they all corroborate Antonio Walker.

(Id. at 1302)²

“Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses.” Daubert, 509 U.S. at 595 (internal citation omitted). The evidence becomes all the more powerful and misleading when the prosecutor trumpets it as definitive evidence that the defendant was the perpetrator of the offense at bar. It is error for the prosecutor to present statistical evidence suggesting that “[DNA] evidence indicates the likelihood of the defendant’s guilt rather than the odds of the evidence having been randomly selected sample.” Brown, 2008 U.S. App. LEXIS 9637 at *17 (internal citations omitted). The prosecution here contorted the unreliable DNA evidence to suggest to Lang’s jury that it proved Lang’s guilt.

This error was compounded by the prosecutor using this evidence to bolster the shaky credibility of a witness. The trial court has the power, through Evidence Rule 403, to exclude evidence in order to ensure fairness and reliability and trial. See Chambers v. Mississippi, 410 U.S. 284, 302 (1973). It was the trial court’s duty to assess the relevancy and reliability of all scientific evidence introduced at trial, but it failed to do so. See Daubert, 509 U.S. at 589. See also Kumho Tire Co., 526 U.S. at 147; Terry, 115 Ohio St. 3d 351, 872 N.E.2d 72 (noting court adopted this gatekeeping function for Ohio trial judges in Miller, 80 Ohio St. 3d 607, 687 N.E.2d 735).

5. The State Cannot Prove Evidence did not Affect Jury’s Decision to Impose Death

The burden is on the State to demonstrate beyond a reasonable doubt that this evidence did not affect the jury’s decision. Chapman, 386 U.S. 18. Prejudice on this record is apparent.

² Despite these arguments, the prosecutor also argued that Lang could be convicted as an aider and abettor. See Proposition of Law No. IV.

The prosecutor capitalized on this evidence to argue to the jury that Lang pulled the trigger, and thus was the principal offender in Cheek and Burditte's murders. Over and over the prosecutor touted this unreliable testing result as proof that Lang was the actual killer. Indeed the references to the DNA evidence far outnumber the prosecutor's references to the testimony of Seery and Walker. (See, generally, T.p.1255 et seq.) Moreover, the prosecutor used this evidence to bolster Lang's co-defendant's shaky credibility. The State cannot now demonstrate that this evidence did not affect the jury's decision to convict Lang as the principal offender. The prosecution's presentation of unreliable scientific evidence that it used to argue Lang was the principal offender improperly weighed into the jury's decision to convict. This evidence was prejudicial. This was not an easy case for the jury; Lang and Walker's version of events differed on only one significant factor—who fired the fatal shots. And, Walker's version of events took death off the table for him. Given the difficulty of the decision presented to the jurors they liked embraced the unreliable "expert" opinion and subsequent prosecutorial argument that "identified" Lang as the shooter. See Jones, 114 Ohio App. 3d at 319, 683 N.E.2d at 95. See also Daubert, 509 U.S. at 595 (internal citation omitted). See Propositions of Law Nos. V, IX. The State cannot meet its burden in this case.

6. Conclusion

The trial court erroneously admitted unreliable scientific evidence. Because the State cannot prove that this evidence did not have an impact on the jury's decision to convict Lang, this Court must vacate Lang's convictions and remand this case for a new trial.

Proposition of Law No. 3

A defendant's right to Grand Jury indictment under the Ohio Constitution, and his rights to due process under both the State and Federal Constitutions are violated when the indictment fails to allege a mens rea element for the offense of aggravated robbery. U.S. Const. amends. V, XIV; Ohio Const. art. I, §§ 10, 16. This error also denies the defendant his rights against cruel and unusual punishment because it affects the jury's verdict on the O.R.C. § 2929.04(A)(7) specification. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, § 9.

In State v. Colon, Nos. 2006-2139, 2006-2250, 2008 Ohio LEXIS 874 (Cuyahoga Ct. App. Apr. 9, 2008), this Court addressed the issue of defective indictments. A jury convicted Colon of robbery in violation of O.R.C. § 2911.02(A)(2). On direct appeal, Colon alleged his state constitutional rights to a grand jury indictment, as well as his state and federal due process rights, were denied by the omission of a mens rea element for the robbery charge. Id. at **3. Cf. Evitts v. Lucey, 469 U.S. 387, 401 (1985) (“When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause”).

In addressing Colon's appeal, this Court noted that every criminal offense in Ohio includes as an element the mental state of the offender, “except those that plainly impose strict liability.” Colon, 2008 Ohio LEXIS 874 at **4. Where the statute neither identifies the necessary mental state, nor imposes strict liability, “recklessness is sufficient culpability to commit the offense.” Id. at **5 (internal citations omitted). In Colon, the indictment failed to allege recklessness as the offender's mental state during the charged robbery, which rendered the indictment defective. Id. at **6, **8.

This error resulted in numerous problems. First, by omitting the necessary mens rea, the indictment was unconstitutional because it failed to include the essential elements of the charged offense. Id. at **13. Second, the record did not establish that Colon “had notice that the state

was required to prove that he had been reckless in order to convict him of the offense of robbery,” thus violating his due process rights. Id. In addition, the prosecutor did not argue that Colon’s conduct was reckless, and the trial court did not instruct the jury on this element. As such, there was no record evidence that the jury considered this element of the offense. Id. That error, this Court held, was structural. Id. at **8. As a result, it could be raised for the first time on direct appeal. Id.

Similar to Colon, Edward Lang was charged with aggravated robbery. (Dkt. 3.) Lang was charged under O.R.C. § 2911.01(A)(1), rather than (A)(2), but this should not alter the analysis. Lang’s indictment failed to allege any mens rea element. (See id.) The trial court did, however, instruct Lang’s jury on “knowledge” with respect this charge. (See Vol. 5, T.p. 1316-18, 1335, 1347-50.) That instruction alone does not cure this error because this Court held in Colon that the failure to include the mens rea element in the indictment is structural error requiring reversal. See Colon, 2008 Ohio LEXIS 874 at **8.

This structural defect affects more than the aggravated robbery charge. Aggravated robbery was the predicate felony to both charges of aggravated murder in this case. (Dkt. 3.) And, aggravated robbery was the underlying felony to the O.R.C. § 2929.04(A)(7) specifications attached to both counts of aggravated murder. (See id.) The jury could not properly find Lang guilty of an aggravated robbery that was not properly indicted. The jury could not find Lang guilty of aggravated murder during an aggravated robbery for which he has not been properly charged. Similarly, he cannot be the principal offender in an aggravated robbery for which he has not been properly charged.

This error taints Lang's entire trial, both trial and sentencing phases. Lang's convictions for aggravated robbery, felony murder, and the O.R.C. § 2929.04(A)(7) specifications must be vacated. This case must be remanded to the trial court for proper indictment and re-trial.

Proposition of Law No. 4

When a defendant is charged with aggravated felony murder and the O.R.C. §2929.04 (A)(7) specification as either the principal offender or an aider and abetter, the jury must be given the option to find the defendant guilty under either the principal offender element or the prior calculation and design element of that specification. U.S. Const. amends. VIII, XIV, Ohio Const. art. I, §§ 9, 16.

The difference between being the shooter or the accomplice is literally the difference between getting a life sentence or the death penalty. Edward Lang was convicted as the shooter and he got the death penalty. Antonio Walker pleaded guilty as the accomplice and he got a life sentence.

Lang's defense was not fanciful. Lang's defense against the death penalty was that Walker was the shooter and he aided and abetted Walker in committing two capital murders. The prosecutor argued that Lang could be convicted as Walker's accomplice. The trial court instructed the jury on the theory that Lang aided and abetted Walker.

The evidence created a genuine question of fact for the jury whether Lang was the shooter or the accomplice. The instructions should have allowed the jury to choose whether Lang was guilty of the O.R.C §292904.(A)(7) specifications as the shooter (principal offender) or as the accomplice (prior calculation and design). However, the trial court's instructions pigeonholed the jury into finding Lang guilty as the shooter. The jury instructions on the (A)(7) specifications omitted the "prior calculation and design" element from the jury's consideration. This error contributed to Lang's death sentence because it forced the jury to find him guilty as the more morally culpable actor, the shooter. This error also violated Lang's substantial right to present mitigating evidence under O.R.C. § 2929.04(B)(6) (offender's degree of participation if not principal offender).

1. Background

Lang was charged with aggravated felony murder in counts one and two, with the predicate felony being aggravated robbery. Attached to each count was an O.R.C. § 2929.04(A)(7) felony murder specification (specification 3 to each count), premised on aggravated robbery. On both counts the jury was instructed to consider whether Lang was guilty as an aider and abetter. (Vol. 5, T.p. 1312, 1314-15, 1330, 1332-33.) However, the (A)(7) specifications included only the principal offender element.

Lang was convicted of both aggravated murder counts and the attached (A)(7) specifications. He was sentenced to death on count two for the aggravated murder of Marnell Cheek. The jury weighed the (A)(7) specification to count two before it returned its death penalty verdict. The jury was not instructed to consider the O.R.C. §2929.04(B)(6) mitigating factor because Lang was found guilty as the shooter.

2. The State hedged on its bet that Lang was the shooter

Although the State sought to convict Lang as the principal offender,³ the State hedged on its bet by also seeking a conviction on the theory that Lang was an aider and abetter. Over objection, the State introduced Lang's statement to the police in which he said that he may be guilty of conspiracy to commit murder.⁴ (Vol. 4, T.p. 1005.) The prosecutor stated twice during closing argument that Lang could be found guilty of the murders as an aider and abetter. (Vol. 5, T.p. 1264, 1297-98.)

³ The principal offender under O.R.C. § 2929.04(A)(7) is defined as the "actual killer." State v. Penix, 32 Ohio St. 3d 369, 371, 513 N.E.2d 744, 746 (1987).

⁴ The jury was instructed to disregard this statement for legal conclusions. The jury was also instructed that Lang was not charged with conspiracy to commit aggravated murder. (Vol. 4, T.p. 1006.)

The prosecutor's waffling between the theories of shooter and accomplice follows from less than overwhelming evidence to prove Lang's guilt as the shooter. Lang's fingerprints were not found in Burditte's truck or on the murder weapon.⁵ (Vol. 4, T.p. 1042, 1062-63.) Lang's clothes revealed no trace of gun powder residue. (Vol. 5, T.p. 1093-96, 1100-01.) His clothes did not have any blood from the victims on them. (Vol. 5, T.p. 1119-26.) This is significant because photographs show that there was blood spatter and pooling in the backseat of Burditte's truck where Lang supposedly sat. (See State's Exhibits 33R and 33S.) This was indeed a bloody crime. (See State's Exhibit 33P.)

Lang could not be excluded as the minor contributor to a small amount of DNA collected off of the weapon. However, the State's expert could not say to a reasonable degree of scientific certainty that any person was the source of the DNA. And the amount of DNA was too inconsequential to check it using the CODIS database. (Vol. 4, T.p. 1129.) (See Proposition of Law No. 2.)

The State's main witness to prove that Lang was the shooter was Antonio Walker. Walker knew Jaron Burditte, and it was Walker's idea to rob him. (Vol. 4, T.p. 901.) The police did not test Walker's pants for trace evidence. (Id. at 1021, 1163.) Walker also made contradictory statements about the weapon. Walker saw the gun and he wiped fingerprints off of a nine millimeter round just before the murders. (Id. at 882, 908.) He also admitted that he knew how to chamber a round for that type of gun. (Id. at T.p. 883.) But he said that he only learned after the crime that the murder weapon was a nine millimeter pistol. (Id. at 879.)

⁵ In addition to Walker's testimony the jury also heard Ted Seery implicate Lang. His testimony is discussed in Lang's challenge to the weight and sufficiency of the evidence. (See Proposition of Law No. 5.)

As the codefendant, Walker had a strong self-interest to say that Lang was the shooter. He avoided a possible death penalty case by turning State's evidence against Lang. (See id. at 914-15, 919.) The jury was instructed to view Walker's testimony with "grave suspicion." (Vol. 5, T.p. 1310-12.)

3. Failure to instruct denied Lang a fair trial

The incomplete instructions on the (A)(7) specifications eviscerated Lang's due process right to present a defense against the death penalty. See Holmes v. South Carolina, 547 U.S. 319, 324 (2006). The central theme of Lang's defense was that Antonio Walker was the shooter and he was the accomplice. (See Vol. 3, T.p. 815; Vol. 5 T.p. 1277, 1281-85.) In essence, this was a defense against the death penalty because the accomplice may be less morally culpable than the shooter. See O.R.C. §2929.04(B)(6).

There was credible evidence to support Lang's alternative shooter defense because the prosecutor argued that Lang could be found guilty as an aider and abetter — and the jury was instructed to consider whether Lang was guilty as Walker's accomplice. (Vol. 5, T.p. 164, 1297-98, 1312, 1314-15, 1330, 1332-33.) Defense counsel also stressed that Walker had bias and interest in testifying that Lang had been the shooter. (Vol. 5, T.p. 1277, 1281-88.) Defense counsel pointed out on cross-examination that Walker had avoided a possible death sentence by pointing his finger at Lang. (Vol. 4, T.p. 914-15, 919.) Moreover, the trial court instructed the jury that Walker's testimony was to be viewed with "grave suspicion" because he was indicted as an accomplice. (Vol. 5, T.p. 1310-12.)

The jury was unable to give due consideration to a disputed question of fact that was central to Lang's defense against the death penalty. A reasonable juror could have found that Lang committed the aggravated murders either as the principal offender (the shooter) or with

prior calculation and design (the accomplice). But the jury instructions on the two (A)(7) specifications failed to conform to the evidence presented. This error deprived Lang of the opportunity to have the jury give any meaningful consideration to his alternative shooter defense against the death penalty. See Holmes, 547 U.S. at 324.⁶

By instructing only on the principal offender element of the (A)(7) specifications, the jury was left with an all-or-nothing choice between acquitting Lang of those specifications or finding him guilty as the shooter. See Beck v. Alabama, 447 U.S. 625, 634-38 (1980). The jury was deprived of the “third option” of finding Lang guilty of the (A)(7) specifications as the accomplice (not the shooter but acting with prior calculation and design). See id. at 642. The trial court’s failure to conform the instructions to the evidence “enhance[d] the risk of an unwarranted conviction...” of two capital specifications. See id. at 638. Most important, Lang was put at a greater risk of getting the death penalty because this error forced the jury’s hand to convict him as the shooter.

Under O.R.C. § 2929.04(A)(7), Lang could be charged as either the “principal offender” or as the accomplice who acted with “prior calculation and design.” See State v. Moore, 81 Ohio St. 3d 22, 40, 689 N.E.2d 1, 17 (1998). But the jury could find Lang guilty of only one of those two (A)(7) elements. See Penix, 32 Ohio St. 3d at 371, 513 N.E.2d at 746. Based on the evidence and arguments of counsel, the jury could have had reasonable doubts whether Lang was the shooter. However, the omission of the prior calculation and design element eviscerated Lang’s defense against the death penalty. The instructions left the jury with the choice between finding Lang guilty as the shooter (principal offender) or acquitting him of

⁶ In Holmes the Supreme Court held that a capital defendant’s due process right was violated by a state evidentiary rule that precluded the jury’s consideration of credible evidence about an alternative suspect. 547 U.S. at 330-31.

the (A)(7) specifications. This type of distortion in the jury's fact finding, regarding a capital sentencing factor, violated Lang's due process rights. See Beck, 447 U.S. at 634-38. Moreover, this error deprived the jury of any meaningful opportunity to consider Lang's alternative shooter defense against the death penalty. See Holmes, 547 U.S. at 330-31.

4. Error not harmless beyond a reasonable doubt

This error is not harmless beyond a reasonable doubt simply because the jury also found Lang guilty of the (A)(5) "course of conduct" specifications. See Chapman v. California, 386 U.S. 18, 24 (1967) (state must prove beyond a reasonable doubt that constitutional error is harmless). The only time the jury had to make the hard choice between shooter or accomplice was when the jury deliberated on the two (A)(7) specifications. The jury could have found Lang guilty of the (A)(5) specifications under the theory that he was Walker's accomplice. Likewise, the jury could have found Lang guilty of both aggravated murder counts as Walker's accomplice. (Vol. 5, T.p. 1312, 1314-15, 1330, 1332-33.)

Indeed, the jury could have been divided on whether Lang was guilty of aggravated murder and the (A)(5) specification as either the shooter or the accomplice as those are alternative means to commit a capital crime. See Schad v. Arizona, 501 U.S. 624, 631-45 (1991). But the jury had to choose between shooter and accomplice on the two (A)(7) specifications. See Moore, 81 Ohio St. 3d at 40, 689 N.E.2d at 17. That critical choice was eliminated by the incomplete instructions on the two felony murder specifications. This error is not harmless because the jury was unable to fairly consider Lang's primary defense against the death penalty — that his moral culpability was reduced by his lesser degree of participation in the murders. (See section 5, infra.)

The only disputed question of fact at trial was whether Lang was the shooter. Lang's participation in an aggravated robbery resulting in two murders was undisputed. (Vol. 3, T.p. 815-16.) In essence, the omission of the prior calculation and design element directed the jury to find Lang guilty as the shooter. The trial court's failure to instruct on this element violated Lang's due process right to present a defense against the death penalty. See Beck, 447 U.S. at 634-38; Holmes, 547 U.S. at 330-31.

5. Error infringed on Lang's right to mitigate punishment

This instructional error deprived Lang of his Eighth Amendment and statutory right to present mitigating evidence under O.R.C. § 2929.04(B)(6), regarding the offender's degree of culpability if not the principal offender. Lang was denied the opportunity to present (B)(6) mitigation after the instructional error forced the jury's hand to find him guilty as the principal offender. (See Section 3, supra.) This error violated Lang's Eighth Amendment right to present relevant mitigation evidence under Lockett v. Ohio, 438 U.S. 586 (1978). The failure to instruct on the prior calculation and design element took a genuine question of fact regarding a mitigating factor from the jury's consideration. See O.R.C. § 2929.03(D)(1) and (2) (jury may consider trial phase evidence in mitigation).

6. Conclusion

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." Holmes, 547 U.S. at 324 (citing Crane v. Kentucky, 476 U.S. 683, 690 (1986)). This error rendered Lang's defense against the death penalty meaningless. The instructions forced the jury

to find Lang guilty as the shooter because his participation in these crimes was otherwise undisputed.

The instructions did not conform to the evidence in a manner that gave the jury a fair opportunity to consider Lang's primary defense against the death penalty. The only time the jury had to make the hard choice between shooter and accomplice was when it deliberated on the two felony murder specifications. And Lang's defense against the death penalty was credible because the evidence supporting the principal offender element was not overwhelming. (See Propositions of Law No. 5.)

Although these errors occurred in the culpability phase, they violated Edward Lang's Eighth Amendment and due process right to a reliable determination of punishment for a capital crime. Lang's rights may be vindicated if he receives a new penalty phase where he may proffer evidence in support of the (B)(6) mitigating factor. See O.R.C. §2929.06(B). Alternatively, Lang may receive a new trial so a jury can decide if he was the shooter or the accomplice on the (A)(7) specifications.

Proposition of Law No. 5

An accused is deprived of substantive and procedural due process rights when a conviction results despite the State's failure to introduce sufficient evidence. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 9, 16.

1. Introduction

The State failed to produce sufficient evidence demonstrating that Edward Lang murdered Jaron Burditte and Marnell Check while he "was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and...was the principal offender in the commission of the aggravated murder." O.R.C. § 2929.04(A)(7). The State's case was not sufficient as to those charges. As a result, Lang's convictions, as well as his death sentence, violate his rights to substantive and procedural due process. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

2. Facts

At trial, the State devoted a great deal of time to introducing scientific evidence of Lang's presence in the car and his supposed role as the principal offender in the murders. It presented various witnesses from the county crime lab and coroner's office. These witnesses did not say, even to a reasonable degree of scientific certainty, that Lang was the shooter. These witnesses could not provide any scientific evidence proving that Lang the shooter.

Michael Short of the Stark County Crime Lab testified regarding evidence he collected and none of it was sufficient to prove that Lang killed Burditte and Check. (Vol. 4, T.p. 1030.) First he presented testimony regarding the results of the search for fingerprints. Short's analysis of the fingerprints lifted from the car came up negative; approximately half belonged to the car's

owner, Jaron Burditte, and of the remaining prints, none belonged to Lang. (Id. at 1042.) Short also checked Lang's gun for fingerprints. Lang's fingerprints were not on the gun. (Id. at 1062.)

Short also tested Lang's clothing. The police did not test Lang's clothes until two months after he was indicted and four months after the lab received them. (Id. at 1100.) Lang's clothes did not have any gunshot residue on them. (Id. at 1100-01.) The Grand Jury never learned about the delay in testing. Nor did it have the results of the test. (Id.) When Lang's co-defendant, Antonio Walker, went to the police station, he gave the police some of his own clothing to test. (Id. at 1011.) The police never tested Walker's clothes for gunshot residue. (Id. at 1102.)

Michele Foster of the Canton-Stark County Crime Laboratory tested the DNA samples. None of Lang's clothing had Burditte or Cheek's blood on it. (Id. at 1119.) (See State's Exhibits 33R and 33S.) Nor did it have any hair on it, forcibly removed from Burditte or Cheek. (Id. at 1119, 1121-22, 1124.) Foster could not prove that any of Lang's DNA was on the gun. (Id. at 1129, 1139.) She could not say, to a reasonable degree of scientific certainty, that Lang's DNA was one of the two in the major sample from the gun. (Id. at 1129.) The minor DNA sample was also inconclusive, excluding none of the four people who were in the car, including Walker. (Id. at 1139.) Foster's conclusions were inconclusive and misleading. Her sample was so small that it could not be submitted to the central DNA bank, CODIS, meaning that she could not say to a reasonable degree of scientific certainty that Lang was the source of the DNA. (Id. at 1135.)

Lang's co-defendant, Antonio Walker, testified for the State. He testified that he went to Tamia Horton's house where he and Lang discussed robbing Burditte. (Id. at 875.) Initially at trial, he said it was Lang's idea, but confessed, on cross-examination, that the robbery was his idea. (Id. at 875, 901.) He explained that as he and Lang waited for Burditte, they saw Burditte's car drive past them. (Id. at 882.) As they waited, Lang tried to chamber a round in the

gun, but it fell on the ground. Walker picked it up, wiped off his fingerprints, and gave it back to him. (Id. at 883.) He then testified that when Burditte pulled back around, he did not feel right about it and did not get in the car. (Id. at 885.) He went to see Sgt. Kandel and gave his statement to the police. (Id. at 891.) He provided the police with clothing to test. (Id. at 1011.) In exchange for his testimony and cooperation, Walker was allowed to plead guilty to complicity to murder and was given 18 to life, including a gun specification. (Id. at 892.)

After Walker, Teddy Seery testified next. He had learned about the murders from a friend and then a short time later, Lang came to his residence. (Id. at 924-26.) Knowing Lang stayed in the area where the murders occurred, he asked him what he knew and Lang was curious what Seery had heard. (Id. at 927.) The police contacted Seery a few days later and spoke with him. (Id. at 931.) He did not tell police that Lang was the shooter. (Id. at 936.) At trial, he testified that Lang confessed to the murders. (Id. at 928.) The police never officially made him a suspect. In exchange for truthful testimony, he was not charged. (Id. at 935.)

3. Standard of Review

The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). See also State v. Adams, 62 Ohio St. 2d 151, 404 N.E.2d 144 (1980); State v. Miclau, 167 Ohio St. 38, 146 N.E.2d 293 (1957); O.R.C. § 2901.05(A). The test for determining sufficiency of the evidence to establish guilt beyond a reasonable doubt, is whether there was “substantial evidence upon which a jury could have reasonably concluded that all the elements of an offense have been proven beyond a reasonable doubt.” State v. Eley, 56 Ohio St. 2d 169, 383 N.E.2d 132, syl. (1978).

For an appellate court, “the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly

instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 318 (1979). See also State v. McKnight, 107 Ohio St. 3d 101, 112, 837 N.E.2d 315, 334 (2005); State v. Moore, 81 Ohio St. 3d 22, 40, 689 N.E.2d 1, 17 (1998). This Court must independently judge the sufficiency of the evidence in Lang’s case and decide whether the essential elements of the alleged crime could have been found beyond a reasonable doubt. A conviction based upon insufficient evidence violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Jackson, 443 U.S. at 316. Where there is insufficient evidence to support an appellant’s criminal conviction, vacating that conviction is the appropriate remedy. Id. at 317.

4. Argument - Principal Offender

The State did not prove that Lang was the principal offender. This Court has held that the term “principal offender” means the “actual killer,” State v. Penix, 32 Ohio St. 3d 369, 371, 513 N.E.2d 744, 746 (1987), or “one who personally performs every act constituting the offense” of aggravated murder, State v. Getsy, 84 Ohio St. 3d 180, 197, 702 N.E.2d 866, 884 (1998), or “one who directly caused the death.” State v. Stallings, 89 Ohio St. 3d 280, 292, 731 N.E.2d 159, 173 (2000). The State has not established sufficient evidence, under any of these formulations, to sustain a conviction.

The primary evidence that Lang was the principal offender came from Walker’s testimony. Walker was not a credible witness. The State offered a deal for his testimony, giving him ample reason to lie. (Vol. 4, T.p. 911.) His testimony should have been considered in light of the circumstances under which it was given. Instead of facing the death penalty, he was looking at 18 to life. (Id.) He lied and contradicted himself on the witness stand. He admitted that it was his idea to commit the robbery, despite telling the jury during his direct examination,

that it was Lang's idea. (Id. at 901.) Only when he was confronted during cross-examination did he tell the truth. (Id.) Walker had a history of felony convictions. (Id. at 870, 901.) He also lied about his criminal history. (Id. at 901.) Considering how incredible and unreliable a witness Walker was, his testimony could not have convinced a reasonable juror, beyond a reasonable doubt, that Lang was the principal offender.

Teddy Seery also testified against Lang. The police approached Seery after finding his cell phone number from one of the phones found in Burditte's car. (Id. at 990.) His number came up in subpoenaed phone records before and after the murder. (Id.) Seery's testimony was at odds with what he told the police. (Id. at 934.) Seery initially told the police that he did not know anything about the killings. Even when he made a statement to the police, he indicated that Lang did not admit to the shooting. (Id. at 936.) In court however, he claimed that Lang confessed. (Id. at 934.) Like Walker, the prosecutors gave Seery incentive to testify for them. They advised him that if he did not testify fully, they would charge him with obstruction of justice, tampering with evidence, and other crimes. (Id. at 935-36.) The police never made Seery a suspect. By testifying favorably for the State, he avoided criminal charges. This sort of deal should cast serious doubts on his validity and credibility. Any reliance on his testimony should also reflect that it was inconsistent with his statement to police, at odds with the claims he made before he had any reason to lie.

None of the physical evidence supported the claim that Lang was the principal offender either. As discussed above, the county investigators could not find evidence of Lang's DNA on the gun. (Id. at 1129, 1139.) The evidence did not support that he was the principal offender. At the same time, Walker's clothing remained untested. (Id. at 1102.)

The purpose of reviewing the sufficiency of the evidence is “to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.” State v. Jenks, 61 Ohio St. 3d 259, 273, 574 N.E.2d 492, 503 (1991). The State placed a great deal of emphasis on the scientific evidence, claiming it proved that Lang was the principal offender. The testimony, however, fell short. The evidence was insufficient to prove that he was the actual killer.

5. Manifest Weight

In assessing the manifest weight of the evidence, this Court must examine the entire record and determine whether the evidence produced attains the high degree of probative force and certainty required for a criminal conviction. This inquiry is separate from the examination for sufficiency of the evidence. This review must be directed toward a determination of whether there is substantial evidence upon which a jury could reasonably conclude that all of the elements have been proved beyond a reasonable doubt. Eley, 56 Ohio St. 2d at 172, 383 N.E.2d at 134; Glasser v. United States, 315 U.S. 60, 80 (1942). “Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept to support a conclusion. It is evidence affording a substantial basis of fact from which the fact at issue can be reasonably inferred.” United States v. Martin, 375 F.2d 956, 957 (6th Cir. 1967).

In this case, the jury did not make a reasonable inference in finding Lang guilty. The State did not establish a substantial basis of fact upon which the jury could decide that he was the principal offender. Much of the State’s argument relied on the insinuation that Lang was guilty not because the evidence indicated it, but only because he could not be excluded. His clothing did not contain any of the victims’ blood. (Vol. 4, T.p. 1121-22.) The State could not say, to a

reasonable degree of scientific certainty, that the DNA recovered from the gun was his either. (*Id.* at 1129, 1139.) Nor were his fingerprints on the gun or inside the car. (*Id.* at 1042, 1062.)

Walker, on the other hand, was not subjected to the same testing. His clothes were not tested. (*Id.* at 1102.) The police never even requested the tests. (*Id.*) Even if it had been tested, they took him at his word that the clothing he handed over voluntarily was what he wore the night of the crime. (*Id.* at 891.) Walker told the jury that he was wearing a blue hooded sweatshirt the night of the crime and that it was the same as the one in evidence but Sergeant Gabbard testified that he collected a black sweatshirt from him. (*Id.* at 878, 893-94, 1011.) As part of the review of the manifest weight of the evidence, this Court must examine the entire record. This inquiry must include the evidence presented and the notable absence of evidence presented about Walker. The State's evidence against Lang was all supposition and implied assumption. Such arguments are even hollower in the face of evidence surrounding Walker; the State willingly refused to pursue this evidence, knowing it was the only way to bolster the case against Lang.

Had evidence favorable to Lang existed and the police refused to turn it over to defense counsel, it would have been in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963). Evidence will be considered material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). This does not require that disclosure results in acquittal. United States v. Agurs, 427 U.S. 97, 111 (1976). A jury needs to similarly understand what the police omitted from their investigations. In refusing to fully investigate Walker, the police made themselves effectively Brady-proof. If they never conducted an investigation, they would not have to turn over the results. If they failed to investigate beyond what they needed,

they could prevent the defense from having a means of establishing alternate theories used to create reasonable doubt. With a selective investigation, they limit the materials they have to turn over, even under the lower standard of materiality. If this Court is truly committed to protecting “the system of justice as a whole,” then it must ensure that the police fully investigate every crime, rather than investigating only leads that will bolster one theory and implicate one suspect. State v. Brown, 115 Ohio St. 3d 55, 63, 873 N.E.2d 858, 866 (2007). The distinction is subtle, but it requires the police to look not just for enough evidence to convict, but for the truth.

The evidence that could have been collected and presented, like in Brown, would have been material and offered independent evidence of who committed the murders. Id. at 65, 873 N.E.2d at 868. That evidence is no longer available to anyone. The “Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” Arizona v. Youngblood, 488 U.S. 51, 57 (1988). In ending their investigation prematurely, the police prevented the preservation of any other evidentiary materials; the effect was the equivalent of spoliation of collected evidence. When the police fail to preserve material evidence, it violates the defendant’s due process rights. As defined in Bagley, 473 U.S. at 682, evidence is material, “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” In the case of uncollected evidence however, the extent of the impact is unknown, so the materiality cannot be judged. It cannot be said or not said that it would have changed the outcome had the evidence been disclosed. The police should have conducted a thorough investigation and allowed the lawyers and judges to determine what

information was used at trial and offered during discovery. In choosing to end their inquiry prematurely, the police acted improperly; the discretion is in the disclosure of the evidence, not in the investigation.

Had the uncollected, untested evidence shown that Walker was the killer, the State would have prosecuted him accordingly. Had it shown that Walker was not the killer, it would have been more evidence for the State to use as proof of Lang's involvement. Instead, the police formed one theory and sought out only the evidence necessary to prove it. They promptly ended their investigation once they amassed enough evidence. In doing so, they avoided further investigation that could have yielded varying degrees of exculpatory evidence. Any other evidence that may have existed was lost. Treating evidence in this manner allows investigators find facts to fit their theory, rather letting the evidence guide the investigation. Such an omission is significant to the consideration of the probative force necessary for a conviction. Without this investigation, however, the conviction is against the manifest weight of the evidence.

6. Conclusion

The State presented insufficient evidence to convict Lang as the principal offender. Both the physical and testimonial evidence fell short of the standards necessary for a conviction. Lang's convictions violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Jackson, 443 U.S. at 316. This Court must vacate his convictions and remand his case for a new trial.

Proposition of Law No. 6

The accused is denied the rights to due process and effective assistance of counsel when a trial court refuses to grant access to grand jury materials prior to trial. U.S. Const. amends. V, VI, VIII, IX, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20.

1. Introduction

Before trial, Lang's attorneys made a number of requests for grand jury materials. But the judge denied their motions. Giving Lang and his counsel access to the grand jury materials would have allowed them to properly prepare for trial and effectively confront his accusers. Lang had a particularized need for the grand jury testimony and the trial court's refusal to grant his motions prejudiced him.

2. Standard for disclosure of grand jury testimony

The prosecuting attorney has access to grand jury materials for the performance of his or her duties. Ohio R. Crim. P. 6(E). Disclosure of those materials, to the defense, is governed by Criminal Rule 16, which makes grand jury transcripts subject to disclosure. Ohio R. Crim. P. 16(B)(3). Additionally, upon proper motion the "court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph...recorded testimony of the defendant or co-defendant before a grand jury." Ohio R. Crim. P. 16(1)(a).

Transcription of the grand jury testimony allows defense counsel to effectively cross-examine any adverse witnesses who appear both before the grand jury and at trial. If the witness provides testimony inconsistent with his or her grand jury testimony, counsel can use the inconsistent statements for impeachment. Ordinarily, grand jury proceedings are not disclosed "unless the ends of justice require it and there is a showing by the defense that a particularized need for disclosure exists which outweighs the need for secrecy." State v. Patterson, 28 Ohio St. 2d 181, 277 N.E 2d 201, syl. para. 3 (1971) (citing State v. Laskey, 21 Ohio St. 2d 187, 191, 257

N.E.2d 65, 68 (1970); State v. Greer, 66 Ohio St. 2d 139, 420 N.E.2d 982, syl. para. 2 (1981)). It is increasingly recognized that “disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.” Dennis v. United States, 384 U.S. 855, 870 (1966).

This Court has held that the need for disclosure outweighs the need for secrecy “where nondisclosure will probably ‘deprive the defendant of a fair adjudication of the allegations placed in issue by the witness’ trial testimony.’” State v. Webb, 70 Ohio St. 3d 325, 337, 638 N.E.2d 1023, 1034 (1994) (citing Greer, 66 Ohio St. 2d 139, 420 N.E.2d 982, syl. para. 3). In United States v. Procter & Gamble Co., 356 U.S. 677 (1958), the Supreme Court outlined the doctrine of particularized need, stating that to “impeach a witness, to refresh his recollection, to test his credibility and the like...are cases of particularized need where the secrecy of the proceedings is lifted.” Id. at 683. This was a non-exhaustive list of particularized needs.

3. Lang met the pre-trial burden

Defense counsel made numerous requests for the grand jury materials. Defendant’s initial demand for discovery included a request for the grand jury materials. (Dkt. 21.) Counsel then filed Defendant’s Motion for a Pre-trial copy of the Grand Jury Proceedings, Defendant’s Motion to Disclose the Names of Grand Jury Witnesses, and Defendant’s Motion to Transcribe the Grand Jury Proceedings Prior to Trial. (Dkts. 61-63.) The State responded to the Motion for a Pre-trial copy of the Grand Jury Proceedings, the Motion to Transcribe the Grand Jury Proceedings Prior to Trial, and the Motion to Disclose the Names of Grand Jury Witnesses. (Dkts. 80-81, 87.) The court denied the defense’s motions for grand jury materials. (Dkts. 95-96.)

Lang needed the grand jury testimony for use in cross-examination. The right to confront one's accusers is a bedrock procedural guarantee. Crawford v. Washington, 541 U.S. 36, 42 (2004). This constitutional right is made applicable to the states through the Fourteenth Amendment. See Davis v. Alaska, 415 U.S. 308, 315 (1974); Olden v. Kentucky, 488 U.S. 227, 231 (1988). The right to confrontation includes the right to cross-examine witnesses and present a complete defense. See Davis, 415 U.S. at 315-16; Crane v. Kentucky, 476 U.S. 683, 690 (1986); California v. Trombetta, 467 U.S. 479, 485 (1984). "[I]t is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked." Dennis, 384 U.S. at 873.

While Walker was Lang's only co-defendant and the key witness against him, he faced different charges from the common set of circumstances. Walker's value to the grand jury accounted for the disparate treatment. Walker had information useful to the grand jury and crucial to Lang's indictment. As a result, anything that Walker said to the grand jury would be particularly instructive to Lang's defense. Knowing what information Walker provided and being able to confront him about it was essential to a proper cross-examination. The Confrontation Clause was directed at such testimonial statements as grand jury testimony. Crawford, 541 U.S. at 68.

It was impossible for Lang's attorneys to prepare for trial without this information. There was also a good chance Walker's story had changed since the police first questioned him. A successful cross-examination and accordingly, a proper defense demanded that defense counsel be able to bring changes in Walker's story to the jury's attention. Some of his changing story was evident because of the deal he struck. The disparity in the charges between the two men only underscored Lang's need for the testimony. The right to confrontation includes both the

right to actually and physically face one's accusers and the right to cross-examine them. Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987). Defense counsel had no way of knowing what Walker told the grand jury and were not there to question him or the other witnesses. It was imperative that defense counsel be able to effectively cross-examine, but without the grand jury materials, they could not.

While this Court generally has not extended the right to inspect grand jury testimony before trial, the circumstances in this case fit perfectly within the allowance of the promulgated rules of Criminal Procedure. Granting a defendant's motion for disclosure of the grand jury testimony is within the rule. Criminal Rule 16(B)(1)(a) outlines when a defendant or co-defendant's grand jury testimony is subject to disclosure. "Where a prosecution witness is not a co-defendant, a trial court does not err in refusing to compel discovery of prior statements and of grand jury testimony given by that witness." State v. Lane, 49 Ohio St. 2d 77, 358 N.E.2d 1081, syl. para. 2 (1976). That this Court specified denial of statements from non-co-defendants, it suggests that a co-defendant's statements are treated differently. If a non-co-defendant's grand jury testimony may be rightly kept from defense counsel, it suggests logically that the court errs when it refuses to compel discovery of a co-defendant's grand jury testimony. Walker was Lang's co-defendant and defense counsel filed motions for discovery of his statements before the grand jury. The trial court denied all of the motions for discovery regarding disclosure of the grand jury testimony and witnesses in Lang's case. The denial of those motions was error.

4. Additional need for the grand jury testimony emerged after Walker's testimony

When defense counsel confronts inconsistent statements, it is proper to hold an in camera inspection of the witness' prior statements with both defense and prosecuting attorneys and the judge present. It is essential that the attorneys have the opportunity to inspect the statements.

“In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.” Dennis, 384 U.S. at 875. “Where the state’s principal witness admits in open court that her testimony is inconsistent with some or all of her prior statements to the police...the trial court must grant a request by defense counsel to inspect the statements....” State v. White, 15 Ohio St. 2d 146, 239 N.E.2d 65, syl. para. 3 (1968).

This is the exact situation that arose in Lang’s case. On cross-examination, Walker admitted that in his initial statement to Detective Kandel he said that the robbery was his idea, despite having made claims to the contrary during his direct examination. (Vol. 4, T.p. 901.) Following Walker’s testimony, defense counsel asked if they would have access to the Ohio R. Crim. P. 16(B)(1)(g) statements. (Vol. 4, T.p. 920.) The judge gave the defense attorneys an opportunity to look at the statements but did not conduct a formal hearing. (Id.) If the surrounding circumstances that were present before the trial were not significant enough to merit disclosure of the grand jury testimony at that time, then the situation that arose after Walker’s testimony was more than sufficient. Once it became apparent that Walker was changing his testimony, the defense should have been given access to his grand jury testimony. A court cannot conclude “that it is ‘safe to assume’ no inconsistencies would have come to light if the grand jury testimony had been examined. There is no justification for relying upon ‘assumption.’” Dennis, 384 U.S. at 874.

Grave concerns about credibility and truthfulness emerged when Walker struck a deal in exchange for his testimony. Both Walker and Lang alleged that the other was the shooter but the State pursued different charges against each of them. Walker then got a deal as the State indicted Lang on capital charges. Walker’s potential sentence went from death to 49 to life, and was

ultimately reduced to 18 to life. (Vol. 4, T.p. 909, 911.) Considering that both men could have faced capital charges, such an arrangement suggests that Walker's story changed. His motive to lie increased and his testimony needed to be more focused against Lang. This had a significant effect on his credibility, as did the content of his testimony. What he told the grand jury was critical to both his own deal and to the State being able to indict Lang. Having Walker's testimony would have enabled defense counsel to properly confront him at trial and properly question his credibility. A defendant must have every opportunity to demonstrate a witness' credibility, or lack thereof, to the jury. Without the grand jury testimony, defense counsel could not properly investigate Walker's credibility or question him on it in front of the jury.

5. The trial court's burden for establishing a particularized need was impossible

The particularized need requirement creates a catch-22 that prevents proper disclosure of the grand jury materials. Without knowing the substance of the grand jury proceedings, it is difficult, if not impossible, for counsel to demonstrate a particularized need for them. "Whether particularized need for disclosure of grand jury testimony is shown is a question of fact; but, generally, it is shown where from a consideration of all the surrounding circumstances it is probable that the failure to disclose the testimony will deprive the defendant of a fair adjudication...." Greer, 66 Ohio St. 2d 139, 420 N.E.2d 982, at syl. para. 3. Lang could only point to the circumstances of the case as proof of a particularized need.

Further proof of a particularized need in this case was not possible. Lang could not provide a more detailed need for grand jury testimony without knowing who testified or the content of their testimony. Most likely, everyone who testified before the grand jury was also included on the State's witness list. But it is more likely that only a small number of the listed potential trial witnesses actually testified before the grand jury. Making defense counsel guess

who testified at the grand jury would have forced them to engage in idle speculation and placed an impossible burden on them. They could not say for certain who even testified, let alone the content of that testimony.

Grand jury proceedings are generally kept secret, out of consideration for anonymity and safety; it protects both those who testify before the grand jury and those who are the subject of the grand jury. In this case, there was no need for protection or secrecy. Once the defendant is in custody and presents no danger to adverse witnesses, release of secret grand jury materials is allowed. Ohio R. Crim. P. 6(E). Lang was in custody by the time defense counsel filed for disclosure of the grand jury testimony; there was no longer any need to prevent him from gaining access. With the defendant in custody, there was no potential danger to anyone who testified.

The second aspect of grand jury secrecy is for the benefit of the accused. In keeping the proceedings secret, it protects the presumption of innocence. If the grand jury does not return an indictment, the public does not find out and thus cannot speculate on the guilt or innocence of those involved. This did not apply to Lang at the time he sought to obtain the records, because he had already been indicted. The identities of any other participants in the grand jury would have been revealed at trial, so there was no need to continue to conceal their identities.

The denial of grand jury materials has implications in the Sixth Amendment. If the defendant does not learn who testified before the grand jury, he cannot have confidence that he has had an opportunity to confront all of his accusers. It is fundamental that a defendant have the right to confront his accusers. Crawford, 541 U.S. at 42; Pointer v. Texas, 380 U.S. 400, 403 (1965). Keeping the grand jury information from the defendant only served to make it impossible for his attorneys to plan a proper defense. "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a

storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations.” Dennis, 384 U.S. at 873.

6. Conclusion

The trial court erred in refusing to make the grand jury transcripts and names of the witnesses available to defense counsel prior to trial. Under the rules of discovery, a defendant is entitled to these materials under the rules of discovery. It was wrong to deny the defendant access to the documents; there was no reason to deny the requests. Because this was a capital case and involved the testimony of a co-defendant, Lang had a particularized need for disclosure of the grand jury materials. Without the grand jury testimony, trial counsel was unable to provide an adequate defense. This Court must vacate Lang’s convictions and remand this case for a new trial.

Proposition of Law No. 7

Admission of the prior consistent statement of a witness violates Ohio R. Evid. 801 and deprives a criminal defendant of a fair trial and due process. U.S. Const. amend. XIV; Ohio Const. art. I, § 16.

A witness's testimony constitutes hearsay when it "is a statement, other than one made by the declarant testifying at the trial ... offered in evidence to prove the truth of the matter asserted." Ohio R. Evid. 801(C). But, Ohio R. Evid. 801(D)(1)(b) provides that a prior consistent statement is not hearsay if it "is offered to rebut an express or implied charge against [the declarant] of recent fabrication or improper influence or motive." However, "consistent statements must have been made before the alleged influence, or motive to fabricate, arose." Tome v. United States, 513 U.S. 150, 158 (1995).⁷ See also Motorists Mut. Ins. Co. v. Vance, 21 Ohio App. 3d 205, 207, 486 N.E.2d 1206, 1208 (Ohio Ct. App. 1985) ("What the rule permits is the rehabilitation of a witness whose credibility has been attacked by means of a charge that he recently fabricated his story or falsified his testimony in response to improper motivation or influence, by admitting into evidence a consistent statement made by the witness prior to the time of the suggested invention or of the emergence of the motive or influence to invent or falsify, as tending to rebut the charge.")

Admission of hearsay statements, including prior consistent statements, has implications well-beyond Ohio's rules of evidence. In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court addressed the Confrontation Clause implications of the State's use of hearsay evidence in a criminal trial. The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against

⁷ Ohio Rule 801(D)(1)(b) is identical to Federal Rule 801(d)(1)(b). See State v. Collins, No. 5-86-26, 1989 Ohio App. LEXIS 452, *13 (Hancock Ct. App. Jan. 31, 1989).

him.” Id. at 42. The Court applied this guarantee to the states in Pointer v. Texas, 380 U.S. 400, 406 (1965).

When presented with a hearsay statement, the relevant query under Crawford is whether the statement being offered is “testimonial.” 541 U.S. at 52. The Court has been very clear that “testimonial” evidence includes a statement to a police officer. Id. See also id. at 53, 68. When presented with a testimonial statement, the Court has determined that “the Framers [did not mean] to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of reliability.” Id. at 61 (internal quotations omitted). When presented with such statements “the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” Id. at 68.

The State met neither condition of the Confrontation Clause in this case. During Antonio Walker’s direct examination, Walker testified that his testimony was the same as the statement he gave Officer Kandel before he received his plea deal. (Vol. 4, T.p. 893.) In an effort to bolster Walker’s credibility, the prosecutor reminded the jury of that earlier statement in closing argument. (Vol. 5, T.p. 1267.) While the State did not elicit the substance of Walker’s prior consistent statement, it did not need to—Walker told the jury that it was identical to his testimony in open court. In essence, he advised the jury of the full detail of his prior consistent statement.

Walker was in court, so he was available. This prior statement was given by him to the police, making it testimonial. And, Lang did not have a prior opportunity to cross-examine him. Walker’s testimony, and the inclusion by inference of his prior consistent statement, thus violated Lang’s Confrontation Clause rights. Id. at 68.

Even if the Confrontation Clause were not implicated, Walker's testimony would be inadmissible under the Ohio Rules of Evidence. While Ohio R. Evid. 801 (D)(1)(b) provides for the admission of prior statements to rebut arguments of "recent fabrication or improper influence or motive," that rule does not apply this case. This is so because that "consistent statement[] must have been made before the alleged influence, or motive to fabricate, arose." See Tome, 513 U.S. at 158. See also Vance, 21 Ohio App. 3d at 207, 486 N.E.2d at 1208 ("What the rule permits is the rehabilitation of a witness whose credibility has been attacked by means of a charge that he recently fabricated his story or falsified his testimony in response to improper motivation or influence, by admitting into evidence a consistent statement made by the witness prior to the time of the suggested invention or of the emergence of the motive or influence to invent or falsify, as tending to rebut the charge.") Walker was a suspect in the Cheek and Burditte murders. His motive to fabricate arose the moment he opened his mouth. He had a vested interest in minimizing his own participation in order to secure leniency from the police, regardless of whether a deal was on the table.

Lang did not object and this claim is reviewed for plain error. See Ohio R. Crim. P. 52(B). Plain error results when an error renders the trial fundamentally. See State v. Fears, 86 Ohio St. 3d 329, 332, 715 N.E.2d 136, 143 (1999) (citing State v. Wade, 53 Ohio St. 2d 182, 189, 373 N.E.2d 1244, 1249 (1978)); State v. Lilly, 87 Ohio St. 3d 97, 104, 717 N.E.2d 322, 328 (1999) (Cook J., concurring) (citing United States v. Atkinson, 297 U.S. 157, 160 (1936)).⁸

Whether reviewed under the Confrontation Clause or the Ohio Rules of Evidence, this error rendered Lang's trial fundamentally unfair. The only issue for the jury to decide at trial was the identity of the shooter—was it Lang or was it Walker? The evidence did not

⁸ Lang also raises this claim as a violation of his Sixth Amendment right to counsel in Proposition of Law No. 10.

overwhelmingly identify Lang as the shooter, as evidenced by prosecutorial argument and trial court instructions informing the jury that it could find Lang guilty as an aider and abetter. (Vol. 5, T.p. 164, 1297-98, 1312, 1314-15, 1330, 1332-33 (argument); *id.* at 1312, 1314-15, 1330, 1332-33 (instructions).) The prosecutor's arguments and the trial court's instructions bolstered Lang's defense at trial, which was to create doubt that he was the shooter; Lang was Walker's accomplice—Walker fired the fatal shots that killed Cheek and Burditte.

The evidence of who shot Cheek and Burditte was not overwhelming. The State's strongest piece of evidence against Lang was Walker's testimony, who escaped the death penalty by pointing his finger at Lang. This was merely one more improper opportunity to bolster Walker's credibility in the jury's eyes. (See Proposition of Law No. IX.) Given the nature of Lang's defense and the lack of overwhelming evidence on the principal offender element, Walker's testimony undermined Lang's only defense to the charges rendering Lang's trial fundamentally unfair. See DePew v. Anderson, 311 F.3d 742, 749 (6th Cir. 2002).

Conclusion

The State's use of this unreliable hearsay violated the Ohio Rules of Evidence and Lang's rights under Confrontation and Due Process Clauses. This Court must reverse Lang's convictions and remand his case for a new trial.

Proposition of Law No. 8

Admission of irrelevant and prejudicial evidence during a capital defendant's trial deprives him of a fair trial and due process. U.S. Const. amend. XIV; Ohio Const. art. I, § 16.

1. Introduction

The State introduced irrelevant and inflammatory evidence during Edward Lang's trial. (See Proposition of Law Nos. 2, 9.) Some of the evidence presented was wholly unrelated to the issues at trial. Instead, it was geared towards painting Lang as violent and dangerous, making it more likely that the jury would convict and sentence him to death.

2. Irrelevant and inflammatory facts offered

The prosecutor solicited irrelevant and inflammatory facts from many of its witnesses.

This included:

- Eliciting testimony from Antonio Walker that Lang wore "red" frequently. (Vol. 4, T.p. 874.) The trial court sustained defense counsel's next objection, when the prosecutor asked Walker if he knew the significance of the color "red." (*Id.*) The implication to anyone with a rudimentary familiarity with gang paraphernalia was that Lang was a member of a notorious and violent gang, the Bloods.

- Eliciting testimony from John Dittmore that he was employed by the City of Canton's gang unit. (*Id.* at 955.) There was no relevance to his position within the gang unit. The implication was that a member of Canton's gang unit was involved because Lang was gang-involved.

- Eliciting testimony from Walker and Teddy Seery that Lang's nickname was "Tech." (*Id.* at 873, 923.) "Tech" or "Tek" is shorthand for a type of 9 millimeter handgun. This suggested that Lang was familiar with guns, and was violent, thus leading the jury to infer that he was likely guilty of the charged offenses.

- Eliciting testimony from Dittmore that drug dealers do not sell drugs to people that they do not know. (*Id.* at 967.) Dittmore also testified that the quantity of drugs made a difference on whether a dealer would sell to a stranger. (*Id.* at 969.) Dealers would sell small amounts of drugs to anyone. (*Id.*) However, when a buyer wants a larger amount, a quarter ounce of powder cocaine, he cannot buy it off the street. (*Id.*) That sort of purchase must be done surreptitiously between parties that know each other. (*Id.*) For a \$200 bump, for example, the dealer must know the buyer in this community. (*Id.* at 970.)

If someone who knew the dealer vouched for the buyer that would also suffice. (Id. at 971.) This testimony was designed to suggest that Lang had bought drugs before.

- Eliciting testimony from Walker that following Burditte and Cheek’s murders, Lang threw up. (Id. at 887.) Walker stated that he checked on Lang’s well-being and that Lang responded, “every time I do this, this same thing happens.” (Id.) The prosecution implied with this testimony that Lang had killed before—he threw up then, just like he did now. (See also Walker’s statement, p. 13.)

- Playing for the jury Lang’s statement to law enforcement. (Vol. 4, T.p. 1001-05; see also State’s Ex. 3.) In the statement, Lang opines that he may well be guilty of conspiracy to murder. (See State’s Ex. 3.)

- Eliciting testimony from Walker that he found out later, after the murders, that the murder weapon was a 9 millimeter pistol. However, Walker also admitted that he knew how to chamber a round for that type of gun. (Vol. 4, T.p. 879, 883.) His familiarity with how to load the weapon demonstrates that Walker was lying when he testified that he did not know, until later, the make and model of the murder weapon.

- Eliciting testimony about scientifically unreliable DNA evidence. See Proposition of Law No. 2. Then the prosecutor told the jury that DNA evidence proved that Lang killed Burditte and Cheek. (See Vol. 5, T.p. 1274-75, 1277, 1287.)

3. Only relevant evidence is admissible

Only relevant evidence is admissible at trial. Ohio R. Evid. 402. To be relevant, evidence must have the “tendency to make any fact that is of consequence to the determination of the action more or less probable.” Ohio R. Evid. 401; Brown v. Cleveland, 66 Ohio St. 2d 93, 97, 420 N.E.2d 103, 106 (1981). To determine whether evidence is properly excluded, this Court looks to the critical considerations at trial. See id. It is logical that this Court also review the critical considerations at trial in assessing whether evidence is improperly admitted at trial.

In the present case, there was only one critical consideration—the identity of the shooter who killed Burditte and Cheek. In Brown, this Court upheld the exclusion of the disputed evidence because it did not address the critical considerations at trial. 97 Ohio St. 2d at 97, 420 N.E.2d at 106. Here, this Court should find error in the trial court’s admission of the previously listed testimony because it was unrelated to the critical issues at trial.

The above listed testimony sheds no permissible light on the shooter's identity. It is true that some of the evidence could *improperly* suggest that Lang was the shooter. (See Proposition of Law No. 14.) However, as Lang argues in that Proposition of Law, such a propensity inference is impermissible. Ohio R. Evid. 404(B). ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith"). Lang incorporates Proposition of Law No. 9 by reference herein.

Absent the impermissible propensity inference, this testimony failed to make a fact of consequence more or less probable, thus the testimony was inadmissible. Ohio R. Evid. 401, 402. Introduction of such testimony aptly demonstrated the State's strategy; Paint Lang as dangerous and violent and the jury will convict him. (See Propositions of Law No. 9.)

Introduction of this type of testimony was not harmless as it served to inflame the jury. The introduction of this information sent a message to the jurors. Jurors would not believe that the State introduced irrelevant evidence at trial. The jurors gleaned from this testimony that Lang was violent, that he was gang-involved, that he had killed before—that he was the killer here, and that he deserved the death penalty.

These factors had no tendency to prove or disprove any fact of relevance to the trial, except via an impermissible inference that Lang acted in conformity with prior bad character evidence. As such, the Rules of Evidence required the exclusion of this testimony at trial and the admission of this evidence deprived Lang of a fair trial and due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, § 16 of the Ohio Constitution.

4. Gruesome photographs

4.1 Law on gruesome photographic evidence

The standard that courts use to determine if gruesome photographic evidence is admissible in a capital case is stricter than the standard used in non-capital cases under Evidence Rule 403. State v. Morales, 32 Ohio St. 3d 252, 258, 513 N.E.2d 267, 274 (1987). In non-capital cases, the party seeking to admit the evidence must demonstrate that the probative value “is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.” Ohio R. Evid. 403(A). Additionally, courts may exclude photographs under the Rules of Evidence if they are persuaded that the “probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.” Ohio R. Evid. 403(B).

In capital cases, however, the burden shifts to the party seeking admission to demonstrate that the probative value of “each photograph” outweighs the “danger of prejudice” to the defendant. Morales, 32 Ohio St. 3d at 258, 513 N.E.2d at 274. In addition, the party seeking admission must also establish that the photographs are not repetitive or cumulative. Id. at 259, 513 N.E.2d at 274. See also State v. DePew, 38 Ohio St. 3d 275, 281, 528 N.E.2d 542, 551 (1988); State v. Maurer, 15 Ohio St. 3d 239, 473 N.E.2d 768, syl. para. 7 (1984). A photograph is gruesome when it depicts the actual body parts of the victim. DePew, 38 Ohio St. 3d at 281, 528 N.E.2d at 550.

The Maurer and Morales standards are designed to protect the capital defendant from the “danger of prejudice”; the defendant need not establish actual prejudice. See Morales, 32 Ohio St. 3d at 258, 513 N.E.2d at 274. Thus, the Maurer and Morales standards are in concert with

capital jurisprudence from the United States Supreme Court that strives to make the trial phase in a capital case as reliable as possible. See Beck v. Alabama, 447 U.S. 625, 630 (1980).

Nevertheless, where evidence of guilt is overwhelming on each element of the offense, admission of gruesome photographs may be harmless error during the trial phase. See State v. Thompson, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 420 (1987). On direct appeal, constitutional error is harmless only if the prosecution proves it to be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 26 (1967). Even when the admission of gruesome photographs is harmless at trial, the use of improper photographs by the prosecution may have a prejudicial “carry over” effect on the trier of fact’s penalty-phase deliberations. See Thompson, 33 Ohio St. 3d at 15, 514 N.E.2d at 421. Moreover, the prosecution’s use of “unduly prejudicial” evidence in a capital case violates the defendant’s right to due process. See Payne v. Tennessee, 501 U.S. 808, 825 (1991).

4.2 Gruesome photographs admitted

During Lang’s trial, the State offered numerous graphic and prejudicial photographs. The objectionable items included Exhibits 33R, 33P, 32B, 31B, and 31A. These exhibits depicted the following:

- Exhibit 33R, a blood-saturated view of the interior of Burditte’s car.
- Exhibit 33P, a view of Burditte and Cheek in the front seat of the Durango. Burditte’s blood-drenched face is fully visible, as is the lower part of Cheek’s face, which is also blood-soaked. A thick trail of blood is visible down the length of Cheek’s black coat.
- Exhibit 32B, a shot with Burditte’s lips separated, showing blood and damage to his teeth and gums.
- Exhibit 31B, a view of the side of Cheek’s head. Her hair is caked in blood; blood is visible on the entirety of her body visible in the shot as well as on the towel or cloth beneath her.

●Exhibit 31A, a view of the other side of Cheek's head. Again, this depicts extensive blood on Cheek's ear, face, and hair. A portion of Cheek's scalp has been shaved to show a gun shot wound. Also, visible in the picture is a bloodied scalpel, presumably used during the autopsy.

Defense counsel did not object to the use of these photographs during the trial phase. (Hrng. 7/6/07, T.p. 13.) (See also Proposition of Law No. 10.)

The jury must have felt "horror and outrage" when it viewed the photographs at the trial phase. See Thompson, 33 Ohio St. 2d 15, 514 N.E.2d at 420. These exhibits were inflammatory and they appealed to the jurors' emotions. See Thompson, 33 Ohio St. 3d at 15, 514 N.E.2d at 420-21. They created an unacceptable risk that the jurors would convict Lang out of their feelings of anger and revulsion.

Unlike Thompson, this trial error is not harmless beyond a reasonable doubt. See 33 Ohio St. 3d at 15, 514 N.E.2d at 420. The prosecution's case was entirely circumstantial. Moreover, Lang's defense at trial was to create doubt that he was the shooter. Instead, Lang was Antonio Walker's accomplice—Walker fired the fatal shots that killed Cheek and Burditte. The evidence of who shot Cheek and Burditte was not overwhelming. The State's strongest piece of evidence against Lang was Walker's testimony, who escaped the death penalty by pointing his finger at Lang. The improperly admitted evidence would likely mislead and/or inflame the jury. Resultantly, it improperly led the jury to find Lang guilty as the shooter. Here, the evidence was not so overwhelming as to make the prosecution's use of the photographs harmless. See Chapman, 386 U.S. at 26.

5. Conclusion

The trial court admitted irrelevant and inflammatory evidence during the trial. This included testimony from a variety of witnesses as well as gruesome photographs of Burditte and

Cheek. The admission of this evidence violated Lang's right to due process. U.S. Const. amend. XIV; Ohio Const. art. I, § 16. Lang is therefore entitled to a new trial.

Proposition of Law No. 9

A capital defendant is denied his substantive and procedural due process rights to a fair trial and reliable sentencing as guaranteed by U.S. Const. amends. VIII and XIV; Ohio Const. art. I, §§ 9 and 16 when a prosecutor commits acts of misconduct during the trial phase of his capital trial.

1. Introduction.

During the trial phase of Lang's capital trial, the prosecutor committed acts of misconduct that deprived Lang of a fair trial. These acts resulted in a violation of Lang's rights as guaranteed under the Eighth and Fourteenth Amendments to the United States Constitution as well as Article I §§ 9 and 16 of the Ohio Constitution. Thus, Lang's convictions must be reversed.

2. Substantive law on prosecutor misconduct

To succeed on a claim of prosecutor misconduct, Lang must meet one of two standards. Lang must demonstrate either that the prosecutor's misconduct prejudiced a substantive right, see Donnelly v. DeChristoforo, 416 U.S. 637, 644 (1974) (citing Griffin v. California, 380 U.S. 609 (1965)) (footnote omitted); United States v. Carter, 236 F.3d 777, 785 (6th Cir. 2001), or that the prosecutor's misconduct rendered the trial fundamentally unfair. See Berger v. United States, 295 U.S. 78 (1935); Gravley v. Mills, 87 F.3d 779, 786 (6th Cir. 1996).

The reviewing court should not give inordinate weight to the strength of the evidence. In Boyle v. Million, 201 F.3d 711, 717-18 (6th Cir. 2000), the Sixth Circuit Court of Appeals reversed a habeas petitioner's conviction based on a finding of prosecutorial misconduct even though the evidence of guilt was quite strong. See also Carter, 236 F.3d at 791 (granting habeas relief on grounds of prosecutorial misconduct despite sufficiency of evidence).

3. Argument

3.1 The prosecutor asked jurors to impose death on Edward Lang

During voir dire, the prosecutor repeatedly asked for a commitment from jurors that they could impose a death sentence on the defendant, Edward Lang. (See, e.g. Vol. 1, T.p. 160-61, 166-68, 213-16, 271-73, 323; Vol. 2, T.p. 386-87, 436-37, 488, 495, 534, 588-89, 637-38.) The prosecutor's line of inquiry, requesting that prospective jurors commit their willingness to impose death on Lang, prejudged Lang's guilt and the sentence and tainted the jurors' ultimate decisions in both the trial and penalty phases of Lang's case.

"It is ... settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.'" Witherspoon v. Illinois, 391 U.S. 510, 521 (1968) (citing Fay v. New York, 332 U.S. 261, 294 (1947); Tumey v. Ohio, 273 U.S. 510 (1927)). At least one justice of the United States Supreme Court agrees that death-qualifying a capital jury makes that jury more prone to convict the accused. Baze v. Rees, 553 U.S. ___, 128 S. Ct. 1520, 1550 (2008) (Stevens, J., concurring) ("Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a 'death qualified jury' is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction.").

The prosecutor's line of inquiry prejudged the issues in the case and robbed Lang of the presumption of innocence guaranteed to all criminal defendants. U.S. Const. amend. XIV; Ohio Const. art. I, § 16.⁹ The prosecutor prejudged the panel making it more likely to convict, and more likely to impose the death penalty during the penalty phase of Lang's trial.

⁹ In State v. Evans, 63 Ohio St. 3d 231, 249-50, 586 N.E.2d 1042, 1057-58 (1992), this Court rejected an argument substantially similar to the one advanced here and the Court may, therefore,

3.2 The prosecutor suggested Lang was gang-involved and violent

The prosecutor elicited, from several witnesses, evidence designed to suggest to the jury that Lang was a gang member. The prosecutor asked Antonio Walker if Lang wore a certain color frequently. (Vol. 4, T.p. 873.) Over defense counsel objection, Walker was permitted to testify that Lang wore “red” frequently. (*Id.* at 874.) The trial court sustained defense counsel’s next objection, when the prosecutor asked Walker if he knew the significance of the color “red.” (*Id.*) Of course, anyone familiar with gang paraphernalia made the leap to which the prosecutor had hoped to have Walker testify—that Lang was a member of a notorious and violent gang, the Bloods.

Officer John Dittmore also testified that he was employed by the City of Canton’s gang unit. (*Id.* at 955.) There was no relevance to his position within the gang unit. The implication sought by the prosecutor, again, was that a member of Canton’s gang unit was involved because Lang was gang-involved.

In addition to attempting to tie Lang to gang activity, the prosecutor elicited irrelevant testimony about Lang’s nickname in an effort to associate him with guns and violence. Walker testified that Lang’s nickname was “Tech.” (Vol. 4, T.p. 873.) Teddy Seery also testified that this was Lang’s nickname. (Vol. 4, T.p. 923.) “Tech” or “Tek” is shorthand for a type of 9 millimeter handgun. The only reason to submit such information to the jury was to suggest that Lang was familiar with guns, and was violent, thus leading the jury to infer that he was likely guilty of the charged offenses.

“Guilt by association is a philosophy alien to the traditions of a free society.” N. A. A. C. P. v. Claiborne Hardware Co., 458 U.S. 886, 932 (1982) (citation omitted). The prosecution’s

summarily reject this claim on its merits. See State v. Poindexter, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988). However, Lang does not concede that this issue lacks merit under Federal law.

questions, as well as the identification of Dittmore as a gang officer, were clearly directed at Lang's character, identifying him as gang member. Given the portrayal of gangs in society, the prosecutor sought to make it easier on the jury to find that Lang was the actual shooter. Because the prosecutor suggested Lang was a gang member, the jury could infer his guilt. "The concept of guilt by association is repugnant to our notion of elemental justice and fair play." Driebel v. City of Milwaukee, 298 F.3d 622, 651 (7th Cir. 2002) (citation omitted). It was improper for the prosecution to base any part of its case for guilt on Lang's "association with unsavory characters." United States v. Wolfswinkel, 44 F.3d 782, 787 (9th Cir. 1995) (citation omitted).

Attacking Lang's character by associating him with gang activity was "gravely improper argument." State v. Keenan, 66 Ohio St. 3d 402, 409, 613 N.E.2d 203, 209 (1993). In Keenan, the prosecutor referenced the defendant's friends and told the jury that Keenan's acquaintance with these people "tells you something about this man." Id. This Court recognized that the prosecutor's reliance on "the thoroughly discredited doctrine of guilt by association...violated a fundamental principal of American jurisprudence, inhabiting a central place in the concept of due process." Id. (internal quotations and citation omitted). Beyond being improper, this type of argument is prejudicial to the defendant. Id.

The prosecutor's questions about the color red and its implications, as well as identifying Dittmore as a gang officer, similarly encouraged Lang's jury to draw a negative inference about his character based on his the prosecutor's suggestions of gang membership. "[A]n accused cannot be convicted...by proving he...is a bad person." Id. (internal citation omitted).

Given that Claiborne Hardware Co. was decided nearly three decades before, and Keenan was decided some fifteen years before Lang's trial, the prosecutors were well aware of the

impropriety of their actions. The prosecutor's tactics deprived Lang of a fair trial and due process. U.S. Const. amend. XIV.

3.3 The prosecutor failed to lay foundation for testimony regarding drug sales

Dittmore testified during the prosecutor's case-in-chief that drug dealers do not sell drugs to people that they do not know. (Vol. 4, T.p. 967.) The trial court overruled defense counsel's objection to this question and answer. (Id.) Dittmore went further on re-direct, testifying that the quantity of drugs made a difference on whether a dealer would sell to a stranger. (Id. at 969.) Dealers would sell small amounts of drugs to anyone. (Id.) However, when a buyer wants a larger amount, a quarter ounce of powder cocaine, he cannot buy it off the street. (Id.) That sort of purchase must be made surreptitiously between parties that know each other. (Id.) For a \$200 bump, for example, the dealer must know the buyer in this community. (Id. at 970.) If someone who knew the dealer vouched for the buyer, that would also suffice. (Id. at 971.) The prosecutor used Dittmore's testimony during closing arguments. (See, e.g., Vol. 5, T.p. 1261-62.)

The prosecutor used Dittmore's lengthy testimony to establish two points. First, Lang knew Burditte. And, second, Lang had bought drugs from Burditte before. The first point, that Lang knew Burditte, was crucial to the State's case. The prosecutor presented extensive testimony from Walker to establish that Lang selected Burditte as the robbery target, which directly contradicted Lang's statement to the authorities. (See State's Ex. 3.) And, if Lang knew Burditte, he would have every reason to kill him to avoid identification. The second point merely bolstered the first—identifying Lang as the mastermind and perpetrator of this crime.

However, this evidence was inadmissible. Nowhere in Dittmore's testimony does the prosecutor establish his expertise in drug dealers, drug buys, or drug sales in Canton or in any

community in Ohio. Perhaps Dittmore possessed such expertise, but the record before this Court does not demonstrate that Dittmore was familiar with the material to which he testified

The Rules of Evidence speak specifically to the admissibility of expert testimony. Under Ohio Rule of Evidence 702, a witness may testify as an expert if three criteria are met. First, the expert's testimony must relate to a matter beyond the knowledge or experience of lay persons or must dispel a common misconception. Ohio R. Evid. 702(A). Second, an expert must be qualified by specialized knowledge, skill, experience, training, or education regarding the subject matter of his or her testimony. Ohio R. Evid. 702(B). Third, the expert must base his or her testimony on reliable scientific, technical, or other specialized information. Ohio R. Evid. 702(C). All three criteria must be met for a witness to qualify to testify as an expert pursuant to Evidence Rule 702.

A police officer can be an expert, and Lang acknowledges that a hypothetical police officer could possess the experience necessary to offer testimony regarding drug dealers, drug buyers, and drug deal that would satisfy Rule 702. The limited credentials offered for Dittmore, however, suggest he could offer expert testimony on gangs, not drugs.

There are limitations on the testimony that an expert may offer. While an expert may be qualified to testify on one subject, he or she may not be similarly qualified to testify as an expert on a related subject. Campbell v. The Daimler Group, Inc., 115 Ohio App. 3d 783, 793, 686 N.E.2d 337, 344 (1996) (citation omitted). Thus, an expert may only give an opinion as to matters that are within his or her realm of expertise. Shilling v. Mobile Analytical, 65 Ohio St. 3d 252, 255, 602 N.E.2d 1154, 1157 (1992).

Moreover, as with all evidence introduced at trial, the expert's testimony must satisfy the requirements of Evidence Rules 401, 402, and 403. Just because the evidence rules provide for

the admission of expert testimony does not mean that every opinion held by an expert should be admitted at trial. Schaffter v. Ward, 17 Ohio St. 3d 79, 81, 477 N.E.2d 1116, 1117 (1985).

Dittmore is a police officer in Canton's gang unit. However, just because Dittmore has expertise in some areas of policing, does not mean that he is an expert in all areas. See Shilling, 65 Ohio St. 3d at 255, 602 N.E.2d at 1157; Campbell, 115 Ohio App. 3d at 793, 686 N.E.2d at 344 (citation omitted). There was no testimony introduced during trial to indicate that he possessed specialized knowledge, skill, experience, training, or education regarding drugs, drug dealers, drug buyers, or even drug deals generally. Dittmore's testimony was inadmissible under Evidence Rule 702 (B).

This testimony was particularly prejudicial because the prosecutor offered Dittmore as a purported expert. Faced with a difficult decision, one that could be incorrect, "jurors may too willingly embrace the opinion of an 'expert.'" State v. Jones, 114 Ohio App. 3d 306, 319, 683 N.E.2d 87, 95 (1996). Resultantly, the prosecutor's conduct deprived Lang of a fair trial and due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, § 16 of the Ohio Constitution.

3.4 The prosecutor used Lang's "throwing up" comment to suggest other acts

The prosecutor elicited prejudicial testimony from Walker suggesting that Lang had committed other murders. In discussing the events following Burditte and Cheek's murders, Walker testified that Lang threw up. (Vol. 4, T.p. 887.) Walker stated that he checked on Lang's well-being and that Lang responded, "every time I do this, this same thing happens." (Id.) The prosecution implied with this testimony that Lang had killed before—he threw up then just like he did now. (See also Walker's statement, p. 13.) The prosecutor grasped this comment in

closing, arguing that Lang threw up because he had just killed two people and that Walker had not thrown up because he did not see the murders happen. (Vol. 5, T.p. 1299.)

This testimony was improper and unduly prejudicial other acts evidence used to show that Lang acted in conformity with his bad character—he killed before, he killed now. The testimony allowed the prosecutor to then make an inflammatory and prejudicial comment in closing argument.

But character evidence may not be used in this manner. See Ohio R. Evid. 404(B). (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith”). Other acts evidence is only admissible to show “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Id. See also O.R.C. § 2945.59. At best, the State of Ohio can try to argue that Walker’s testimony goes to identity, since it does not demonstrate the other enumerated factors. However, the State cannot demonstrate that Walker’s testimony provides a *permissible* inference of Lang’s identity as the shooter.

Other acts are admissible to prove identity in two situations. They can be used where they “form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment,” and which are “inextricably related to the alleged criminal act.” State v. Lowe, 69 Ohio St. 3d 527, 531, 634 N.E.2d 616, 619 (1994) (quoting State v. Curry, 43 Ohio St. 2d 66, 73, 330 N.E.2d 720, 725 (1975)). Put more simply—the other acts must establish a *modus operandi*. In such situations, the other acts must show that the defendant has committed other crimes that share a “distinct, identifiable scheme, plan, or system” in common with the charged offense. Lowe, 69 Ohio St. 3d at 531, 634 N.E.2d at 619 (quoting State v. Jamison, 49 Ohio St. 3d 182, 552 N.E.2d 180, syllabus (1990)). Put another way, the

other acts evidence must provide a behavioral fingerprint to identify the defendant as the perpetrator of the charged offense. *Id.* at 531, 634 N.E.2d 619-20.

The other acts evidence Walker offered was inadmissible and prejudicial to Lang because it suggested to the jury that Lang had killed before. This made it more likely that he had pulled the trigger in the present case. This allowed the jury to draw the improper inference explicitly prohibited by the Ohio R. Evid. 404(b). The prosecutor's actions were misconduct, which deprived Lang of a fair trial and due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, § 16 of the Ohio Constitution.

3.5 The prosecutor presented Lang's statement that he may be guilty of conspiracy

Lang's statement to law enforcement was played for the jury and admitted into evidence in its entirety, over defense counsel's objection. (Vol. 4, T.p. 1001-05; see also State's Ex. 3.) In the statement, Lang opines that he may well be guilty of conspiracy to murder. (See State's Ex. 3.) While the trial court gave the jury a limiting instruction regarding use of Lang's opinion (Vol. 4, T.p. 1006), the instruction was insufficient to correct the error.

A trial court's general instructions may often suffice to cure error. State v. Smith, 14 Ohio St. 3d 13, 15, 470 N.E.2d 883, 885-86 (1984). However, there are certain instances of misconduct that are too great for the trial court's instruction to cure. *Id.* The present case presents such an instance. Here, the trial court permitted the prosecutor to offer Lang's opinion that he was guilty of conspiracy to commit aggravated murder, despite the fact that Lang lacked the legal acumen to make such a determination. This dove-tailed into one of the prosecutor's chief themes in closing argument—that Lang could be guilty as an aider and abettor to these murders. (See Vol. 5, T.p. 1264-65.) And, his best piece of evidence on this point came straight from Lang's mouth.

In Smith, the sufficiency of the evidence was not relevant to the inquiry and could not excuse the “prosecutor’s improper remarks.” Id. at 15, 470 N.E.2d at 886. Rather, it had to be “clear beyond a reasonable doubt that, absent the prosecutor’s comments, the jury would have found the defendant guilty.” Id. (citing United States v. Hasting, 461 U.S. 499, 510-11 (1983)). Similarly, this Court should find that the sufficiency of the evidence cannot excuse the prosecutor’s comments. It is not clear on this record that the jury would have found Lang guilty absent the prosecutor’s elicitation of this evidence. See Proposition of Law No. 5. The prosecutor committed misconduct when offering Lang’s statement in its entirety. This statement was irreparably prejudicial to Lang. Thus, the prosecutor’s conduct deprived Lang of a fair trial and due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, § 16 of the Ohio Constitution.

3.6 The prosecutor presented false testimony

Walker testified that he found out later, after the murders, that the murder weapon was a nine millimeter pistol. However, Walker also admitted that he knew how to chamber a round for that type of gun. (Vol. 4, T.p. 879, 883.) Walker was lying when he testified that he did not know, until later, the make and model of the murder weapon. Moreover, based on the fact that prosecutor elicited testimony that Walker knew how to chamber ammunition in such a weapon, it is apparent that the prosecutor knew Walker was lying.

A prosecution’s presentation of evidence known to be false violates the Fourteenth Amendment. The same result occurs when prosecutors, although not soliciting false evidence, allow false evidence to go uncorrected. Giglio v. United States, 405 U.S. 150, 153 (1972). Prosecutors cannot create a materially false impression regarding the facts of the case or the credibility of a witness. The knowing use of false testimony entitles the accused to a new trial

“if there is any reasonable likelihood the false testimony could have affected the verdict.” United States v. Agurs, 427 U.S. 97, 103-04 (1976); Napue v. Illinois, 360 U.S. 264, 271 (1959).

In Napue, the prosecution’s principal witness testified in response to a question raised by the prosecutor that he had received no promise of consideration in return for his testimony. The prosecution knew that this testimony was false but did nothing to correct it. The Court, in reversing and remanding for a new trial in Napue, noted that the State’s obligation “does not cease to apply merely because the false testimony goes only to the credibility of the witness.” Id. at 270 (citations omitted). The Court reaffirmed these principles in Giglio. 405 U.S. at 153 (citations omitted).

Walker’s lie was significant. The only issue in dispute at trial was the identity of the shooter, Lang or Walker. There was evidence to support Lang’s position that it was Walker who fired the fatal shots—the prosecutor argued that the jury could find Lang guilty as an accomplice and the trial court instructed the jury on this theory of culpability. (Vol. 5, T.p. 164, 1297-98, 1312, 1314-15, 1330, 1332-33 (argument); id. at 1312, 1314-15, 1330, 1332-33 (instructions).) Walker’s testimony was designed to falsely suggest that he could not be the shooter because he did not even know what kind of gun killed Burditte and Cheek.

Given the disputed issue at trial, and the fact that the prosecutor elicited both pieces of testimony, the evidence demonstrates that the prosecutor knowingly presented false evidence. The prosecutor’s presentation of Walker’s false testimony deprived Lang of a fair trial and due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, § 16 of the Ohio Constitution.

3.7 The prosecutor argued DNA evidence proved Lang shot Burditte and Cheek

Several times during closing argument, the prosecutor told the jury that DNA evidence proved that Lang killed Burditte and Cheek. (See Vol. 5, T.p. 1274-75, 1277, 1287.) Each time, the prosecutor made his assertion as a statement of fact. (See *id.*) The record, however, does not support the prosecutor's argument. See Washington, 228 F.3d at 700.

As demonstrated in Lang's Proposition of Law No. 2, the expert evidence offered regarding DNA from the gun was far from conclusive evidence that Lang committed these offenses. DNA expert Foster testified that she found low levels of DNA from two individuals on the gun. (Vol. 4, T.p. 1128.) Foster testified that she was able to exclude Antonio Walker as the major source of the DNA, (*id.* at 1129), and that she could not exclude Lang as a possible source of the minor DNA found on the gun. (*Id.*) But, Foster indicated that she could not "say to a reasonable degree of scientific certainty that" Lang was the source of the DNA on the gun. (*Id.*) The inability to exclude Lang is not the same as an expert finding that Lang's DNA was on the gun. Lang incorporates Proposition of Law No. 2 herein by reference.

It is the jury's duty to decide facts. State v. Hutton, 53 Ohio St. 3d 36, 47, 559 N.E.2d 432, 444 (1990) ("the jury's essential task is to make determinations of fact and apply the law to the facts it finds."). There is no place for the prosecutor's personal beliefs in his case presentation. Young, 470 U.S. at 8. Amplifying the prosecutor's impropriety is the fact that the jury likely gave significant weight to the prosecution's conclusions of fact. See Berger, 295 U.S. at 88. Those personal beliefs, when linked to a purported expert opinion, can have a devastating impact. Faced with a difficult decision, one that could be incorrect, "jurors may too willingly embrace the opinion of an 'expert[.]'" State v. Jones, 114 Ohio App. 3d 306, 319, 683 N.E.2d

87, 95 (1996). See also Daubert v. Merrell Dow Pharms., 509 U.S. 579, 595 (1993) (internal citation omitted).

The prosecutor's personal beliefs had no place in the case. Nor was there a place for scientifically unreliable evidence suggesting Lang was the killer. The prosecutor's comments deprived Lang of a fair trial and due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, § 16 of the Ohio Constitution.

3.8 The prosecutor speculated

The prosecution repeatedly speculated during trial phase closing arguments. For example, the prosecutor argued that Cheek saw the shot that killed her coming because "she put her hand up." (Vol. 5, T.p. 1266.) The trial court overruled defense counsel's objection to this remark. (Id.)

Despite the fact that the court overruled this objection, the prosecutor's comment was pure speculation, unsupported by the record. Criminalist Michael Short was the only witness to testified on this subject. The best Short could offer was that Cheek's hand was six to twelve inches from the gun when it was fired. (Vol. 4, T.p. 1079.) In fact, the trial court sustained defense counsel's objection to the prosecutor's question seeking to develop evidence to support the assertion he made in closing—whether the stippling on Cheek's hand could be a "possible response to someone raising their hand because they saw something coming." (Id. at 1084.) Such speculation was entirely inadmissible. See State v. Wogenstahl, 75 Ohio St. 3d 344, 357, 662 N.E.2d 311, 322-23 (1996) ("the prosecutor obviously invited the jury to concentrate on what the victim experienced and was thinking in her last moments of life. As we recognized in State v. Combs, 62 Ohio St. 3d 278, 283, 581 N.E.2d 1071, 1077 (1991) such argument could be considered error to the extent that it invites the jury to speculate on facts not in evidence.").

The prosecutor also argued that DNA got on the gun by firing it. (Vol. 5, T.p. 1275-77.) Again, this was nothing more than rank speculation on the prosecutor's part. There is no evidence in the record that supports the prosecutor's contention. The same holds true for the prosecutor's comments about fingerprints on the gun clip. There were, however, multiple explanations for the lack of fingerprints, including wetness or wiping the gun down.

If a prosecutor makes a "short, oblique, and justified" statement that is unsupported by admissible evidence, there is no prejudicial error. State v. Lott, 51 Ohio St. 3d 160, 166, 555 N.E.2d 293, 300 (1990). Here, there is no evidence to support the prosecutor's arguments. Moreover, the prosecutor's comments were not short, oblique, or justified.

The prosecutor speculated regarding the final moments of Cheek's life, suggesting to the jury what she must have gone through in those final moments, raising her hand to ward off the fatal gunshot wound. The prosecutor's speculation continued when he told the jury that there was scientific evidence to prove that Lang fired the gunshots that killed Cheek and Burditte, and also that he had wiped the gun clean of fingerprints. Each time he asserted facts that were unsupported by the record.

Without record support, the jury must have inferred that the prosecutor was privy to information to which it had not been made aware. It is improper for the prosecutor to make assertions of personal knowledge. See State v. Hill, 75 Ohio St. 3d 195, 204, 661 N.E.2d 1068, 1079 (1996). Such assertions of personal knowledge likely carried great weight with jury when it should carry none. Berger, 295 U.S. at 88.

The prosecutor's comments were not based on evidence admitted at trial. Moreover, the fact that it was the prosecutor who suggested this theory made it likely that the jury would give it substantial weight, thus prejudicing Lang. Resultantly, the prosecutor's conduct deprived Lang

of a fair trial and due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, § 16 of the Ohio Constitution.

3.9 The prosecutor vouched for witnesses

The prosecutor repeatedly vouched for witnesses and the veracity of their testimony. The prosecutor vouched for Walker's testimony, bolstering his claim that he did not shoot Burditte and Cheek.

We know Antonio didn't enter the truck because he told us that.

(Vol. 5, T.p. 1273.) The prosecutor also told the jury that Teddy Seery was truthful.

But I submit to you, and you judge his credibility and you look at what he knew, he [Seery] is telling the truth.

(Id. at 1269.) The trial court sustained defense counsel's objection and directed the jury to "disregard the Prosecutor's indication that he believes that he was telling the truth. That is not a proper closing argument for either side to do." (Id. at 1269-70.)

The prosecutor also vouched for the testimony of criminalist Mike Short and his identification of the gun found in Lang's car as the murder weapon.

We know that this is the murder weapon beyond a reasonable doubt. Mike Short told you that.

(Id. at 1261.)

At the conclusion of the prosecutor's argument, defense counsel moved for a mistrial. In particular, defense counsel focused on prosecutorial vouching and comments on Lang's guilt. (Vol. 5, T.p. 1303.) The trial court overruled this motion. (Id. at 1304.)

It is improper for an attorney to express his opinion as to the credibility of a witness. State v. Williams, 79 Ohio St. 3d 1, 12, 679 N.E.2d 646, 657 (1997) (citing State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931); Smith, 14 Ohio St. 3d 13, 470 N.E.2d 883). Such commentary

poses two dangers. United States v. Young, 470 U.S. 1, 18 (1985). First, “such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant’s right to be tried solely on the basis of the evidence presented to the jury.” Id. Second, “the prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.” Id. at 18-19 (citing Berger, 295 U.S. at 88-89). The prosecutor’s argument deprived Lang of a fair trial and due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, § 16 of the Ohio Constitution.

The prosecutor’s vouching was particularly prejudicial here. The prosecutor assured the jury that its witnesses were telling the truth. He also promised that they had correctly identified the murder weapon—the gun found in the back seat of the car Lang was driving. This vouching made it more likely that the jury would infer Lang’s guilt, substituting the prosecutor’s credibility determinations for its own.

4. Carry over to penalty phase

The extensive prosecutorial misconduct in this case may have a prejudicial “carry over” effect on the trier of fact’s penalty-phase deliberations. See State v. Thompson, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 421 (1987). This is particularly true when the misconduct is geared towards demonizing Lang as a violent, drug-dealing, gang-banger—an offender worthy of the death penalty.

5. Conclusion

The trial court sustained some objections to the misconduct in this case. However, as the Supreme Court recognized in Berger, sometimes the misconduct is simply too much for the trial

court's instructions to cure. 295 U.S. at 85. See also Boyle, 201 F.3d at 717-18. In this case, like Berger, the misconduct "was pronounced and persistent with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." Id. at 81. Even sufficient evidence of guilt cannot save a conviction tainted by misconduct. Boyle, 201 F.3d at 717-18. Here, because the evidence of guilt on the essential element of principal offender was not overwhelming, Berger dictates relief from Lang's convictions based on prosecutorial misconduct. Id.

This is not a case of slight or confined misconduct, but rather "misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." Berger, 295 U.S. at 89. This Court should vacate Lang's convictions and remand this case for a new trial.

Proposition of Law No. 10

The defendant's right to the effective assistance of counsel is violated when counsel's performance during the culpability phase of a capital trial is deficient to the defendant's prejudice. U.S. Const. amends. VI and XIV; Ohio Const. art. I, § 10.

The errors and omissions of Edward Lang's appointed counsel violated his Sixth Amendment right to effective representation in the culpability phase of his trial.

The Sixth Amendment right to counsel applies to the states through the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). The test for whether that right to counsel has been violated is found in Strickland v. Washington, 466 U.S. 668 (1984). The reviewing court must determine if counsel's performance was deficient. Id. at 687. If counsel's performance was deficient, the court must determine if the deficiency prejudiced the accused. Id. To establish prejudice, the accused need not establish outcome determinative error. Id. Instead, the accused is prejudiced if the reviewing court loses confidence in the fairness of the trial. Id.

Strategic choices by appointed counsel are virtually unassailable. Id. at 690. Strickland makes clear, however, that a reasonable investigation of both the facts and the applicable law is required before a court may deem counsel's choice strategic. Id. at 691. Further, under Strickland, appointed counsel in a criminal case has a "duty to advocate the defendant's cause" as well as "a duty to bring to bear such skill and knowledgeable as will render the trial a reliable adversarial testing process." Id. at 688. Federal courts have consistently recognized that Strickland's duties to advocate and to employ "skill and knowledge" include the necessity for trial counsel to object or otherwise preserve federal issues for review. See e.g., Gravley v. Mills, 87 F.3d 779, 785 (6th Cir. 1996); Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994). Cf.

Freeman v. Lane, 962 F.2d 1252, 1259 (7th Cir. 1992) (appellate counsel ineffective for abandoning viable federal claim; cause and prejudice for default established).

When assessing the performance prong in a capital case, the American Bar Association's Guidelines for the Appointment of Counsel in Death Penalty cases are highly instructive of what is required of appointed counsel. See Wiggins v. Smith, 539 U.S. 510, 524 (2003). And when assessing the prejudice to Lang's Sixth Amendment right, this Court should assess the cumulative effect of counsel's deficient performance. See Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995).

1. Failure to challenge weak DNA evidence

Defense counsel failed to mount a forceful challenge to the State's DNA evidence. Lang's counsel did substantial harm to his defense by incorrectly conceding that there was a DNA "match" that identified him as the principal offender (shooter). Lang was prejudiced because he claimed that Antonio Walker was the shooter, and the evidence identifying Lang as the shooter was not overwhelming. Without trial counsel's error, the jury could have convicted Lang as Walker's accomplice; as the jury was instructed to consider if Lang aided and abetted Walker in the murders. (Vol. 5, Tp. 1312, 1314-15, 1330, 1332-33.)

Michele Foster testified that she tested, for DNA, the genetic material found on State's Exhibit 1, the murder weapon. Foster testified that she found low levels of DNA from two individuals on the gun. (Vol. 4, T.p. 1128.) Foster testified that she was able to exclude Antonio Walker as the major source of the DNA. (Id. at 1129.) However, Foster testified that she could not exclude Lang as a possible source of the minor DNA found on the gun. (Id.) Foster said that there was a one in 3,461 chance of finding the DNA profile for the major contributor. (Id.) During cross-examination, Foster testified that her results could not be submitted to CODIS

because the figures were so small (Combined DNA Index System). (*Id.* at 1135.) Moreover, “that statistic has to be more than 1 in 280 million” before the expert may conclude that DNA is present to a reasonable degree of scientific certainty. (*Id.*)

This DNA evidence had weak probative value and it was too unreliable to be used to secure Lang’s capital convictions and death sentence. Accordingly, defense counsel should have moved to suppress this evidence under Ohio R. Evid. 401-403, and the Sixth and Fourteenth Amendments. Counsel also should have objected to Foster’s testimony about this DNA evidence. In Proposition of Law No. 2, Lang explains why this DNA evidence should not have been admitted. Lang incorporates that claim here by reference to more fully explain why he was prejudiced by this error.

However, defense counsel’s error exceeds the mere failure to object to this weak DNA evidence. Counsel exaggerated the value of the State’s DNA evidence by conceding that Lang’s DNA matched the genetic material on the murder weapon.

The gun. I was interested in noting how Mr. Barr misstated the facts. He said Eddie Lang’s DNA is on the gun.

That’s not what I heard. I think the Crime Lab people said that he can’t be excluded. I think that’s what they said. I don’t think they said it is conclusive.

Plus, there was some minor DNA that they couldn’t identify whose DNA it was. But maybe I am wrong. **Maybe they did say that. It is conclusively Eddie Lang’s DNA. Maybe that’s true.**

(Vol. 5, T.p. 1296.) (Emphasis added.)

There was no conclusive proof that Lang’s DNA was on the murder weapon. Foster could only say that Lang could not be excluded as the minor contributor to the source of the DNA found on the gun. DNA, unlike a fingerprint, does not create a conclusive match. A DNA test can definitively exclude a suspect. DNA test results can also show that a suspect is not

excluded as the source of the genetic material — along with a statistical probability of how often the known DNA profile appears within a population group, such as Caucasians or African-Americans. See Brown v. Farwell, No. 07-15592, 2008 U.S. App. LEXIS 9637, 21, n.5 (9th Cir. May 5, 2008).

Here, similar to Brown, defense counsel were ineffective because they conceded that the State's DNA evidence may have conclusively identified Lang as the source of the genetic material on the gun. See generally id. Rather than making concessions, counsel should have vigorously challenged the DNA evidence. The jury would tend to be overly-impressed with any DNA evidence because its efficacy is enforced through popular culture and the media. But this DNA evidence was too inconsequential for the CODIS database. All this evidence established was that Lang could not be excluded as the minor contributor. This evidence did not establish that Lang was the minor contributor. There was no "match."

Lang was prejudiced. Defense counsel's concession undermined Lang's only defense to the capital charges — Walker was the shooter and he was the accomplice. The jury was instructed to view Walker's testimony with grave suspicion because, as the codefendant, Walker had a strong bias and interest in testifying that Lang was the shooter. (Vol. 5, T.p. 1310-12.) (See Proposition of Law No.V.) The jury could have had reasonable doubts whether Lang was the shooter, but for defense counsel's failure to vigorously contest this weak DNA evidence. Worse, defense counsel falsely bolstered the strength of this evidence by stating that it may have conclusively identified Lang as the source of the DNA on the gun.

2. Lynch mob comparison

Defense counsel squandered the opportunity to make a cogent argument that reasonable doubts exist whether Lang was the shooter. Lead defense counsel lost his credibility and alienated the jury when he compared the jury to a lynch mob.

[MR. BEANE:] That's a tragedy which brings me to the second thing I learned in my years of practicing law, being a lover of history. I like history.

That's this: **A lynch mob is composed of the same people that make up a jury.**

MR. BARR: Objection.

THE COURT: I will give you a little leeway. Hopefully you will tie this up.

MR. BEANE: Yes, I will. Repeat. **A lynch mob is made up of the same people that make up a jury.** They are citizens of the community, employers, employees, taxpayers, voters, they are the same people.

So what separates them? One thing separates a lynch mob from a jury and one thing only. That's your oath of office. I do solemnly swear that I will well and truly try. That's the only thing that separates a lynch mob from a jury.

A lynch mob is not interested in the evidence. Billy Joe will get the rope, Jimmy Joe will bring the pickup truck around, Earl Ray, go get the Defendant. He did it, look at that victim, look at these photos, he has got to pay for that.

They are not interested in evidence. They are not interested in the fact that there is no forensic evidence linking Eddie Lang to either one of those murders. They are not interested in that.

A jury is. A jury is interested, and they want to know of four people in that vehicle on October 22, why do you run tests on three of them and not the guy that got the deal?

Why run tests on Jaron Burditte's clothes? Why run tests on Marnell Cheek's clothes? Why run tests on Eddie Lang's clothes, and stop, come to a halt with Antonio Walker's clothes? Why?

A jury, not the lynch mob, would be interested in that. They are made up of the same people.

Now, just because a jury takes an oath of office does not mean that they have to act like a jury. They can go in the jury room, close the jury door, hey, let's flip a coin. So guilty, let's go. Okay. Jury has spoken.

But the problem is violence was done to not only the Defendant but beyond that. Violence was done to the system. If I am indicted, if the Court is indicted, Prosecutor is indicted, if Mr. Koukoutas is indicted,

even one of those Deputies are indicted, the only safeguard we have is the oath of office.

Life will go on for everybody in this courtroom. **If you act like a jury or if you act like a lynch mob.** I don't know about Eddie. I will keep trying cases. Mr. Koukoutas will keep trying cases.

(Vol. 5, T.p. 1289-91.) (Emphasis added.)

This argument may have been an attempt by counsel to reinforce the importance of the jury's role in the criminal justice system. However, it failed even in that respect. After counsel differentiated between a jury and a lynch mob, counsel then stated that a jury may "act like a lynch mob" and counsel said "if you act like a lynch mob." (Id. at 1291.)

A lynch mob reference, especially when made by an African-American advocate, presents vivid imagery of racist brutality from the most unfortunate chapters of American history. In the context of a racially-charged crime, such an argument could serve as a proper cautionary remark not to let racism infect the jury's deliberations. But this was not a racially-charged crime. Rather, this case involved charges that an African-American defendant and his African-American co-defendant killed two African-American victims in a robbery.

Counsel's argument could easily have been perceived by the jury as an attempt to play the proverbial race card. Implicit in this argument was the accusation that the jury would be the equivalent of a lynch mob if it convicted Lang. Further, the lynch mob comparison was not likely to resonate with the all-white jury; especially under the circumstances of this case. The only African-American juror (386) was removed for cause after she was empanelled. (See Proposition of Law No. 1.)

Lang was prejudiced. Counsel could have used his skill to create reasonable doubts whether Lang was the shooter. Counsel instead chose the ill-conceived lynch mob argument. This argument undermined counsel's credibility with the jury.

3. Failure to voir dire regarding juror 386

A biased juror (number 386) was empanelled. This juror was removed during the State's case. Defense counsel failed to voir dire the other jurors to determine whether juror 386 tainted the panel. Counsel were thus ineffective.

After the State's case began, defense counsel put on the record that Lang saw one of the jurors "look[] out into the audience, smile[] and nod[] her head." (Vol. 4, T.p. 864.) The prosecutor then explained that juror 386 was related to Marnell Cheek by marriage. This information came to light after Cheek's father told the prosecutor about this juror's relationship to Cheek's family. (Id. at 865.) Juror 386 never volunteered this information.

MR. BARR: Yes, Juror No. 386's mother is married to Marnell's brother. His name is Donte Jeffries. Marnell's maiden name is Jeffries. Cynthia Jeffries is Juror No. 386's mother. They live in the State of Florida.

Juror No. 386 lives in Canton, as she told us in voir dire, with her grandparents; and, according to Mr. Cheek, she moved up here in August with her grandparents.

I don't know how much contact she has with her mother or with her, it would be her stepfather. In fact, they might have even said he was the natural father, I am not sure; but I can find out.

THE COURT: Okay. When we get our next break, we will make an inquiry of this particular juror alone.

I will ask that juror, also, if she made any – assuming that this is accurate, if she discussed this with any of the other jurors.

Then if counsel wants me to, if you want me to go further than that on either side and actually poll the balance of the jurors, to make sure she didn't say anything to anybody, I will be happy to do that.

(Id. at 865-66.) Defense counsel asked the trial court to deal with this issue "before . . . any further testimony." However, the trial court allowed the State to examine Antonio Walker and Ted Seery before this issue was addressed at the next break. (See Proposition of Law 1.)

When questioned, juror 386 admitted that her "mom is married to [Marnell Cheek's] brother." (Vol. 4, T.p. 940.) Juror 386 conceded that she did not disclose her connection to

Cheek's family at voir dire. (Id.) Juror 386 denied discussing her relationship to Cheek with any other jurors. (Id. at 944-45; id. at 950-51.)

Juror 386 was excused by agreement of the parties. (Id. at 948.) However, defense counsel failed to ensure that the other jurors were questioned on this matter. See Remmer v. United States, 347 U.S. 227, 228 (1954). Counsel were ineffective because they failed to ensure that juror 386 did not taint the panel.

Juror 386 was not credible and it was unreasonable to accept her self-serving denials. Foremost, Juror 386 was asked plain and simple questions at voir dire whether she knew anyone involved in this case or anything about the case. (See generally Vol. 1, T.p. 16-60, T.p. 134-148.) At voir dire, juror 386 claimed only to have some knowledge of this case through a newspaper article. (Id. at T.p. 145.) But juror 386's response at voir dire was disingenuous because, as it was later revealed, she was related to Cheek by marriage.

Moreover, juror 386's questionnaire on publicity reveals her dishonesty. The first question asked her to disclose "what you may know of your own personal knowledge, concerning the shooting details of Jaron Burditte and Marnell Cheek" (See Dkt. 352.) Juror 386 responded "[w]ell the newspaper stated that both of them were shot execution style in the back of their heads over drugs." (Id.)

Juror 386 was evasive in her answer to that question. The question asked her what she knew about Marnell Cheek's death from any source. She deliberately avoided revealing her knowledge by answering only what she had read in the newspaper. Juror 386 qualified her answer to this question to avoid lying. Nevertheless, her answer shows that she was gaming the court to keep her bias a secret.

The record also strongly suggests that juror 386 wanted to sit as a juror because she was biased. As defense counsel noted, Lang observed this juror making non-verbal connections to persons seated in the gallery. (Vol. 4, T.p. 864.) Juror 386's nodding and smiling to persons in the gallery raises the prospect that she wanted to be on Lang's jury to seek retribution for Cheek and her family.

Juror 386 also attended the viewing of Cheek's body before her funeral. (Id. at 946.) She denied discussing the case in any way at the viewing, and she denied that she overheard any discussion of the crime at the viewing. (Id.) Juror 386's far-fetched response is too hard to swallow. It is incredible to believe Cheek's family avoided any discussion of the tragic circumstances of Cheek's premature death at the viewing.

Juror 386 was not credible. It appears that she hid her bias because she wanted to be on the jury. And juror 386 never volunteered her connection to Cheek. If not for Cheek's father, her relationship to one of the victims would never have been known.

It was insufficient for defense counsel to take juror 386 at her word. This is so especially because this juror had to be worried about being in trouble with the court. Juror 386 was aware that she gave untruthful answers on her questionnaire and at voir dire. Juror 386 also had a "friendly" relationship with juror 387, making the need for voir dire more important. (Id. at 944.) Counsel were ineffective because they failed to request an individual voir dire of the other jurors to determine whether juror 386 tainted the panel. See Hughes v. United States, 258 F.3d 453, 463-64 (6th Cir. 2001) (biased juror is structural error and counsel cannot waive an impartial jury as matter of strategy).

4. No objection to instructions on (A)(7) specifications

Lang's only defense to the capital murder charges, and his primary defense against the death penalty, was that Antonio Walker was the shooter. Defense counsel eviscerated Lang's defense because they failed to object to jury instructions on the O.R.C. § 2929.04(A)(7) specifications that omitted the prior calculation and design element. This omission, in effect, forced the jury to find Lang guilty as the principal offender. Lang incorporates Proposition of Law No. 4 here by reference to more fully explain how this error prejudiced him.

5. Failure to contest prejudicial testimony

Antonio Walker testified that Lang was also known as "Tech." (Vol. 4, T.P. 873.) Walker also testified that Lang vomited after the murders, and that Lang said "every time I do this, this same thing [vomiting] happens." (*Id.* at 887.) Defense counsel should have moved to suppress this testimony, or counsel should have objected to it and sought a curative instruction.

Lang was prejudiced by Walker's testimony. This was a thinly veiled reference to a TEK-9, nine millimeter, automatic weapon. This Tech reference — along with the prosecutor's attempt to inject the color red used by the Bloods gang — was an attempt by the prosecutor to make Lang seem more guilty by his association to gangs. The Tech reference also associated Lang to gun violence.

Moreover, Walker's statement that Lang threw up "every time [he did] this" was the prosecutor's attempt to show that Lang had committed other bad acts and perhaps even prior murders. The prosecutor sought to convict Lang based on his propensity for bad character.

This type of "other acts" evidence was especially prejudicial because there was a disputed question of fact whether Lang or Walker was the shooter. This evidence made the jury more likely to choose Lang as the shooter, not on evidence, but based on prior bad acts and his

propensity to act like a gangster. See Ohio R. Evid. 403 (A), 404 (B). (See Proposition of Law No. 9.)

6. Failure to test Walker's clothes

Defense counsel failed to secure a forensic expert to conduct independent testing of Antonio Walker's clothes for trace evidence. Counsel moved "to make the [S]tate's physical evidence available to defendant for inspection and scientific testing by defendant's experts." (Motion 66, 6/3/07, Dkt. 248.) This motion explained that "[t]he expert, to conduct tests, obviously needs the clothes, blood standards, weapons, and any other evidence tested." (Id. at 2.) The trial court granted this request. (Dkt. 256.) But counsel failed to take advantage of the trial court's entry granting this type of testing.

At trial, criminalist Michael Short testified that he tested the waist band of Lang's blue denim shorts for gun shot residue and none was found. (Vol. 4, T.p. 1095-97.) On cross-examination, Short said that Walker's pants had not been submitted by law enforcement for a similar test. (Id. at 1101-02.)

Criminalist Michelle Foster said that she tested Lang's shoes, coat, white tank top shirt, red t-shirt, knit cap, and blue denim cropped pants for trace evidence. (Id. at 1119-26.) Foster found Lang's blood on his red t-shirt and blue denim cropped pants. (Id. at 1124-25.) But she did not find either of the victim's blood on Lang's clothing. Foster also tested Walker's dark blue hooded sweatshirt and found no blood on it. (Id. at 1127.) However, Walker's pants were not tested for blood or gun shot residue.

Counsel were ineffective in failing to secure a forensic expert to test Walker's pants for trace evidence. This failure was inexcusable because counsel had the court's permission to conduct the testing. (Dkt. 256.) Lang was prejudiced. His defense was that Walker was the

shooter. A test revealing gun shot residue or the victim's blood on Walker's pants would have greatly bolstered his defense.

This omission was not the result of a tactical choice by defense counsel. Defense counsel faced no risk in having Walker's pants tested. Negative test results would not have exculpated Walker; just as the absence of trace evidence on Lang's pants did not exculpate him. But a positive test of Walker's pants for gun shot residue or the victims' blood would have greatly aided Lang's claim that Walker was the shooter.

7. Ineffective cross examination of coroner

Defense counsel were unprepared to cross examine the coroner, Dr. Murthy. Defense counsel confused the jury and diminished their credibility by asking an irrelevant question about a weapon found on Jaron Burditte's body.

Q. Okay. When you examined the body of Jaron Burditte, you took a firearm off of that body, didn't you?

MR. SCOTT: Objection.
MR. BEANE: It is in his report, Your Honor.
MR. BARR: Where?
THE COURT: Let's find it in the report.
MR. BEANE: On the bottom, weapon, firearm.
MR. BARR: No, no, that is the cause.
THE COURT: You can ask the question.

BY MR. BEANE:

Q. The weapon down is firearm. That is the cause of death, not the fact that that is on him?
A. Beg your pardon?
Q. In your report down here, you have the weapon, firearm, you have that listed - -
A. Yes, yes.
Q. Thank you.

THE COURT: So that the jury understands, in looking at the report, it was not on the person. It was just indicated that that was the cause of death.

State, any other questions?

(Vol. 5, 1229-30.) Counsel were unprepared to effectively cross-examine the coroner. As a result, counsel confused the cause of death with the coroner finding a weapon on the victim.

8. Failure to challenge chain of custody for weapon

Officer Dittmore testified that State's Exhibit 1, a nine millimeter pistol was seized when Lang was arrested. (Vol. 4, T.p. 968.) Dittmore did not collect the gun as evidence. Instead, Dittmore testified that an I.D. officer took the gun into the crime lab for processing. (*Id.*) The gun was later identified by criminalist Michael Short as the murder weapon. (Vol. 4, T.p. 1072-74.) However, no chain of custody for the weapon was established. Officer Randy Weirich collected evidence and he processed Burditte's truck, but he did not testify about transporting the gun to the crime lab. (Vol. 4, T.p. 1142-62.) The State failed to establish a chain of custody for the gun between Dittmore and Short. Counsel were ineffective because they failed to contest Exhibit 1 on this point.

9. Counsel failed to move to seal prosecutor's file

Defense counsel failed to move to have the prosecutor's file sealed for appellate review. In State v. Brown, 115 Ohio St. 3d 55, 63-65, 873 N.E.2d 858, 866-68 (2007), this Court reversed and remanded for a new trial, in part, based on a violation of the prosecutor's duty to disclose evidence favorable to the defense. Under Brady v. Maryland, 373 U.S. 83 (1963), the relevant documents were identified in Brown on appeal after "the prosecutor's file [was] sealed and made part of the record for appellate review." *Id.* at 63, 873 N.E.2d at 866. Counsel failed

to safeguard Lang's due process rights because they did not move to seal the prosecutor's file for appellate review.

10. Counsel failed to object to gruesome photos

Defense counsel were ineffective to Lang's prejudice because they failed to object when State's exhibits 31A, 31B, 32B, 33P, and 33R were admitted into evidence. The risk of prejudice from these gruesome photographs was not substantially outweighed by their probative value. See Ohio R. Evid. 403 (A)(1); State v. Morales, 32 Ohio St. 3d 252, 258, 513 N.E.2d 267, 274 (1987). This evidence would tend to inflame the passions of the jurors, and lead the jury to convict Lang as the shooter out of emotion; despite evidence that Lang may not have been the shooter. For brevity, Lang incorporates Proposition of Law No. 8 here by reference to further develop this argument.

11. Failure to object to instances of prosecutor misconduct

The prosecutor committed several acts of misconduct at the culpability phase of Lang's trial, violating his due process right to a fair trial. Defense counsel failed to object to the following instances of prosecutorial misconduct.

11.1 The prosecutor asked jurors to impose death on Edward Lang

During voir dire, the prosecutor repeatedly asked for a commitment from jurors that they could impose a death sentence on the defendant, Edward Lang. (See, e.g. Vol. 1, T.p. 160-61, 166-68, 213-16, 271-73, 323; Vol. 2, T.p. 386-87, 488, 495, 534, 588-89, 637-38.)

11.2 The prosecutor suggested Lang was gang-involved and violent

Officer John Dittmore testified that he was employed by the City of Canton's gang unit. (Id. at 955.) His position within the gang unit had no relevance to the case. The implication

sought by the prosecutor, again, was that a member of Canton's gang unit was involved because Lang was gang-involved.

In addition to attempting to tie Lang to gang activity, the prosecutor elicited irrelevant testimony about Lang's nickname in an effort to associate him with guns and violence. Walker testified that Lang's nickname was "Tech." (Vol. 4, T.p. 873.) Teddy Seery also testified that this was Lang's nickname. (Vol. 4, T.p. 923.) "Tech" or "Tek" is shorthand for a type of nine millimeter handgun.

11.3 The prosecutor failed to lay foundation for testimony regarding drug sales

On re-direct, Dittmore testified that the quantity of drugs made a difference on whether a dealer would sell to a stranger. (Id. at 969.) Dealers would sell small amounts of drugs to anyone. (Id.) However, when a buyer wants a larger amount, a quarter ounce of powder cocaine, he cannot buy it off the street. (Id.) That sort of purchase must be made surreptitiously between parties that know each other. (Id.) For a \$200 bump, for example, the dealer must know the buyer in this community. (Id. at 970.) If someone who knew the dealer vouched for the buyer, that would also suffice. (Id. at 971.) The prosecutor used Dittmore's testimony during closing arguments. (See, e.g., Vol. 5, T.p. 1261-62.)

11.4 The prosecutor presented false testimony

Walker testified that he found out later, after the murders, that the murder weapon was a nine millimeter pistol. However, Walker also admitted that he knew how to chamber a round for that type of gun. (Vol. 4, T.p. 879-883.)

11.5 The prosecutor argued DNA evidence proved Lang shot Burditte and Cheek

Several times during closing argument, the prosecutor told the jury that DNA evidence proved that Lang killed Burditte and Cheek. (See Vol. 5, T.p. 1274-75, 1277, 1287.) Each time, the prosecutor made his assertion as a statement of fact. (See id.)

The prosecutor also argued that DNA got on the gun by firing it. (Vol. 5, T.p. 1275-77.)

11.6 The prosecutor vouched for witnesses

The prosecutor repeatedly vouched for witnesses and the veracity of their testimony. The prosecutor vouched for Walker's testimony, bolstering his claim that he did not shoot Burditte and Cheek.

We know Antonio didn't enter the truck because he told us that.

(Vol. 5, T.p. 1273.)

The prosecutor also vouched for the testimony of criminalist Mike Short and his identification of the gun found in Lang's car as the murder weapon.

We know that this is the murder weapon beyond a reasonable doubt. Mike Short told you that.

(Id. at 1261.)

11.7 Conclusion

Lang argues that prosecutor misconduct denied him a fair trial in Proposition of Law No. 9. For brevity, Lang incorporates Proposition of Law No. 9, here by reference to demonstrate prejudice based on these instances of prosecutor misconduct.

12. Failure to object to irrelevant evidence

The State presented irrelevant evidence at the trial phase that prejudiced Lang's due process right to a fair trial. Defense counsel were ineffective because they failed to object to the following evidence.

12.1 Gang association

The State elicited testimony from Antonio Walker that Lang frequently wore red. (Vol. 4, T.p. 874.) The trial court sustained defense counsel's next objection, when the prosecutor asked Walker if he knew the significance of the color "red." (Id.) The implication to anyone with a rudimentary familiarity with gang paraphernalia was that Lang was a member of a notorious and violent gang, the Bloods.

The State elicited testimony from John Dittmore that he was employed by the City of Canton's gang unit. (Id. at 955.) There was no relevance to his position within the gang unit. The implication was that a member of Canton's gang unit was involved because Lang was gang-involved.

Further, the State elicited testimony from Walker and Teddy Seery that Lang's nickname was "Tech." (Id. at 873, 923.) "Tech" or "Tek" is shorthand for a type of nine millimeter handgun. This suggested that Lang was familiar with guns, and was violent, thus leading the jury to infer that he was likely guilty of the charged offenses.

12.2 Drug buys

The State elicited testimony from Dittmore that drug dealers do not sell drugs to people that they do not know. (Id. at 967.) Dittmore also testified that the quantity of drugs made a difference on whether a dealer would sell to a stranger. (Id. at 969.) Dealers would sell small amounts of drugs to anyone. (Id.) However, when a buyer wants a larger amount, a quarter ounce of powder cocaine, he cannot buy it off the street. (Id.) That sort of purchase must be done surreptitiously between parties that know each other. (Id.) For a \$200 bump, for example, the dealer must know the buyer in this community. (Id. at 970.) If someone who knew the

dealer vouched for the buyer that would also suffice. (Id. at 971.) This testimony was designed to suggest that Lang had bought drugs before.

12.3 Prior bad acts

The State elicited testimony from Walker that following Burditte and Cheek's murders, Lang threw up. (Id. at 887.) Walker stated that he checked on Lang's well-being and that Lang responded, "every time I do this, this same thing happens." (Id.) The prosecution implied with this testimony that Lang had killed before, because he threw up then, as he did after these murders. (See also Walker's statement, p. 13.)

12.4 False testimony from co-defendant

The State elicited testimony from Walker that he found out later, after the murders, that the murder weapon was a nine millimeter pistol. However, Walker also admitted that he knew how to chamber a round for that type of gun. (Vol. 4, T.p. 879, 883.) His familiarity with how to load the weapon demonstrates that Walker was lying when he testified that he did not know, until later, the make and model of the murder weapon.

12.5 Weak DNA evidence

The State elicited testimony about scientifically unreliable DNA evidence. Then the prosecutor told the jury that DNA evidence proved that Lang killed Burditte and Cheek. (See Vol. 5, T.p. 1273-75, 1277, 1287.)

12.6 Conclusion

Lang more fully develops these claims in Proposition of Law Nos. 2, 8, and 9. For brevity, he incorporates Proposition of Law Nos. 2, 8, and 9 here by reference to establish prejudice resulting from all of this improperly admitted evidence.

13. Prior consistent statement

Defense counsel failed to object when the State elicited a prior consistent statement from Antonio Walker. During Walker's testimony, the State elicited from him that his testimony was the same story he told Officer Kandel, before he received his plea deal. (Vol. 4, T.p. 893.) The prosecutor reminded the jury of that early statement in closing argument. (Vol. 4, T.p. 1267.) This argument bolstered Walker's testimony. While the State did not elicit the substance of Walker's statement, it did not have need to — Walker told the jury that it was identical to the testimony he gave in open court. In essence the State advised the jury in full detail of Walker's prior consistent statement. Walker was in court, so he was available. And, he gave this prior statement was given by him to the police, which meant Lang did not have a prior opportunity to cross-examine him. Walker's testimony, and his inclusion by inference of his prior consistent statement, thus violated Lang's Confrontation Clause rights. See Tome v. United States, 513 U.S. 150, 158 (1995). For brevity, Lang incorporates Proposition of Law No. 7 here by reference to demonstrate the prejudice from counsel's failure to object.

14. No challenge to defective indictment

Defense counsel failed to challenge the defective indictment that omitted the mens rea requirement for aggravated robbery. The failure to allege the mens rea element in the indictment is a structural defect that creates plain error. State v. Colon, 2008 Ohio LEXIS 874 (Apr. 9, 2008). In light of Colon, Lang is entitled to relief on this claim despite his counsel's failure to preserve this issue in the trial court. (See Proposition of Law No. 3, incorporated here by reference.) Out of an abundance of caution, Lang also raises this error as ineffective counsel.

15. Conclusion

Lang's right to the effective assistance of counsel in the culpability phase was violated by his counsel's errors and omissions, and their cumulative effect. See Strickland, 466 U.S. 668; Harris, 64 F.3d at 1438. Lang is entitled to a new trial.

Proposition of Law No. 11

Where the jury recommends the death sentence for one count of aggravated murder, but recommends a life sentence on another count, and the aggravating circumstances and mitigating factors are identical, the resulting death sentence is arbitrary and must be vacated. U.S. Const. amends. VIII, XIV.

Edward Lang was charged with two counts of aggravated murder, one each for Jaron Burditte and Marnell Cheek's death. Each aggravated murder charge carried the same aggravating circumstances—course of conduct (O.R.C. § 2929.04(A)(5)) and felony murder, with aggravated robbery as the underlying felony (O.R.C. § 2929.04(A)(7)). Lang's jury convicted him of both counts of aggravated murder and the accompanying aggravating circumstances.

During the penalty phase of Lang's trial, the jury weighed the aggravating circumstances against the mitigating factors. Ohio's death penalty scheme permits imposition of the death penalty only when the aggravating circumstance(s) a capital defendant is found guilty of outweighs the mitigating factors. O.R.C. § 2929.03(D)(2). In Ohio, a trial court may not impose the death penalty absent the jury's determination that the aggravating circumstances outweigh the mitigating factors. *Id.* Ohio law specifies what are aggravating circumstances and what are mitigating factors. *See* O.R.C. § 2929.04. Moreover, the sentencer may only consider those aggravating circumstances attached to the aggravated murder. Further, the aggravated murder itself is not an aggravating circumstance. *State v. Wogenstahl*, 75 Ohio St. 3d 344, 662 N.E.2d 311, syl.1 (1996).

Ohio enacted its statutory scheme in response to the United States Supreme Court's Eighth Amendment jurisprudence, requiring that the capital sentencer's discretion be channeled by "clear and objective standards that provide specific and detailed guidance." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). In a capital case, the sentencer must exercise discretion so as

to “minimize the risk of wholly arbitrary and capricious action.” Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Justices Stewart, Powell, and Stevens). The decision to impose the death penalty must “be, and appear to be, based on reason rather than caprice or emotion.” Zant v. Stephens, 462 U.S. 862, 885 (1983) (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)). If the sentencing procedure is unreliable, the resulting death sentence cannot stand. Caldwell v. Mississippi, 472 U.S. 320 (1985).

At the close of the penalty phase, Lang’s jury recommended a sentence of life imprisonment without possibility of parole for Burditte’s murder. The jury recommend that Lang be sentenced to death for Cheek’s murder.

The troubling component of these recommendations is that the two counts of aggravated murder were identical. Similarly, the aggravating factors charged in both counts were identical. And, Lang offered no mitigation evidence that was specific to a particular count—the evidence offered to mitigate these offenses was identical.

The victim was the solitary factor that distinguished the two aggravated murder counts. Burditte was a known drug dealer. Despite the fact that Cheek was seated next to Burditte when they were killed, and that Burditte had drugs in his hand at that time, no one testified that she sold drugs. (Vol. 4, T.p. 982, 1151.) The jury improperly weighed who the victim was as an aggravating circumstance, in effect weighing the actual murder as an aggravating circumstance to reach its incongruent sentencing recommendation. See Wogenstahl, 75 Ohio St. 3d 344, 662 N.E.2d 311, syl.1. The trial court made this same mistake in its sentencing opinion. (See Proposition of Law No. 17.)

The Supreme Court has held that “inconsistent verdicts are constitutionally tolerable.” Dowling v. United States, 493 U.S. 342, 353-54 (1990) (Standefer v. United States, 447 U.S. 10,

25 (1980)). See also State v. Gapen, 104 Ohio St. 3d 358, 381, 819 N.E.2d 1047, 1071 (2004) (citing State v. Hicks, 43 Ohio St. 3d 72, 78, 538 N.E.2d 1030 (1989); United States v. Powell, 469 U.S. 57, 68 (1984); State v. Mapes, 19 Ohio St. 3d 108, 112-13, 484 N.E.2d 140, 145 (1985); State v. Adams, 53 Ohio St. 2d 223, 374 N.E.2d 137, syl. at 2 (1978)). Here, however, the Eighth Amendment concerns distinguish Lang's case from Dowling and its progeny. Because of the heightened need for certainty and the need for the appearance of reason over caprice and emotion in death penalty cases, this Court cannot allow these inconsistent verdicts on identical facts to stand. See, e.g., Godfrey, 446 U.S. at 428; Gregg, 428 U.S. at 189 (Opinion of Justices Stewart, Powell, and Stevens); Zant, 462 U.S. at 885 (quoting Gardner, 430 U.S. at 358).

The jury's inconsistent verdict as to Cheek's death demonstrates that the jury acted arbitrarily and capriciously. It gave more weight to identical aggravating circumstances in the count involving the victim who was seated next to, but was not herself, a drug dealer. The jury therefore weighed an aspect of the murder in its decision. This violates Ohio's sentencing scheme. Lang's death sentence is therefore based on an improper recommendation and violates the Eighth and Fourteenth Amendments to the United States Constitution. This Court must vacate the death sentence and impose a life sentence.

Proposition of Law No. 12

A capital defendant's rights to due process and a fair trial are denied when a prosecutor engages in misconduct during the penalty phase. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, § 10.

1. Introduction

During the penalty phase, the prosecutor made a number of comments that mischaracterized the defendant and the evidence presented. He misled the jury and engaged in improper and prejudicial behavior. Because of these actions, Edward Lang was denied his right to a fair and reliable capital sentencing hearing. He was denied his due process rights guaranteed by the Fourteenth Amendment to the United States Constitution. In light of this misconduct, the sentence of death must be overturned.

2. Standard of Review

To successfully raise a claim of prosecutorial misconduct, an appellant must demonstrate that the prosecutor's actions have either prejudiced a specific constitutional right see Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974) (citing Griffin v. California, 380 U.S. 609 (1965)) (footnote omitted); United States v. Carter, 236 F.3d 777, 785 (6th Cir. 2001) or rendered the trial fundamentally unfair. See Berger v. United States, 295 U.S. 78 (1935); Gravley v. Mills, 87 F.3d 779, 786 (6th Cir. 1996). "Allowing the prosecutor to make inadmissible, inflammatory -- and in the words of the Ohio Supreme Court, 'misleading' -- statements which directly undercut the defendant's sole theory of mitigation effectively undermines the defendant's right under the Eighth Amendment to receive the 'constitutionally indispensable' consideration of his proffered mitigating evidence." DePew v. Anderson, 311 F.3d 742, 749-50 (2002) (Citing Lockett v. Ohio, 438 U.S. 586, 604 (1978)).

To evaluate prosecutorial misconduct, this Court must determine the impropriety of the statements and then decide if they rise to such a level as warrants reversal. Boyle v. Million, 201 F.3d 711, 717 (6th Cir. 2000) (citing United States v. Carroll, 26 F.3d 1380 (6th Cir. 1994)). The flagrancy of the misconduct is viewed in light of four factors: “1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of the evidence against the accused.” United States v. Francis, 170 F.3d 546, 549-50 (6th Cir. 1999).

The last factor should be given considerable weight. Boyle, 201 F.3d at 717-18. Nor does the strength of evidence in the trial phase, have relevance to claims of misconduct that occurred during the mitigation phase. Bates v. Bell, 402 F.3d 635, 641 (6th Cir. 2005). The mitigation is concerned with the defendant’s moral guilt, rather than his legal guilt. State v. Holloway, 38 Ohio St. 3d 239, 527 N.E.2d 831, 840 (1988) (Douglas, J., concurring); California v. Brown, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring). See also State v. Fears, 86 Ohio St. 3d 329, 715 N.E.2d 136 (1999) (Moyer, C.J., dissenting) (citing Satterwhite v. Texas, 486 U.S. 249, 258-59 (1988)) (harmless error standard is “stringent” for penalty phase error involving prosecutor misconduct).

3. Misrepresentation of the mitigation

The prosecutor engaged in misconduct in telling the jury, “until the age of 10 life seemed to be pretty good.” (Mit. T.p. 92.) This statement was at odds with the testimony from the witnesses. Lang’s sister, Yahnena Robinson, testified that before Lang was ten, his mother, Tracy Carter, would not let his father come around and see his son. (Id. at 48.) Carter wanted to protect her son from his father’s drug abuse and violence. (Id. at 48.) That was certainly not a

good or normal childhood, living in fear of your own father. It is not good when one parent forces the other to stay away from the children, afraid of his abuse. Nor is it normal for a child, under the age of ten, to be taking multiple medications. (*Id.* at 64.) The prosecutor's comments were an inaccurate characterization of Lang's youth.

The prosecutor described the two years while Lang was his father's hostage as "allegedly not so good." (*Id.* at 92.) The prosecutor cast doubts on the quality of Lang's life in captivity. He later claimed that "bad things happened" but claimed "there is absolutely no evidence of that." (*Id.* at 102.) Although Carter did not bring in medical reports of her son's abuse, records of his shameful trauma, she did testify to that effect, as did Lang's sister. For the prosecutor to say there was "absolutely no evidence" was false and improper. (*Id.*) He not only discounted the "burn on his shoulder towards his back and that he had a gash on his hand and that he had bruises on him" but the people who testified about those injuries. (*Id.* at 63.) He led the jury to believe that the testimony that those things did happen was not evidence. "Misrepresenting facts in evidence can amount to substantial error because doing so 'may profoundly impress a jury and may have a significant impact on the jury's deliberations.'" Washington v. Hofbauer, 228 F.3d 689, 700 (6th Cir. 2000) (citing Donnelly, 416 U.S. at 646). The prosecutor's words misrepresented the record and misled the jury.

The prosecutor also faulted Lang for not taking his medications when he was a child. His comments gave the impression that as a young boy, Lang was to blame for not taking prescribed medications. He told the jury, "his mother on numerous occasions sought help for Eddie, but Eddie didn't take his medication." (Mit. T.p. 92.) The prosecutor inappropriately criticized Lang for circumstances that as a child, were beyond his control. His point was that Lang's mother wanted to help him but he would not cooperate. He passed judgment on a young boy for

being unable to take medications, even when many adults struggle with the same problem. This blunted any mitigating effect that Lang's mental health problems would have had.

Lang's struggle with his mental health should have been viewed as a mitigating factor. The prosecutor made it an issue of compliance, that Lang should be punished for not taking his medication. It suggested that any issues Lang had were of his own making and he had only himself to blame. His point was that allowing any leniency would reward Lang for failing to maintain his health. In presenting an argument that faulted Lang, the prosecutor again turned mitigating circumstances into aggravating circumstances. In addition to getting the jury to use mitigating factors against Lang, these factors were not among the enumerated statutory aggravating factors, and their consideration was improper. Consistent with the factors in Boyle, the prosecutor's statements concerning the mitigating evidence were misrepresentative of the records. He purposefully made the statements throughout his argument, misled the jury, and prejudiced Edward Lang.

4. References to gang affiliation

Another aspect of the prosecutor's misconduct was his use of prejudicial language. The prosecutor repeatedly referred to Lang as Tek. ("The first is that Eddie Lang, also known as Tek, committed the offense..." and "The second is that Eddie Lang, also known as Tek, did commit...") (Mit. T.p. 29.) The nickname refers to a 9mm pistol, frequently known as a Tek (also Tec, Teck, or Tec-9). His references to Lang's purported nickname were an attempt to associate him with gangs and violence, implying that he has a reputation for using a gun.

There was no testimony to support the contention that Lang had any gang affiliation; no witnesses spoke to this effect. This is serious misconduct and a substantial error. Arguing facts that are not supported by the record may mislead and prejudice the jury. Washington, 228 F.3d

at 700; Berger, 295 U.S. at 84. The closest the State came to providing evidence of gang-related activity was the testimony of Sergeant Dittmore, who was a member of the gang taskforce. However, there were no allegations of gang-related activities in connection with this case. (Vol. 4, T.p. 955.)¹⁰ It was improper for the prosecutor to repeatedly refer to the nickname. Its use served no valid purpose and had no support from the evidence. The mention of the nickname served only to associate Lang with a criminal element and inflame the passions of the jury.

Another effect of the use of gang references and symbols was that the jury attributed bad character by association with a criminal element. Painting Lang as a gang member allows the jury to impute the gang's bad acts to him. A defendant can not be judged by the company he keeps; guilt by association remains a thoroughly discredited doctrine. State v. Keenan, 66 Ohio St. 3d 402, 409, 613 N.E.2d 203, 209 (1993); Uphaus v. Wyman, 360 U.S. 72, 79 (1959). Arguments, like the prosecutor's, that continue to employ this doctrine are prejudicial and improper. If the jury believes that Lang is the member of a gang and a notorious gunslinger, they are going to attach the negative attributes of those things to him. This is precisely the line of reasoning that is forbidden. Such associations and depictions are dehumanizing and misleading.

Even more importantly, the contention that Lang was a gang member had no basis in the evidence presented. Strong characterizations are only allowed when they are supported by the record. Washington, 228 F.3d at 700. There is a difference between simply using strong language as a rhetorical device and actually accusing someone of being a certain type of person or belonging to a particular group. Courts grant greater latitude in closing arguments for name calling when there is a basis for it in the evidence. State v. White, 82 Ohio St. 3d 16, 23, 693 N.E.2d 772, 779 (1998). "As a general rule, counsel should not comment on matters not at issue

¹⁰ This is being argued as error elsewhere in the brief. See Proposition of Law No. 8.

in the trial.” State v. Brown, 38 Ohio St. 3d 305, 316, 528 N.E.2d 523, 538 (1988). Washington, 228 F.3d at 700. Referring to someone as a monster will not prove that they are subhuman. But, insinuating someone’s membership in a gang carries with it actual associative properties. The distinction is critical because the latter requires evidentiary support, none of which was provided in this case. Prosecutors occupy a unique position as servants of the law and juries place great faith and trust in them. Berger, 295 U.S. at 88. Thus, for a prosecutor to make an argument such as this, “undignified and intemperate” and “calculated to mislead the jury,” it is misconduct and the defense is prejudiced with no hope of repair. Id. Such ad hominem attacks are severe and will not be tolerated. Cook v. Bordenkircher, 602 F.2d 117, 120 (6th Cir. 1979).

Introducing evidence of gang affiliation sought to use “bad character” evidence to prove Lang acted in conformity with that character and committed the crime. Fed. R. Evid. 404(a); Michelson v. United States, 335 U.S. 469, 476, 93 L. Ed. 168, 69 S. Ct. 213 (1948). It can be misconduct for a prosecutor to dwell on such arguments. Washington, 228 F.3d at 699. As in Washington, the comments pervaded the argument and were thus severe and prejudicial. Id. at 700. There was nothing in the record that forced the prosecutor to make these comments. Reminding the jury of Lang’s nickname or suggesting that he was in a gang had no bearing on anything in the aggravating circumstances.

5. Victim-impact

The prosecutor also stated that “Eddie has a child just like Jaron and Marnell.” (Mit. T.p. 92) This comment amounted to an inadmissible victim-impact statement. Victim-impact statements are severely restricted. Payne v. Tennessee, 501 U.S. 808, 827 (1991); State v. Fautenberry, 72 Ohio St. 3d 435, 650 N.E.2d 878 (1995) (evidence of a victim’s character and of the impact of the victim’s death on his or her survivors is not per se inadmissible based on the

Eighth Amendment).¹¹ Neither Payne nor any other case has ever erased the fundamental principle that states may grant greater protections than those required by the Federal Constitution. See California v. Greenwood, 486 U.S. 35, 43 (1988). It is improper to rely on victim-impact evidence in the sentencing phase. State v. Loza, 71 Ohio St. 3d 61, 82, 641 N.E.2d 1082, 1105 (1994). Reminding the jury that the victims had children was only done to enhance the enormity of the crime. Such an argument is aimed at the passions of the jury rather than the prudence of the punishment. Nothing in the statements offered any insight into the appropriateness of the death penalty. Payne, 501 U.S. at 827. See also Baze v. Rees, 553 U.S. ___, 128 S. Ct. 1520 (2008) (Stevens, J., concurring). The prosecutor's statement did more than simply call attention to the fact that the victims had children. (See Proposition of Law No. 15.) Still impermissible under Payne is use of victim-impact statements to suggest a penalty. 501 U.S. at 83, n.2. The prosecutor's pronouncement reminded the jury that Burditte and Cheek's children lost parents, while Lang's child did not. It implied that some measure of justice could then be exacted by depriving Lang's daughter of her parent. It suggested that there was an additional retributive benefit to sentencing Lang to death.

In the alternative, the prosecutor's statement about kids "just like Jaron and Marnell" was making the argument that they had once been children, too. (Mit. T.p. 92.) Pointing out to the jury that everyone was once young is not germane to evaluating the mitigating evidence. The jury rightly considered O.R.C. § 2929.04(B)(4) evidence of Lang's youth. Using the youth of the victims argument to highlight the defendant's actions, however, was improper. It not only

¹¹ Payne overruled portions of Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989). However, Payne left intact the Constitutional prohibition against admitting evidence of the victim's family members' characterizations and opinions of the crime, of the defendant, and of the appropriate sentence. 501 U.S. at 830 n.2; id. at 835 n. 2 (Souter, J. and Kennedy, J., concurring).

discounted the defendant's background as an additional mitigating factor, but allowed the jury to compare Lang's actions to those of others. Such a statement had nothing to do with Lang's mitigation and only misled the jury. It invited a comparison of the victims' childhoods to Lang's and then begged a comparison of their adulthoods. Under either interpretation, the mention of children had no bearing on the appropriateness of the death penalty and it was improper for the prosecutor to say it. This evidence was another example of the prosecutor's misconduct through purposeful, repeated, misleading statements.

6. Rendering justice

It was also misconduct for the prosecutor to tell the jury to "render justice." (*Id.* at 103.) In his closing statement, the prosecutor asked the jury to "render justice, a sentence of death." (*Id.*) In conflating the rendering of justice and the death sentence, the prosecutor implied that anything less than death would not be justice. While both parties are given some latitude in presenting their closing arguments, they must not go beyond the record. Washington, 228 F.3d at 700; State v. Byrd, 32 Ohio St. 3d 79, 82, 512 N.E.2d 611, 616 (1987). This is particularly true where such argument implores the jury to return a particular sentence to satisfy a public demand. Berger, 295 U.S. 88; State v. Davis, 60 Ohio App. 2d 355, 361-62, 397 N.E.2d 1215, 1220 (1978). "An appeal to the jury's sense of outrage and sympathy for the victim is particularly troublesome when made after the jury has already determined the defendant's guilt, and the only remaining task is to decide his fate." State v. Mills, 62 Ohio St. 3d 357, 373, 582 N.E.2d 972, 987 (1992). The prosecutor's charge led the jury to believe that sparing Lang's life would be an injustice. This was both misleading and a blatant misstatement of the law.

"The closing argument must...be reviewed in its entirety to determine if the prosecutor's remarks were prejudicial." State v. Moritz, 63 Ohio St. 2d 150, 157, 407 N.E.2d 1268, 1273

(1980); United States v. Young, 470 U.S. 1, 12 (1985) (Court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly.). In Lang's case, the prosecutor engaged in numerous fallacious and misleading arguments. As whole, the prosecutor's remarks prejudiced Lang. The prosecutor undermined the mitigation and introduced victim-impact statements. He misrepresented facts in the record and inaccurately characterized the defendant.

7. Conclusion

When a prosecutor engages in misconduct, the defendant is denied the right to a fair trial and due process. Because the prosecution argues last, the defense has little opportunity to correct or refute the statements that the prosecutor makes in closing. The prosecutor's comments during the penalty phase of this case were purposeful, misleading, prejudicial, and damaging. The prosecutor's behavior during the mitigation phase was rife with misconduct. He engaged in a pattern of behavior that prejudiced Lang's right to due process and his right to a fair trial. These comments were intentional and repeated throughout the trial. As a result, Edward Lang was prejudiced and denied a fair trial. This case must be remanded for a new mitigation phase and sentencing.

Proposition of Law No. 13

The defendant's right to the effective assistance of counsel is violated when counsel's performance, during the penalty phase of his capital trial, is deficient to the defendant's prejudice. U.S. Const. amend. VI; Ohio Const. art. I, § 10.

1. Introduction.

The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases set the bar high for defense counsel in a capital case. Counsel must begin their work early, prioritize mitigation, and assemble a competent team to work on the defendant's behalf. The record before this Court demonstrates that Lang's counsel's efforts fell well-below the standards outlined by the ABA. Counsel were so ill-prepared for the mitigation phase that they presented a woefully incomplete mitigation case, minimized evidence of horrific abuse, and failed to object to errors committed by the trial court and the prosecution. Defense counsel could not even correctly articulate for the court the name of their mitigation specialist, identifying his last name on the record as "Krantz" rather than "Crates." (Mitigation Tp. 85) This error was symptomatic of a presentation that failed to meet counsel's constitutional obligations. Their deficient performance prejudiced Lang, denying him a fair trial and a reliable sentence. As a result, Lang's rights as guaranteed by the Sixth and Fourteenth Amendments and Article I, §§ 10 and 16 of the Ohio Constitution were violated.

2. Law.

The Sixth Amendment right to counsel applies to the states through the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). The test for whether that right to counsel has been violated is found in Strickland v. Washington, 466 U.S. 668 (1984). The reviewing court must determine if counsel's performance was deficient. Id. at 687. If counsel's performance was deficient, the court must determine if the deficiency prejudiced the accused.

Id. To establish prejudice, the accused need not establish outcome determinative error. Id. Instead, when the reviewing court loses confidence in the fairness of the trial, the accused is prejudiced. Id.

Strategic choices by appointed counsel are virtually unassailable. Id. at 690. Strickland makes clear, however, that a reasonable investigation of both the facts and the applicable law is required before a court may deem counsel's choice strategic. Id. at 691. When assessing the performance prong in a capital case, this Court is informed by the American Bar Association's Guidelines for the Appointment of Counsel in Death Penalty Cases. See Wiggins v. Smith, 539 U.S. 510, 524 (2003). "The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence" Id. (citation and internal quotation marks omitted).

Further, under Strickland, appointed counsel in a criminal case has a "duty to advocate the defendant's cause" as well as "a duty to bring to bear such skill and knowledgeable as will render the trial a reliable adversarial testing process." Id. at 688. Federal courts have consistently recognized that Strickland's duties to advocate and to employ "skill and knowledge" include the necessity for trial counsel to object or otherwise preserve federal issues for review. See e.g., Gravley v. Mills, 87 F.3d 779, 785 (6th Cir. 1996); Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994). Cf. Freeman v. Lane, 962 F.2d 1252, 1259 (7th Cir. 1992) (appellate counsel ineffective for abandoning viable federal claim; cause and prejudice for default established).

3. Counsel rendered prejudicially deficient performance during the penalty phase.

3.1 Defense counsel failed to present relevant mitigating evidence.

Jaron Burditte was a known drug dealer living a criminal lifestyle. The facts of this crime demonstrate that his girlfriend, Marnell Cheek, was aware of his occupation as demonstrated by her presence while Burditte intended to conduct a drug sale. On the night Burditte and Cheek were killed, Burditte was found in the front seat of his car with a package of cocaine in his hand. (Vol. IV, Tp. 1151-52; see also Ex. 33T) Cheek was seated next to him. Had police stopped the vehicle, both occupants would have been arrested because of the criminal enterprise in which they were involved.¹²

Burditte's criminal lifestyle, one in which Cheek was enmeshed, facilitated this offense. Lashonda Burditte, his sister, testified that he was charged with possession of cocaine in 2006. (Mitigation Tp. 38) He met Cheek that same year. (Id.) Most significant, however, Cheek was seated right next to Burditte, who had drugs in hand at the time of the murders. (Vol. IV, Tp. 1151-52; see also Ex. 33T) Counsel should have offered this as mitigation under O.R.C. § 2929.04(B)(1). See State v. Green, 66 Ohio St. 3d 141, 153, 609 N.E.2d 1253, 1263 (1993) (“Willis arguably “induced or facilitated” the offense because he illegally bought food stamps and sold liquor”).

Counsel deprived the jury of information relevant to its sentencing determination, the presence of a statutory mitigating factor. This resulted in an unfair sentencing proceeding and an

¹² At a minimum, Burditte and Cheek could have been charged with drug possession under O.R.C. § 2925.11. See, e.g., State v. Stewart, No. 83428, 2004 Ohio App. LEXIS 3712, *8 (Cuyahoga Ct. App. Aug. 5, 2004) (citing State v. Tomlinson, No. 83411, 2004 Ohio App. LEXIS 2958, *15 (Cuyahoga Ct. App. June 24, 2004) (finding usable drugs within a close proximity to defendant may constitute circumstantial evidence and support the conclusion that the defendant had constructive possession)).

unreliable sentence, rendering counsel's assistance ineffective. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 9, 10, 16.

3.2 Counsel failed to adequately investigate and prepare.

Due to the ineffective assistance of counsel, Lang's mitigation was woefully incomplete. Lang's mother and sister testified on his behalf. His mother's testimony was replete with information that should have led counsel to dig deeper, to present a complete and compelling picture of Edward Lang's life.

Counsel must conduct a thorough investigation into their client's background. Williams v. Taylor, 529 U.S. 362, 397 (2000) (internal citation omitted); Austin v. Bell, 126 F.3d 843, 848 (6th Cir. 1997). See also ABA Guidelines, Comment 10.7. Lang had the right to present and to have the jury consider all of the mitigating evidence available in his case. Strickland, 466 U.S. at 706 (Brennan, J., concurring in part and dissenting in part) (citing to Eddings v. Oklahoma, 455 U.S. 104 (1982)). However, this right means very little when trial counsel fails to look for and present mitigating evidence. Strickland, 466 U.S. at 706 (citing Comment, 83 Colum.L.Rev. 1544, 1549 (1983)); See, e.g., Burger v. Zant, 718 F.2d 979 (11th Cir. 1983), stay granted, 466 U.S. 902 (1984). Trial counsel did not take the necessary effort to prepare a case sufficient to convince the jury that the aggravating circumstances did not outweigh the mitigating factors, their ineffectiveness effectively sealing Lang's fate.

Failure to present mitigating evidence is not alone proof of ineffective assistance of counsel or a deprivation of the defendant's fair trial right. State v. Johnson, 24 Ohio St. 3d 87, 91, 494 N.E.2d 1061, 1065 (1986). However, it is incumbent on trial counsel to offer mitigating evidence when the penalty their client faces is so severe and the reality of the situation is that

their client's life is at stake. Pickens v. Lockhart, 714 F.2d 1455, 1468 (8th Cir. 1983); Williams, 529 U.S. at 397 (counsel ineffective for failure to present mitigation evidence).

Lang's counsel presented "some" mitigation, but failed to explore the wealth of available evidence. Lang's mother and sister testified on Lang's behalf—Lang's mother's testimony is the roadmap for what counsel should have investigated and presented to the jury. Lang's mother, Tracy Carter, testified about a horrific history of violence and abuse in her home, by Lang's father. (Mit. T.p. 56-57) She testified that as a result, Lang's father went to jail for setting her apartment on fire and for stabbing her. (Id. at 58) She also testified that Lang's father went to prison for child molestation. (Id. at 57)

When, at the age of ten, Lang went to visit his father for two weeks, a family visit turned into a two-year abduction. (Id. at 58-62) Carter went to police for help, but got none. (Id. at 59) When Carter tracked her son down two years later, he was in the same clothes he wore when he left and he was undernourished. (Id. at 62) Carter took him to the doctor—he weighed 87 or 89 pounds. (Id.) There were cigarette burns on his shoulder, a gash on his hand, and bruises on him. (Id. at 63) Carter testified that Lang Sr. sexually abused one of her children and expressed her belief that Lang was sexually abused by his father during the two years he was held captive. (Id. at 68-69)

Lang was on medication prior to his abduction, but upon his return things worsened. Lang was placed in a psychiatric facility over 28 times. (Id. at 66)

This is but a snippet of the horrific life Edward Lang endured. These factors are particularly significant because Lang was just days past his nineteenth birthday at the time of the offenses; he was not removed from his childhood or the impact it had on him. See State v. Campbell, 95 Ohio St. 3d 48, 53, 765 N.E.2d 334, 341 (2002) ("At forty-nine, Campbell had

considerable time to distance himself from his childhood and allow other factors to assert themselves in his personality and his behavior”). However, because defense counsel did not do their job, the prosecution was able to systematically dismantle this evidence by suggesting Lang’s mom was embellishing, if not flat-out lying to save her son’s life. (See, e.g., id. at 71, 73, 75, 102)

Counsel’s failure is apparent on the face of this record. See Rompilla v. Beard, 545 U.S. 374, 389, 393 (2005). Johnson illustrates Lang’s point. “The totality of the circumstances” present in Johnson forced this Court to “conclude that the instant cause illustrates the utter lack of informed, calculated decision-making on the part of counsel in the penalty phase of appellant’s capital trial.” 24 Ohio St. 3d at 91-92, 494 N.E.2d at 1065 (footnote omitted). In Johnson, the only mitigating evidence presented to the jury was the defendant’s unsworn statement and defense counsel’s closing argument. Id. at 90, 494 N.E.2d at 1064. It was this inept presentation, along with “pointless and provocative statements,” that compelled this Court to find ineffective assistance of counsel on the face of the direct appeal record. Id. at 91, 494 N.E.2d at 1064.

The totality of the circumstances present in Lang’s case similarly point to a finding of ineffective assistance of counsel on the face of the record before this Court. There were red flags that should have led counsel’s investigation, the collection of records, and their selection of experts. The ABA Guidelines are quite clear on counsel’s obligations; counsel has to do more than interview a few family members. Counsel must obtain records from numerous sources—schools, social services and welfare, juvenile or family courts, medical records, criminal records, treatment records. Guideline 10.7, Commentary. Police records, juvenile records, medical

records, and mental health records would have confirmed Carter's story of Lang's horrific past, yet none were presented to the jury.

Moreover, no psychological expert was called to explain the impact of exposure to such horrific abuse, the abduction, or Lang's failure to take his medications when he finally was returned home. It was counsel's job to find, assemble, and present this information to the jury, but they failed in this task. See Williams, 529 U.S. at 397; Austin, 126 F.3d at 848. This Court should not feel confident in concluding, that had credible evidence of Lang's horrific childhood and mental illness been offered, it "would have had no effect upon the jury's deliberations." Skipper, 476 U.S. at 8. Counsel's inept performance, however, compels a finding of ineffective assistance. See Johnson, 24 Ohio St. 3d at 91, 494 N.E.2d at 1064.

In Skipper v. South Carolina, 476 U.S. 1 (1986), the United States Supreme Court addressed the exclusion of relevant mitigating evidence by the trial court, granting relief to the petitioner. Skipper is also instructive on the issue before this Court on two points.

First, Skipper recognized the value of a disinterested witness's testimony at the penalty phase of a capital trial. The Skipper Court noted that evidence offered by Skipper was of the type "that a jury naturally would tend to discount as self-serving." Id. at 8. The type of evidence presented by Lang—a horrific childhood and a history of mental illness, which this Court has frequently recognized as compelling mitigation—similarly would be discounted by the jury as "self-serving" when offered only by the defendant's mother. Thus, testimony of "more disinterested witnesses" (jailers in Skipper) "who would have had no particular reason to be favorably predisposed ... would quite naturally be given much greater weight by the jury." Id. Records, and the disinterested people who created them, would serve a similar purpose—created years before the current crimes, the jury would give them much greater weight. See also ABA

Guideline 10.11, Commentary. (“Community members such as co-workers, prison guards, teachers, military personnel, or clergy who interacted with the defendant or his family, or have other relevant personal knowledge or experience often speak to the jury with particular credibility”) (footnote omitted).

Second, Skipper demonstrates why such evidence mattered in Lang’s case. In Skipper, the prosecution argued in closing that Skipper would pose a real danger to other inmates and prison staff. Id. at 3. See also id. at 5, n.1, 8. The prosecution made affirmative statements that Skipper could have rebutted with the evidence precluded by the trial court. While the trial court did not preclude the evidence that is the subject of this Proposition of Law, the result is the same. Repeatedly, the prosecution noted that the defense offered no documentation to support Carter’s claims, suggesting she had made up her testimony. Then, in closing, the prosecution specifically told the jury not to believe her, stating that she was biased. (Mit. T.p. 102)

This Court’s review cannot cure counsel’s failure to present mitigation evidence to the jury. Had the trial court prohibited the presentation of mitigation evidence, Lang would have been unconstitutionally prejudiced, regardless of the strength of the aggravating circumstances. Blake v. Kemp, 758 F.2d 523, 535 (11th Cir. 1985). While the source of error is different, counsel’s ineffectiveness resulted in the same prejudice.

Further, the weight of the aggravating circumstances does not vitiate Lang’s constitutional claim; trial courts and juries have shown mercy for “behavior at least as egregious,” especially after presentation of adequate information about the defendant’s personality and life. Strickland, 466 U.S. at 719. (Marshall, J., dissenting). This argument is particularly compelling here, where the jury recommended a life sentence on one of the aggravated murder counts. Had counsel presented the wealth of available mitigation evidence, at

least one juror would have opposed death.¹³ See State v. Brooks, 75 Ohio St. 3d 148, 162, 661 N.E.2d 1030, 1042 (1996). Counsel was ineffective. Counsel deprived the jury of information crucial to its sentencing determination, resulting in an unfair sentencing proceeding and an unreliable sentence, rendering counsel's assistance ineffective. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 9, 10, 16.

3.3 Defense counsel referred to Lang's childhood as "normal."

Defense counsel, during its penalty phase closing argument, told Lang's jury that his childhood was "pretty normal" before he reached ten years of age. (Mit. Tp. 96) This was a gross misrepresentation of the record and detrimental to their client's interest. A childhood filled with horrific abuse and violence is not normal. Nor is a childhood filled with mental illness. While things worsened for Lang, during his abduction and after he returned to his mother, to claim that before age 10, Lang's childhood was normal, is inaccurate and detrimental to Lang's interest. Counsel was ineffective. Counsel incorrectly characterized information crucial to the jury's sentencing determination, resulting in an unfair sentencing proceeding and an unreliable sentence, rendering counsel's assistance ineffective. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 9, 10, 16.

3.4 Failure to object.

Trial counsel had an obligation to ensure that Lang received a fair trial. Strickland's duty to advocate and employ "skill and knowledge" includes the necessity for trial counsel to object or otherwise preserve federal issues for review. See e.g. Groseclose v. Bell, 895 F. Supp. 935,

¹³ Lang is aware of this Court's decision in State v. Davis, 116 Ohio St. 3d 404, 451, 880 N.E.2d 31, 80 (2008). He asserts that deficient performance and prejudice are apparent on the face of this record. Johnson, 24 Ohio St. 3d at 88, 494 N.E.2d at 1063. However, he advises the Court that there is a wealth of documentation like that identified above, which also supports this claim on postconviction review.

956 (M.D. Tenn. 1995), aff'd, 130 F.3d 1161; Gravley, 87 F.3d at 785; Starr, 23 F.3d at 1285; Cabello v. United States, 884 F. Supp. 298, 302-03 (N.D. Ind. 1995); Cf. Freeman, 962 F.2d at 1259 (appellate counsel ineffective for abandoning viable federal claim).

3.4.1 Defense counsel did not object to various instances of prosecutor misconduct.

The cumulative effect of prosecutor misconduct at both phases of this case violated Lang's right to a fair trial. However, defense counsel failed to object to much of the misconduct committed. Lang incorporates Proposition of Law No. 12, here for brevity for a discussion of the facts and prejudice resulting from this error.

3.4.2 Defense counsel did not object to an improper definition of "reasonable doubt."

Counsel failed to object to an instruction on reasonable doubt that undermined the State's constitutionally required burden of proof. Lang incorporates Proposition of Law No. 20, here for a discussion of the facts and prejudice resulting from this error.

3.4.3 Defense counsel did not object to the trial court's failure to identify for the jury what evidence was relevant for consideration during the mitigation phase.

Defense counsel failed to object to the trial court's direction to the jury to consider trial phase evidence relevant to the aggravating circumstances, without identifying that evidence for the jury. Lang incorporates Proposition of Law No. 14, here for a discussion of the facts and prejudice resulting from this error.

3.4.4 Defense counsel did not object to the trial court's imposition of costs on Lang.

Despite the fact that Lang is indigent, defense counsel failed to object to the trial court's imposition of costs on Lang at sentencing. Lang incorporates Proposition of No. 19, here for a discussion of the facts and prejudice resulting from this error.

3.5 Defense counsel broke promises made to the jury.

During opening statements, defense counsel promised the jury two pieces of evidence that they failed to deliver. First, counsel promised to provide the jury with evidence of the neighborhood in which Lang grew up, in particular, that it was “one of the most dangerous ones in the State of Maryland. (Mit. T.p. 32.) Second, counsel promised to offer evidence that Lang suffered from thoughts of suicide. (Id. at 33.) Both pieces of evidence would have been relevant to the jury. They would have explained where Lang came from, his emotional state, and shed light on whether death was the appropriate sentence in this case. Trial counsel’s failure to fulfill their promise was prejudicial to Lang; it hampered their credibility in the jurors’ eyes as well as weakening Lang’s overall mitigation case. See Hampton v. Leibach, 347 F.3d 219, 257-60 (7th Cir. 2003) (holding that where a lawyer has promised the jury that a criminal defendant will testify in his own defense, and then unreasonably breaks this promise, the error is both objectively unreasonable and prejudicial to the defendant); Anderson v. Butler, 858 F.2d 16, 18-19 (1st Cir. 1988) (granting habeas relief where defense counsel failed to present expert witness testimony after telling the jury in his opening statement that they would testify). Counsel’s performance was deficient, resulting in an unfair sentencing proceeding and an unreliable sentence, rendering counsel’s assistance ineffective. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 9, 10, 16.

4. Conclusion.

The cumulative effect of the foregoing errors and omissions by trial counsel infringed on Lang’s Sixth Amendment right to effective assistance of counsel. See Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995) (counsel’s errors assessed for cumulative effect on defendant’s right to fair trial). His convictions must be reversed and his case remanded for a new trial.

Alternatively, his death sentence must be vacated and his case remanded for re-sentencing. See
O.R.C. § 2929.06 (B).

Proposition of Law No. 14

A capital defendant's rights to due process and against cruel and unusual punishment are violated by instructions that render the jury's sentencing phase verdict unreliable. U.S. Const. amends. VIII, XIV, Ohio Const. art. I, §§ 9, 16.

Edward Lang's death sentence was made unreliable as the result of two sets of instructions regarding the jury's role in capital sentencing. At voir dire, the jury was misled by instructions stating that the death penalty could be imposed without weighing the aggravating circumstances against the cumulative weight of the mitigating factors. In the penalty phase, the trial court's instruction improperly gave to the jury the legal question of which trial phase evidence was relevant to the capital selection factors.

1. Death penalty if aggravation outweighs any mitigating factors

At voir dire, the trial court explained to the prospective jurors the process of weighing the capital selection factors. During this process, the trial court instructed the jury "[i]f the State proved that the specific aggravating circumstance outweighed **any** of the mitigating factors, then you would have to, the law would require you to consider and to in fact order the death penalty." (Vol. 1, T.p. 141.) Jurors 380, 381, and 387 were present when the trial court gave this explanation of the weighing process.

The trial court repeated this explanation of the weighing process five additional times at voir dire, each time stating that the death penalty must be imposed if the aggravating circumstances outweigh any mitigation. (Vol. 1, T.p. 242-43, 305, 317, 319; Vol. 2, T.p. 362-63.)¹⁴ Jurors 420, 424, 436, 447, and 484 were present when the trial court instructed that the death penalty must be imposed if the aggravating circumstances outweighed any of Edward Lang's mitigating factors.

¹⁴ At page 363, the trial court gave a conflicting explanation by stating that the death penalty must be imposed if aggravation outweighs any mitigation and all mitigation.

The trial court's explanation of the weighing process was incorrect and prejudicial to Lang's right to a reliable capital sentencing hearing. The death penalty may not be imposed merely if the aggravating circumstances outweigh any mitigating factors. Rather, the death penalty may be imposed only if aggravating circumstances outweigh all of the mitigating factors. Lang's mitigation had to be weighed in the aggravate and not parsed out separately against the aggravating circumstances. See State v. Smith, 89 Ohio St. 3d 323, 332, 731 N.E.2d 645, 654-55 (2000); O.R.C. § 2929.03(D)(1) and (2).

This error rendered Lang's death sentence unreliable because the jury was "affirmatively misled regarding its role in the sentencing process." Romano v. Oklahoma, 512 U.S. 1, 9 (1994). Lang's jury received materially inaccurate information about its role under local law regarding this capital sentencing hearing. See Dugger v. Adams, 489 U.S. 401, 407-08 (1989); Caldwell v. Mississippi, 472 U.S. 320, 341-44 (1985) (opinion of the court by O'Connor, J.). Moreover, capital sentencing juries must first be properly instructed before deliberating on capital sentencing issues. See Kelly v. South Carolina, 534 U.S. 246, 256 (2002) ("A trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part."); Mills v. Maryland, 486 U.S. 367, 377 n.10 (1988).

2. Jury decided which evidence was relevant to punishment.

The jury was instructed to consider testimony and evidence from the culpability phase that was relevant to the capital selection factors. (Mit. T.p. 107, 113.) The trial court readmitted some culpability phase exhibits, over defense objection, into evidence during the penalty phase. (Mit. T.p. 5-8.) (See Proposition of Law No. 15.) Other than those exhibits, however, the jury

was left to determine which culpability phase evidence was relevant to its sentencing determination. This was error.

Under O.R.C. § 2929.03(D)(1), culpability phase evidence that is relevant to the nature and circumstances of the aggravating circumstances may be readmitted for the jury's consideration. However, any determination of the legal question of relevance respecting the readmission of culpability phase evidence lies strictly with the trial court. See State v. Getsy, 84 Ohio St. 3d 180, 201, 702 N.E.2d 866, 887 (1998).

The trial court abdicated to the jury its duty to decide the legal question of which evidence was relevant to the selection factors. In doing so, the trial court opened the door for the jury to consider irrelevant and prejudicial evidence. Lang relies on Proposition of Law No. VIII here by reference to demonstrate prejudice from this error. In Proposition of Law No. 8, Lang identifies culpability evidence that was prejudicial to his right to a fair trial. This evidence likewise would mislead the jury and prejudice Lang in the penalty phase.

The procedure followed in this case created an unacceptable risk that Lang's jury weighed nonstatutory aggravators — and that it considered extraneous evidence that may have influenced its death penalty verdict. Greater reliability is needed in capital sentencing hearings. See e.g. Beck v. Alabama, 447 U.S. 625, 637 (1980) (lesser included offense required in capital case to avoid "risk of unwarranted conviction"); Gardner v. Florida, 430 U.S. 349, 358 (1977) (death sentence must be based on reason and not caprice or emotion); Gregg v. Georgia, 428 U.S. 153, 158 (1976) (Eighth Amendment prohibits arbitrary sentencing procedures where death penalty may be imposed). Edward Lang's death sentence must be vacated and his case remanded for a new penalty phase. O.R.C. § 2929.06(B).

Proposition of Law No. 15

A capital defendant's rights against cruel and unusual punishment and to due process are violated by the admission of prejudicial and irrelevant evidence in the penalty phase of the trial. U.S. Const. amends. VIII, XIV, Ohio Const. art. I, §§ 9, 16.

The trial court violated Edward Lang's right to a fair and reliable capital sentencing hearing when, over objection, it readmitted trial phase evidence that stressed the homicide itself. The trial court also rendered Lang's penalty phase unreliable when, over objection, it admitted victim impact testimony.

1. Trial phase exhibits readmitted

At the start of the penalty phase, the State moved to readmit State's exhibits 1 (9 millimeter pistol), 4A, B, C (two spent shell casings and bullet), 31A, B, C (coroner photographs of Marnell Cheek), 32A, B (coroner's photographs of Jaron Burditte), 33 (photograph of victims in Dodge Durango), 29 (coroner's report for Cheek), and 30 (corner's report for Burditte). (Mit. T.p. 5-6.) Defense counsel objected to "the autopsy photos, the gun, the bullets ... [and] the autopsy reports" being readmitted for the jury's consideration in the penalty phase. (*Id.* at 6-7.) The prosecutor claimed that these exhibits should be readmitted "because the State has the burden of proving the aggravating circumstances in this case and those items all go to the aggravated robbery, deadly weapon used and also the purposeful killing of two or more people." (*Id.* at 7.) The trial court readmitted these items as "appropriate exhibits" since the State carried the burden of persuasion in the penalty phase. (*Id.* at 7-8.) This was error.

In the penalty phase the jury must weigh the aggravating circumstances against the collective weight of the defendant's mitigation. O.R.C. § 2929.03(D)(2). But only the aggravating circumstances may be weighed against the defendant's mitigation. *State v. Wogenstahl*, 75 Ohio St. 3d 344, 356, 662 N.E.2d 311, 322 (1996). The homicide itself is not an

aggravating factor and it may not be weighed against the mitigation. See State v. Hancock, 108 Ohio St. 3d 57, 78, 840 N.E.2d 1032, 1055 (2006). Constitutional error results when an invalid aggravator is placed on “death’s side of the scales.” See Stringer v. Black, 503 U.S. 222, 232 (1992); Sochor v. Florida, 504 U.S. 527, 532 (1992).

Further, “in capital cases this [C]ourt has ... set forth a stricter standard for the introduction of photographs.” State v. Morales, 32 Ohio St. 3d 252, 257-58, 513 N.E.2d 267, 273 (1987) (citation and emphasis in original omitted.) The State, as the proponent of photographic evidence, has the burden to establish that “the danger of material prejudice to a defendant is outweighed by [the probative value of the photographs].” Id. at 258, 513 N.E.2d at 274 (citation and emphasis in original omitted). This stricter standard should necessarily apply to the question of whether a properly admitted photograph in the culpability phase may be also readmitted in the penalty phase. In other words, under this stricter standard the State should have to clear a second hurdle to show a substantial need to have the jury to view such photographs again. See id.

The trial court abused its discretion when it readmitted these exhibits over Lang’s objections. The jury’s culpability phase verdicts established that there were two victims killed in a course of conduct and that both murders were committed purposefully. The State had already met its burden of proof regarding the existence of the aggravating circumstances before the penalty phase. The State did not need to readmit this evidence to “prov[e] the aggravating circumstances in this case” (Mit. T.p. 7.)

This evidence had only marginal relevance for sentencing purposes. However, this evidence created a substantial risk of prejudice to Lang because it placed undue emphasis on the homicide — which the jury was not entitled to consider as a reason to impose the death penalty.

The autopsy reports merely stressed the deaths of each victim. The autopsy reports did not lend support to the aggravating circumstances. The same is true of the coroner's photographs of each victim, and the spent shell casings and bullet. Moreover, the photographs could only horrify and outrage the jury and cause it to seek retribution based on an emotional response. See State v. Thompson, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 420-21 (1987); Gardner v. Florida, 430 U.S. 349, 358 (1977) (death sentence must be based on reason and not caprice or emotion).

2. Victim impact testimony before the jury.

At the start of the penalty phase, the prosecutor gave notice of the State's intention "to call two family members, LaShonda Burditte and Rashu Jeffries. LaShonda is Jaron's sister, Rashu is Marnell's brother." (Mit. T.p. 8.) Defense counsel objected. Defense counsel argued that Edward Lang's "due process rights are heightened and there is more of a danger that the jury will hear this testimony, see the victim's family testifying and that would cause them not to look at any of the mitigating factors, but to make a decision on the penalty based on what they see the victims going through." (Id. at 10-11.)

The trial court ruled that the State could offer the testimonies of LaShonda and Rashu to the jury. The trial court cautioned the prosecutor to ensure that neither witness was to be "overly emotional" before the jury or express an opinion on "the penalty to be imposed." (Id. at 12-13.)

LaShonda testified as the first witness in the penalty phase. She stated that she was Jaron Burditte's sister, she gave Burditte's age, she told the jury that they grew up in Los Angeles, that Burditte graduated high school in Canton, that he served in the Navy, he worked as an electrician, he had been married with two daughters, his legal troubles involving drugs, and the year he met Cheek. (Id. at 34-38.)

Rashu was the next witness in the penalty phase. He began with information about his own history and background; including his involvement with illegal drugs. He then stated that he was Cheek's brother, that she attended high school in Canton, that she was the band mascot, that Cheek had been married with two children, her age if she had lived, and her employment history. (Id. at 39-42.)

The Supreme Court held in Payne v. Tennessee, 501 U.S. 808, 827 (1991), held that "the Eighth Amendment erects no per se bar" to victim impact testimony. In State v. White, 85 Ohio St. 3d 433, 445, 709 N.E.2d 140, 153 (1999), this Court explained that after Payne "the General Assembly has yet to expand victim-impact evidence in capital cases to the extent allowed in Payne." In White, this Court further explained "that capital sentencing juries [under Ohio jurisprudence] are permitted to review victim impact evidence if the evidence is relevant to the circumstances of the murder, [or] the existence of the statutory aggravating circumstances that permit the death penalty" Id. at 446, 709 N.E.2d at 154. Moreover, such evidence is allowed if it is relevant to "the nature and circumstances of the statutory aggravating circumstances, if the evidence is introduced to attempt to refute or rebut the mitigating evidence offered, or if the defendant requests a presentence investigation report." Id.

The victim impact evidence in this case was irrelevant. None of the conditions for victim impact evidence set out in White were met in this case. Lang did not request a presentence investigation report. (Vol. 6, T.p. 1472.) He did not open the door to this evidence. The testimonies of LaShonda and Rashu also preceded Lang's presentation of any mitigation witnesses. Accordingly, the testimonies of LaShonda and Rashu had no rebuttal value against any of the mitigation evidence presented. Indeed, neither witness claimed any association with

Lang or knowledge of him, or of this offense. Nor is the testimony of either witness relevant to the circumstances of the offense or the aggravating circumstances.

The victim impact evidence admitted in this case served no proper purpose under the rationale set out under State v. White. This evidence thus put undue considerations of sympathy into the jury's penalty phase deliberations. See California v. Brown, 479 U.S. 538, 543 (1987) (describing mere sympathy among "extraneous emotional factors" that are irrelevant to a jury's consideration); State v. Lorraine, 66 Ohio St. 3d 414, 417, 613 N.E.2d 212, 216 (1993) (rejecting sympathy as improper in capital sentencing). This evidence also risked confusing the jury because it was not admitted for any proper purpose, such as statements in a pre-sentence report, or as rebuttal to mitigation. See Ohio R. Evid. 403(A). The statements of LaShonda and Rashu should have been reserved for sentencing before the judge. (See Mit. T.p. 11.)

3. Conclusion.

The jury's consideration of misleading and prejudicial evidence — with little if any relevance to the jury's weighing task under O.R.C. § 2929.03(D)(2) — violated Lang's right to a reliable sentencing hearing. Although Lang received a life sentence for the aggravated murder of Burditte, this Court should not presume that these errors did not prejudice him. Burditte was a drug dealer. The jury may have given Lang a life sentence in count one based on the bad character of the victim. (But see Proposition of Law No. 11.)

This Court should not presume that these errors, and their cumulative effect, did not contribute to the jury's death penalty verdict on count two. There is reasonable doubt whether these errors inflamed the juror's emotions and distracted the jurors from properly weighing the mitigation evidence. These errors are not harmless beyond a reasonable doubt. See State v. Fears, 86 Ohio St. 3d 329, 354, 715 N.E.2d 136, 158 (1999) (Moyer, C.J., dissenting) (citing

Satterwhite v. Texas, 486 U.S. 249, 258-59 (1988)) (“The harmless error standard is even more stringent when applied to errors committed at the penalty phase of a capital trial.... [The question is] whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.”)(internal quotation marks omitted).

Edward Lang is entitled to a new penalty phase under O.R.C. § 2929.06(B).

Proposition of Law No. 16

A capital defendant's death sentence is inappropriate when the evidence in mitigation outweighs the aggravating circumstances. O.R.C. §§ 2929.03; 2929.04; U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

A number of factors in mitigation favored life over the death penalty. Elements in Edward Lang's history, character, and his background were relevant mitigation. His troubled childhood and the resulting traumas and difficulties were significant. Another relevant factor was Lang's history of substance abuse and the effect it had on him. Victim inducement was also relevant mitigation. Lang's age and youth were significant as well. The other mitigating factors include Lang and Walker's disparate sentences, the love of Lang's family, and his own mental health problems.

1. Lang's History, Character, and Background

After Lang's father kidnapped him, he was never the same. Unfortunately, the horrors he experienced were neither the first nor the last that he would face. Those traumas altered the trajectory of his entire life.

Lang's parents met and formed what was scarcely a storybook romance. Tracy Carter met Edward Lang Sr. when she was a single, 18 year old parent. (Mit. T.p. 56.) He was her landlord and she traded him sex for housing. (Id.) Soon afterwards, Carter became pregnant. (Mit. T.p. 57.) Edward Sr. abused her. (Id. at 56.) He began using heroin and cocaine. (Id. at 56, 57.) When he was using, he would beat her. (Id. at 57.) The only respite she had was when he was sent to prison for stabbing her, setting her apartment on fire, and domestic violence. (Id.) He also served time for child molestation. (Id.)

Growing up without a father was hard for Lang. But things got worse when the two actually met. Knowing what kind of influence Edward Sr. could be, Carter kept him away from

her son. (Id. at 48.) Lang did not meet his father until he was ten. (Id. at 57.) At the conclusion of the school year, Lang went to stay with his father in Delaware for two weeks. (Id. at 58.) But when the two weeks drew to a close, he remained. (Id. at 58–59.) His father offered only excuses. He claimed that he was having car trouble and could not bring Lang home yet. (Id. at 58.) When Carter called the next week she discovered that he had disconnected the phone. (Id. at 59.) Weeks passed and he still did not return his son. If Carter did manage to get a hold of Edward Sr., he refused to put her son on the phone. (Id. at 51.) He would not even allow his son to use the phone if his siblings called. (Id.) Carter’s attempts to involve the police were also unsuccessful. (Id. at 72.)

It was not until two years later that Carter finally tracked down her son and rescued him. (Id. at 61.) When she found him, he was undernourished, small, and fragile. (Id. at 62, 73.) He was 12 years old and weighed less than 90 pounds. (Id. at 62.) Despite the cold December weather, he did not have a coat or any warm clothing. He was wearing the same t-shirt and shoes he had on when he left his mother’s, years before. (Id. at 63–64.) Although he had few clothes on, his body was covered in burns, bruises, and gashes. (Id. at 63.) It was also evident that someone had used his back as an ashtray. (Id.)

This was not the full extent of the abuse that Lang endured. He did not fully reveal what happened to him. (Id. at 69.) He never really told his family about what had gone on in his father’s house while he was a hostage. (Id. at 52.) They did know that it changed him and he came back hurt and angry. (Id.) Edward Sr. abused Lang’s brother, Mendez. (Id. at 68.) Carter long suspected that the same happened to Lang. (Id. at 68–69.)

Lang’s kidnapping also interrupted his education. As a young boy, Lang was a good student. (Id. at 48.) His problems began after his elementary school graduation. He spent two

years in a different school while he was his father's captive. When he left his mother's house he had no idea that he would not return for two years. Nor did he have any idea that his whole life would be changing, including attending a different school. He had not planned on transferring schools and his switch back was just as abrupt, his mother whisking him away in the middle of the winter. (*Id.* at 63.) Beginning in a new school is hard enough; having to do so suddenly and without any warning or preparation, only to be go back after two traumatic years is not conducive to learning or development. State v. White, 85 Ohio St. 3d 433, 456, 709 N.E.2d 140, 161 (1999); State v. Campbell, 69 Ohio St. 3d 38, 54, 630 N.E.2d 339, 353 (1994). He also missed time from school when he was undergoing treatment at mental health facilities. (Mit. T.p. 66–67.) Lang's education ended prematurely; he left school in the 11th grade. (*Id.* at 75.)

Evidence of a traumatic childhood is a valid mitigating circumstance that fits within the O.R.C. § 2929.04(B)(7) catch-all. This Court has long recognized such situations as mitigating. State v. Frazier, 115 Ohio St. 3d 139, 178, 873 N.E.2d 1263, 1304 (2007); State v. Davis, 116 Ohio St. 3d 404, 459, 880 N.E.2d 31, 86 (2008); State v. Slagle, 65 Ohio St. 3d 597, 610, 605 N.E.2d 916, 935 (1992) (Wright, J., dissenting); State v. Green, 66 Ohio St. 3d 141, 153, 609 N.E.2d 1253, 1263 (1993).

Lang was “doomed from the start,” considering the “abusive, neglectful, and pernicious influences” in his life. State v. Tenace, 109 Ohio St. 3d 255, 272, 847 N.E.2d 386, 402 (2006). “[A]n extremely difficult and troubled childhood” lacking in the “appropriate parental support and guidance,” a chaotic family life, and reprehensible conduct of a parent resulting in situations during the formative years that were “nothing short of atrocious” will constitute a “troubled childhood, history, and family background...entitled to some meaningful weight in mitigation.” State v. Raglin, 83 Ohio St. 3d 253, 272, 699 N.E.2d 482, 497 (1998). Lang's history of severe

mental and physical abuse and neglect cannot be discounted and must be considered as powerful mitigation against death. Penry v. Lynaugh, 492 U.S. 302, 322 (1989) (abusive childhood mitigating); State v. Fautenberry, 72 Ohio St. 3d 435, 446, 650 N.E.2d 878, 886 (1995) (abusive childhood mitigating).¹⁵

1.1 History of Substance Abuse

Another significant element of Lang's character was his history of substance abuse. (Vol. 4, T.p. 878.) This Court has recognized a capital defendant's substance dependence as a mitigating factor. See, e.g., State v. Reynolds, 80 Ohio St. 3d 670, 686, 687 N.E.2d 1358, 1374 (1998).

2. Whether the Victim Induced the Offense

Burditte was a drug dealer, an inherently dangerous and violent occupation. His participation in crime mitigates against the offense. While this does not diminish the seriousness of the offense, it is significant to the conditions under which the crime arose. State v. Holloway, 38 Ohio St. 3d 239, 242, 527 N.E.2d 831, 835 (1988). Requiring mitigating factors to diminish the seriousness of the crime is erroneous. As this court has explained, "mitigating factors under R.C. § 2929.04(B) are not related to a defendant's culpability but, rather, are those factors that are relevant to the issue of whether an offender convicted under R.C. § 2903.01 should be sentenced to death." Id. at 241, 527 N.E.2d at 834.

3. The Youth of the Offender

Lang's age is also relevant in mitigation. O.R.C. § 2929.04(B)(4). The murders occurred only a few days after Lang's 19th birthday. Significant as mitigation are both Lang's chronological age and his relative maturity, surely stunted by his upbringing. As a child, Lang

¹⁵ Counsel are aware of significant additional mitigation being presented on post-conviction.

was immature and a class clown. (Mit. T.p. 48.) Lang was just beyond the age of majority at the time of the crime and so his youth is entitled to significant weight in mitigation. State v. Bethel, 110 Ohio St. 3d 416, 449, 854 N.E.2d 150, 187 (2006); State v. Franklin, 97 Ohio St. 3d 1, 24, 776 N.E.2d 26, 50 (2002). That Lang was barely old enough to face the death penalty should entitle him to the maximum weight of mitigation for the age of the offender.

4. Other Relevant Factors

Several issues in Lang's life are significant to mitigation as "other factors that are relevant to the issue of whether the offender should be sentenced to death." O.R.C. § 2929.04(B)(7). The disparate prosecution and sentencing of Lang's co-defendant, Antonio Walker weighs in favor of sparing Lang's life. Although Walker was similarly situated, he was not treated similarly. It was Walker who suggested the robbery. (Vol. 4, T.p. 901.) Walker was sentenced to 18 years to life in prison and Lang was charged with aggravated murder with death penalty specifications. (*Id.* at 892.) Walker's disparate sentence should have been considered at mitigation against Lang's aggravating circumstances. State v. Herring, 94 Ohio St. 3d 246, 264, 762 N.E.2d 940, 959 (2002). When there is such a disparity in codefendants' sentences, it mitigates in favor of a life sentence. See State v. Getsy, 84 Ohio St. 3d 180, 208, 702 N.E.2d 866, 892 (1998) ("In Parker v. Dugger, 498 U.S. 308 (1991), the United States Supreme Court implicitly recognized that a co-defendant's sentence could be considered a nonstatutory mitigating factor."). Walker was the one who came up with the idea and suggested a plan that resulted in the death of two individuals but only Lang faced capital charges. (Vol. 4, T.p. 901.) This difference must enter on the side of mitigation.

It is also significant in mitigation that Lang has a loving family. State v. Myers, 97 Ohio St. 3d 335, 366, 780 N.E.2d 186, 220 (2002). Lang is father to a young daughter. (Mit. T.p. 53.)

His daughter Kanela was only two years old at the time of the murder. (Id.) He is utterly devoted to her and cared for her even before she was born. (Id. at 69–70.) Lang’s mother and his siblings are also supportive and loving. At his mitigation hearing, his mother and sister testified on his behalf. (Id. at 45, 56.)

Even before his kidnapping, Lang had mental problems. The abuse and neglect he suffered during that time could only have made them worse. Before leaving, Lang struggled to behave appropriately. (Id. at 63.) His mother attributed his outbursts to sibling rivalry and had him evaluated at Warner P. Carter, a children’s outpatient center. (Id. at 64.) The doctors there thought he might be depressed and so they put him on medication to control his behavior. (Id. at 52, 64.) They prescribed Depakote, Lithium, and the anti-psychotic medication Risperdal. (Id. at 64.) During Lang’s captivity in Delaware, his father refused to honor the decisions Lang’s doctors and mother had made about his medication. (Id. at 65.) After he returned home, Lang resumed his regimen but was unable to consistently stay on his medication. (Id. at 74.)

After his liberation, Lang’s mental health deteriorated even further; he became withdrawn and quiet. (Id. at 65.) His sister, who had been close with him before his abduction, noticed a change. (Id. at 48.) She described him as sad, hurt, and angry. (Id. at 52.) They used to play together before the kidnapping, but afterwards, he kept to himself. (Id.) His mother took him to counseling. (Id. at 68.) Lang began making regular visits to area psychiatric facilities. He went to Sheppard Pratt over 28 times. (Id.) His visits there usually included a two-week stay. (Id. at 67.) He spent a year at Woodburn Respiratory Treatment Center. (Id. at 68.) There were also two, 90-day stays at the Bridges Program. (Id. at 66–67.) Even with all of the care, it was not enough; he needed more than just the counseling. (Id. at 67.)

Lang's behavior as an adult was the product of both his nature and his upbringing. He never received proper parental nurturing. State v. Powell, 49 Ohio St. 3d 255, 264, 552 N.E.2d 191, 200-01 (1990). Lang became "withdrawn...did not speak...stayed to [himself]." (Mit. T.p. 65.) He also suffered horrible abuses while his father's captive. This Court has held that such evidence "is unquestionably entitled to some mitigating weight," as it suggested that the defendant's "behavior may not be entirely his own fault." Powell, 49 Ohio St. 3d at 264, 552 N.E.2d at 200-01. A troubled and disadvantaged background is relevant in mitigation. Wiggins v. Smith, 539 U.S. 510, 535 (2003); Penry, 492 U.S. at 319 (1989) *rev'd on other grounds Penry v. Johnson*, 532 U.S. 782 (2001). This Court, in State v. Campbell, 95 Ohio St. 3d 48, 53, 765 N.E.2d 334, 341 (2002) noted that a 49 year-old offender "had considerable time to distance himself from his childhood and allow other factors to assert themselves in his personality and his behavior." Lang had no such time to heal from his horrific childhood. While Campbell had over 30 years to overcome his childhood, Lang barely had one. Lang's childhood of abuse and neglect has a significant mitigating effect.

5. Conclusion

The individual mitigating factors in Lang's case demonstrate that the death penalty is not appropriate. The mitigation presented requires imposition of a life sentence. This Court must vacate Lang's death sentence under its independent sentence review and remand for imposition of a life sentence. O.R.C. § 2929.05(A).

Proposition of Law No. 17

When the trial judge trivializes and minimizes mitigating evidence, it violates a capital defendant's right to a reliable sentence. O.R.C. §§ 2929.03, 2929.04; U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

1. Introduction

The trial court erred in its opinion accepting the jury's recommendation of death for the murder of Marnell Cheek. The court minimized and trivialized the mitigation that Edward Lang offered during the penalty phase. The judge did not properly weigh Lang's mitigation and discounted arguments that should have had more of an effect.

2. Marnell Cheek's involvement in the drug deal

Among the judge's findings was that Cheek was not involved in the drug deal. He found "no evidence to suggest that Cheek was a participant in the drug transaction." (T.C.O. at 5.) Burditte though, was a known drug dealer. Lang and Walker referred to him as the "dope boy." (Dkt. 346.) They knew he controlled all of the drug activities in that area and Cheek would have been aware as well. (*Id.*) Although there was no specific testimony that Cheek was involved, the circumstantial evidence demonstrates that she was well aware of the nature of her visit to Rem Circle and the purpose of their trip.

Cheek must have known that there was a reason for her and Burditte to be driving to Rem Circle at night. The shooting took place late at night. The first call, setting up the drug deal came to Burditte at 9:13 PM. (Vol. 4, T.p. 984.) At 9:33 PM, Burditte got the call that he had driven past the meeting spot. (*Id.* at 985.) By the time Burditte pulled up, he already had out the drugs for the sale and was holding it in his hand. (*Id.* at 982, 1151.) Had circumstances been different and they were pulled over and searched, simply accompanying Burditte on his errand and being present in the car during a drug transaction would have been sufficient to establish

probable cause to indict Cheek with trafficking in drugs. O.R.C. § 2925.03. In the eyes of the law she was a part of the drug deal. That she would put herself in such a position late at a night removes all doubt that she was simply, “a person riding in the vehicle at the wrong place and at the wrong time.” (T.C.O. at 5.)

The judge did imply however, that she was more significant to the events. He referred to “Marnell Cheek and her companion,” making her the focus, even though it was Burditte who had organized the deal. (T.C.O. at 11.) The judge was inconsistent. He wrote that Burditte accompanied her, but decried that it was Cheek’s bad luck, caught in the middle of the sequence of events.

Regardless of Cheek’s involvement or participation in the sale, there is nothing in the record that would support giving Lang a harsher sentence for her murder; nothing in Ohio law sets her murder apart from Burditte’s. There are no provisions in O.R.C. § 2929.04 that allow for a more severe penalty simply because a victim was in the “wrong place and at the wrong time.” (T.C.O. at 5.)

The first aggravating circumstance, that the murder was part of a course of conduct, necessarily involves more than one death, but does not justify a more significant punishment for one of the murders over the other. If anything, that would be an argument for facilitation or inducement, a mitigating factor. O.R.C. § 2929.04(B)(1). It implies that Burditte induced the crime and that mitigated against the aggravating circumstances in his murder and resulted in the lesser sentence.

The second aggravating circumstance was that the murder occurred during the course of an aggravated robbery. O.R.C. § 2929.04(A)(7). Nothing in that specification supported varying sentences, either. There is no provision in the law differentiating between victims as bystanders

or participants in the underlying felony. Nor were there any separate or different aggravating factors in the count for Cheek's murder. The mitigating factors that outweighed the aggravation in Burditte's case should have had the same effect in Cheek's and supported another life sentence. Unless the judge relied on impermissible victim impact statements to differentiate between the victims, there was nothing to account for a more severe penalty for Cheek's death. (See Proposition of Law No. 15.)

The court noted that "the 'course of conduct' aggravating circumstance factually involves the death of Jaron Burditte, as he was the additional person killed." (T.C.O. at 3.) It makes no logical sense that the judge would suggest that Cheek was not involved, marginalizing her role, then lessen Burditte's role. Both victims cannot be on the periphery and still merit a death sentence.

3. Youth as a mitigating factor

The court did not properly consider Lang's youth. He was only three days past his 19th birthday. The United States Supreme Court determined that "the chronological age of a minor is itself a relevant mitigating factor of great weight." Eddings v. Oklahoma, 455 U.S. 104, 116 (1982); State v. Raglin, 83 Ohio St. 3d 253, 273, 699 N.E.2d 482, 498 (1998). Since Lang was barely of legal age, the mitigating factor of his youth "is an important one." State v. Herring, 94 Ohio St. 3d 246, 267, 762 N.E.2d 940, 961 (2002). Regardless of the offender's sophistication, it is their actual age that is most significant in their adjudication. Lang had neither maturity nor the benefit of the wisdom of many years of experience.

The trial court however, felt that Lang was "not a youthful offender." (T.C.O. at 12.) It went on to claim "his conduct and taped statement" as proof that he is a "street-hardened individual." (T.C.O. at 12.) This Court has held that trial and appellate courts may "distinguish

between defendants of the same age on the basis of relative experience and maturity.” State v. Cooney, 46 Ohio St. 3d 20, 39-40, 544 N.E.2d 895, 918 (1989). See also State v. Byrd, 32 Ohio St. 3d 79, 81, 512 N.E.2d 611, 615 (1987).

If anything, Lang’s circumstances further argue in favor of sparing his life. Lang’s hardscrabble and humiliating childhood forced him to grow up quickly, but gave him little time to mature. He enjoyed barely any childhood after his father abducted him; he was withdrawn and isolated, a loner. (Mit. T.p. 52, 65.) Nor did he have any strong, positive male influences in his life. In and out of treatment for much of his childhood, it interrupted his social development. (Id. at 66.) He became a father and dropped out of school before the age of 18. (Id. at 53, 75.) He then left and moved to Canton, Ohio. (Id. at 76.) These are not hallmarks of foresight and maturity. Everything in his biography and the facts of the case suggest impetuosity and youthful folly rather than cruel calculation.

Lang’s actions were more consistent with those of a scared, immature boy than with the machinations of a criminal mastermind. First, the robbery was not his idea. (Vol. 4, T.p. 901.) Nor did he work to fully conceal his identity or hide himself from witnesses. He and Walker planned the crime together and right in front of Tamia Horton and he spoke with Teddy Seery after the crime. (Id. at 875, 928.) Even once the plan was in motion, he did not prove that he was a seasoned perpetrator of violent crimes. He inexpertly handled the gun, dropping one of the bullets on the ground while trying to chamber a round. (Id. at 883.) Most significantly, he did not manage to actually rob Burditte. That he ended up bruised, alone, and empty-handed suggests that he is still a very rash and immature youth. Suggesting that his age should not carry

the full weight of mitigation because he is a streetwise, savvy criminal simply has no support in the record.¹⁶

4. The court's minimization of mitigation

The trial court erred by trivializing Lang's mitigation. First, the court considered the nature and circumstances of the offense. In State v. Hicks, 43 Ohio St. 3d 72, 77, 538 N.E.2d 1030, 1036 (1989), this Court reaffirmed its holding in State v. DePew, 38 Ohio St. 3d 275, 289, 528 N.E.2d 542, 557 (1988), saying that "those [mitigating] factors not raised [by the defendant] may not be referred to or commented upon by the trial court or the prosecution." Hicks, 43 Ohio St. 3d at 77, 538 N.E.2d 1036. Lang's counsel did not invoke the nature and circumstances as a mitigating factor. Only "out of an abundance of caution and fairness" was this considered. (T.C.O. at 9.)

But this did not create a more equitable result. It had the exact opposite effect and illuminated precisely why this Court prohibits such unsolicited evaluations. Finding that there was an absence of mitigation in the nature and circumstances did more than fail to provide mitigation, it actually transformed to aggravation. Trial courts should not admit absent mitigating factors because it is "impossible to weigh those factors *against* the aggravating circumstances." DePew, 38 Ohio St. 3d at 289, 528 N.E.2d at 557. It is proper practice to "refrain from even referring to mitigating factors not raised by the defendant." Id. at 290, 528 N.E.2d at 558. In considering the nature and circumstances, the judge could not possibly have considered them properly, absent a valid factor to weigh.

¹⁶ Lang does not concede that he was the principal offender. But even assuming that the State's witnesses testified truthfully that Lang was the shooter, this record does not support his death sentence.

The court next turned to Lang's history, character, and background. While factually accurate, the court's opinion trivialized much of this mitigation. First, it noted that Lang was born while his mother, Tracy Carter, was still a teenager. (T.C.O. at 6.) The judge omitted that she was already a mother and another child meant more of a burden on this young parent. (Mit. T.p. 56.) The judge glossed over the just how dangerous and unhealthy Carter's relationship with Edward Sr. was. Carter had sex with him in exchange for a place to stay. (*Id.*) The judge downplayed the actual nature of their arrangement. He sanitized the nature of her Faustian bargain by saying only that "Edward Lee Lang's mother had a relationship with a much older man who was her landlord." (T.C.O. at 6.) The judge completely discounted that the partnership consisted of little more than sexual abuse. This was not a relationship, it was prostitution and Edward Sr. was nothing more than a John. The judge treated their subsequent relations with similar detachment. Edward Sr. was a sex offender and a drug addict. (Mit. T.p. 57.) He beat and abused Carter, once stabbing her and setting her apartment on fire. (*Id.*) The judge concisely described this cycle of abuse as a "stormy relationship" and did not elaborate or acknowledge the domestic violence and other felonious behavior. (T.C.O. at 6.)

The judge's callous skepticism further prejudiced Lang. He gave little consideration to all of the horrors that Lang experienced. When Tracy finally found and rescued Lang after two years with his father, he was malnourished. He was weighed at a doctor's office and was less than 90 pounds at the age of 12, but this was not enough to convince the skeptical judge, who felt only that "he appeared undernourished." (Mit. T.p. 62, 73; T.C.O. at 7.) Nor did he attribute any psychological weight to the abuse Lang suffered while he was a captive. The cut on his hand, the bruises, the cigarette burn, as best the judge could tell were of "unknown origin" and

“unexplained,” as though there was a possible explanation other than that someone abused him. (T.C.O. at 7.)

Following his rescue, Lang was in and out of treatment. If the judge had doubts about the traumas that Lang faced, the resulting treatment was ample proof that it had a deleterious effect. Instead of paying heed to this, the judge lumped together the 28 separate visits to a psychiatric facility, two 90-day stays at an abuse center, and a full year at a treatment center. (Id.) Lang literally spent years in treatment. The judge’s words, “Edward Lee Lang’s mother testified that he was treated at various psychiatric facilities” suggest that the judge did not actually believe that Lang was under the care of mental health workers. (Id.)

For most of his life, Lang was on medication. As a young boy, he was taking a number of prescribed drugs. (Mit. T.p. 64.) The judge faulted him for failing to comply with his drug regimen, even though Lang was only a child at the time. (T.C.O. at 7.) Not only did this ignore the underlying problem, that he remained untreated as long as he was unable to stay on his medications, but it also placed the blame on a little boy. The judge dismissed this with little deliberation but should have considered it under O.R.C. § 2929.04(B)(7). He noted that Lang’s kidnapping merely seemed to worsen his early-childhood issues. (T.C.O. at 8.) The judge should have more seriously a great deal of Lang’s mitigation. The judge unfairly trivialized significant mitigating factors and refused to acknowledge the events that shaped Lang’s life and behavior.

5. Sentencing discrepancy

Not only was the appropriateness of the death penalty in question, but there were significant mitigating circumstances that outweighed the aggravating circumstances. The discrepancy in the jury’s verdict is indicative of his uncertainty. (See Proposition of Law No.

11.) The aggravating factors, identical for both victims, could only have yielded differing verdicts as a result of juror error or on account of the mitigating factors. In addition, the mitigating circumstances were significant and should have outweighed all of the aggravating factors for both victims. The judge's erroneous application of the mitigating factors prevented him from overturning the jury's decision.

6. Conclusion

Within his opinion, the judge mischaracterized a number of factors. The judge viewed, with a naïve understanding, Marnell Cheek's involvement the night of the crime. He also discounted Lang's mitigation. He gave no weight to Lang's young age. In considering the rest of the mitigation, the judge offered that Lang had a "less than perfect childhood." (T.C.O. at 8.) This was an understatement, to say the least. The judge felt that the mitigating factors plus his entire childhood have some slight amount of mitigation value." (*Id.*) But the judge believed that the real trauma was simply that Lang spent some time apart from his mother. (*Id.*) Shifting the focus to Lang's time away from his mother completely discounted the years of physical abuse that he suffered. Lang faced horrors that no child should ever suffer and the judge placed no stock in their effect. What should have been significant mitigation, the judge erroneously trivialized and largely ignored. Because of the errors in the trial court's opinion, this Court must vacate Lang's sentence and remand this case for resentencing. See State v. D'Ambrosio, 73 Ohio St. 3d 141, 652 N.E.2d 710 (1995).

Proposition of Law No. 18

The cumulative effect of trial error renders a capital defendant's trial unfair and his sentence arbitrary and unreliable. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 5, 16.

Edward Lang raised numerous errors worthy of relief both from his convictions and his death sentence. Each error, standing alone, is sufficient to warrant a reversal. However, by viewing the many errors together, it is apparent that their cumulative impact rendered Lang's trial fundamentally unfair. See Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1983). See also, State v. Brown, 115 Ohio St. 3d 55, 69-70, 873 N.E.2d 858, 871 (2007) ("Although the Brady violation and Brown's claims of ineffective assistance of counsel have been addressed independently, their full effect cannot be appreciated isolated from one another...when considered together, these two errors call into question the fundamental fairness of Brown's trial."). Cf. State v. Williams, 99 Ohio St. 3d 493, 518, 794 N.E.2d 27, 53 (2003) (reversing conviction based on 2nd, 15th, 16th, and 17th propositions of law). This Court must reverse Lang's convictions and sentence.

From beginning to end, Lang's capital trial was replete with prejudicial error. See Propositions of Law Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21. Assuming *arguendo* that none of the errors Lang raised alone warrant reversal of his convictions and sentence, the cumulative effect of the errors is so prejudicial that this Court must order a new trial.

The adequacy of the legally admitted evidence is only one factor for this Court to consider in determining the influence that an error has on a jury. The Supreme Court made clear in Satterwhite v. Texas, 486 U.S. 249 (1988), that it "is not whether the legally admitted evidence was sufficient to support" the verdict, but rather "whether the [prosecution] has proved

‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” Id. at 258-59. Review must also determine whether the cumulative effect of the errors rendered the trial fundamentally unfair. See Walker, 703 F.2d at 963. “We must reverse any conviction obtained in a proceeding in which the cumulative impact of irregularities is so prejudicial to a defendant that he is deprived of his fundamental right to a fair trial. Fourteenth Amendment, United States Constitution.” State v. Wilson, 787 P.2d 821, 821 (N.M. 1990) (citing State v. Martin, P.2d 937, 943 (1984)); United States v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988); State v. DeMarco, 31 Ohio St. 3d 191, 509 N.E.2d 1256, 1257, syl. 2 (1987). See also Brown, 115 Ohio St. 3d at 69-70, 873 N.E.2d at 871.

Perhaps the most telling example of the prejudice resulting from the cumulative impact of the errors at Lang’s trial is the errors of defense counsel, the prosecution, and the trial court that combined to deprive Lang of the opportunity to fully and fairly present his defense that Walker was the principal offender in this matter, while Lang was the accomplice. See Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citing California v. Trombetta, 467 U.S. 479, 485 (1984)). During the State’s case-in-chief, it presented testimony that Lang could not be excluded as the minor contributor of DNA on the murder weapon. Expert testimony, however, made clear that this conclusion had not been reached to a reasonable degree of scientific certainty. As such the evidence should not have been admitted. (Proposition of Law No. 2.) Defense counsel should have objected vigorously to the admission of this unreliable “scientific” testimony. Instead, counsel actually told the jury that the State had proved that Lang’s DNA was on the gun that killed Jaron Burditte and Marnell Cheek. (Proposition of Law No. 10.) The State then championed this evidence repeatedly as scientific “proof” that Lang was the principal offender of these murders. (Proposition of Error No. 9.)

These errors are further combined with the failure of the State and defense counsel to test Walker's clothing for evidence, like blood and gunshot residue, which would have bolstered Lang's claim that Walker was the principal offender. (Proposition of Error Nos. 5, 10.) And, despite the fact that the trial court granted defense counsels' request to conduct independent testing of Walker's clothing for such evidence, defense counsel failed to follow through with this testing. (Proposition of Error No. 10.)

The final blow to Lang's accomplice defense came from the bench. Despite instructing Lang's jury on potential accomplice liability, the trial court effectively took away any consideration of that issue when it instructed the jury on only the principal offender element of the O.R.C. § 2929.04(A)(7) specification. (Proposition of Error No. 4.)

These combined errors deprived Lang of the defense that he was not the principal offender in these murders. This was prejudicial to Lang during both phases of his capital trial; had the jury found Lang to be the accomplice, rather than the principal offender, that would have been a compelling mitigating factor during the penalty phase. See O.R.C. § 2929.04(B)(6).

The result of cumulative error entitles Lang to a new trial. His convictions based upon cumulative error denied him a fair trial and his right to due process. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 5, 16. Additionally, these same errors render Lang's death sentence unreliable and arbitrary. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

Proposition of Law No. 19

Imposition of costs on an indigent defendant violates the spirit of the Eighth Amendment. U.S. Const. amends. VIII And XIV; Ohio Const. art. I, §§ 10, 16.

1. **Lang Is Indigent – He Cannot Afford To Pay Court Costs.**

The trial court determined Lang was indigent. This is demonstrated by the trial court's appointment of both trial counsel and appellate counsel. Despite the trial court's recognition of Lang's impoverished status, costs of this litigation were imposed on him. (See Dkt. 354, Judgment Entry, July 26, 2007) Counsel did not object to the imposition of costs, an issue raised separately as ineffective assistance of counsel in Proposition of Law No. 13.

2. **Ohio Law Permits Imposition And Collection Of Costs From An Indigent Defendant.**

In State v. White, 103 Ohio St. 3d 580, 817 N.E.2d 393 (2004), this Court held that O.R.C. § 2947.23 requires assessment of costs against convicted defendants. However, this Court noted that payment could be waived for indigent defendants. State v. Threatt, 108 Ohio St. 3d 277, 278, 843 N.E.2d 164, 165 (2006) (internal citation omitted). But, a clerk of courts may "attempt to collect costs from indigent defendants." Id. To summarize, this Court held in White that "costs must be assessed against and may be collected from indigent defendants." Id. at 279, 843 N.E.2d at 166.

Lang respectfully requests that this Court reconsider its rulings in White and Threatt. Collection of costs from an incarcerated and indigent defendant violates the spirit of access to the courts. At the federal level, the in forma pauperis statute was "intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States, solely because . . . poverty makes it impossible . . . to pay or secure the costs of litigation." Denton v. Hernandez, 504 U.S. 25, 31 (1992) (citing

Adkins v. E. I. Du Pont de Nemours & Co., 335 U.S. 331, 342 (1948)) (internal quotation marks omitted). By analogy, the collection of costs against an indigent imposes a cost to defend against an action brought by the State; a fact that may dissuade defendants from requesting aid or even proceeding to trial. The result—a chilling effect on the defendant’s right to trial by jury.

Additionally, the Eighth Amendment is aimed at limiting the State’s power to punish. See Austin v. United States, 509 U.S. 602, 610 (1993). The Eighth Amendment precludes excessive bail and fines. See id. It also precludes cruel and unusual punishments. The purpose of the Eighth Amendment, putting the Bail Clause to one side, was to limit the government’s power to punish. See id.

Collection of costs from an indigent defendant is an additional punishment, one that is particularly cruel to those who are incarcerated and who have no hope of meeting the obligation. Inmates have no source of income, save low paying institutional jobs. Some receive support from outside the institution, but not all. Moreover, inmates use their inmate accounts to obtain items many would deem to be necessities, including food and toiletries. While it may be proper to impose costs on an indigent criminal defendant, it imposes an unnecessarily high cost to collect those fees while an indigent defendant is incarcerated. The better practice would be to impose costs, yet stay collection until the inmate is released from prison.

3. Conclusion.

The spirit of the Eighth Amendment is violated when costs are collected from an indigent, incarcerated defendant. This Court should reconsider its holdings in White and Threatt. This Court should modify those rulings to ensure collection is not attempted upon indigent, incarcerated inmates. So doing, this Court should stay the collection of costs against Lang.

Proposition of Law No. 20

The accused's right to due process under the Fourteenth Amendment to the United States Constitution and Article I, § 16 of the Ohio Constitution is violated when the State's burden of persuasion is less than proof beyond a reasonable doubt.

During the trial phase, Edward Lang's jury was instructed on the statutory definition of reasonable doubt under O.R.C. § 2901.05. (See Vol. 5, T.p. 1305-06.)¹⁷ This charge, taken as a whole, did not adequately convey to jurors the stringent "beyond a reasonable doubt" standard. Because it is too lenient, the "willing to act" language of O.R.C. § 2901.05 did not guide the jury. The statutory definition of reasonable doubt is flawed because the "firmly convinced" language represents only a clear and convincing standard. Additionally, the trial court's use of the phrase "moral evidence" was improper. The jury convicted Edward Lang on a standard below that required by the Due Process Clause of the Fourteenth Amendment. This is a fundamental, structural error that requires reversal of Lang's convictions. See Sullivan v. Louisiana, 508 U.S. 275 (1993).

In In re Winship, 397 U.S. 358 (1970), the Supreme Court addressed the fundamental nature of the reasonable doubt concept. The court noted that "[t]here is always in litigation a margin of error" and stressed that "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." Id. at 364. To maintain confidence in our system of laws, the court continued, proof beyond a reasonable doubt must be held to be proof of guilt "with utmost certainty." Id. Following Winship, the Supreme Court reversed a Louisiana defendant's capital conviction and death sentence because the instruction on reasonable doubt could have led jurors to find guilt

¹⁷ The trial court gave a substantially similar instruction on reasonable doubt at the penalty phase. (Mit. T.p. 105-06.) The trial court correctly omitted the "truth of the charge" phrase from its penalty phase definition of reasonable doubt.

“based on a degree of proof below that required by the Due Process Clause.” Cage v. Louisiana, 498 U.S. 39, 41 (1990).

Likewise, the trial court’s definition of reasonable doubt allowed the jurors to find guilt on proof below that required by the Due Process Clause. Although this Court has held that the statutory reasonable doubt definition is not an unconstitutional dilution of the State’s burden of proof, State v. Nabozny, 54 Ohio St. 2d 195, 202-03, 375 N.E.2d 784, 791 (1978), the Supreme Court, federal circuit courts, and lower Ohio courts have condemned the language in the statute that defines reasonable doubt as “proof of such character that an ordinary person would be willing to rely and act upon in the most important of his own affairs.”

1. Willing to act defect

In Holland v. United States, 348 U.S. 121, 140 (1954), the court indicated strong disapproval of the “willing to act” language when defining proof beyond a reasonable doubt. The United States Court of Appeals has also noted that “there is a substantial difference between a juror’s verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him.” Scurry v. United States, 347 F.2d 468, 470 (D.C. Cir. 1965). The Scurry court stated that human experience shows that a prudent person, called upon to act in his more important business or family affairs, would gravely weigh the risks and considerations tending in both directions. After weighing these considerations, however, a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Id. Indeed, several federal circuit courts have disapproved the “willing to act” phrase and adopted a preference for defining proof beyond a reasonable doubt in terms of a prudent person who would hesitate to act when confronted with such evidence. See, e.g., Monk v. Zelez, 901 F.2d 885

(10th Cir. 1990); United States v. Colon, 835 F.2d 27 (2nd Cir. 1987); United States v. Pinkney, 551 F.2d 1241 (D.C. Cir. 1976); United States v. Conley, 523 F.2d 650 (8th Cir. 1975).

Ohio courts have also criticized the “willing to act” language of O.R.C. § 2901.05 (D). In State v. Frost, No. 77AP-728, 1978 Ohio App. LEXIS 10525, slip op. at 8 (Franklin Ct. App. May 2, 1978), the court concluded that the final sentence of O.R.C. § 2901.05(D) should be eliminated or modified by adding the word “unhesitating” to the last sentence before the phrase “in the most important of his own affairs.” Ordinary people who serve as jurors are frequently required to make important decisions based upon proof of a lesser nature by choosing the most preferable action. This was recognized in State v. Crenshaw, 51 Ohio App. 2d 63, 65, 366 N.E.2d 84, 85 (1977), where the court stated that the “willing to act” language was the traditional test for the clear and convincing evidence standard of proof: “A standard based upon the most important affairs of the average juror ... reflects adversely upon the accused.” Federal courts and several Ohio courts have recognized, the “willing to act” language in O.R.C. § 2901.05(D) does not meet the standard of proof beyond a reasonable doubt standard. This is because most people do not make important decisions based upon a reasonable doubt standard but rather are “willing to act” upon a lesser standard.

2. Firmly convinced defect

The “firmly convinced” language in the first sentence of the court’s instruction did not define the reasonable doubt standard. Rather, it defined the clear and convincing standard. In Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118, syl. (1954), this Court defined clear and convincing evidence as that “which will provide in the mind of the trier of facts a firm belief or conviction to the facts sought to be established.” That definition is similar to O.R.C. § 2901.05 (D), where reasonable doubt is present only if jurors “cannot say they are firmly convinced of the

truth of the charge.” The jurors were given a definition of reasonable doubt in this instruction that failed to satisfy the requirement of the Due Process Clause.

3. Moral evidence defect

The trial court’s definition of reasonable doubt was flawed because it informed the jury that “[r]easonable doubt is not mere possible doubt because everything relate[d] to human affairs [or] moral evidence is open to some possible or imaginary doubt.” (Vol. 5, T.p. 1306.) The phrase “moral evidence” improperly shifted the focus of this jury to the subjective morality of Lang rather than the required legal quantum of proof.

In Victor v. Nebraska, 511 U.S. 1, 13 (1994), the court rejected a due process challenge to a jury instruction that included the phrase “moral evidence.” But see id. at 21 (Kennedy J., concurring). The court found no error because the phrase “moral evidence” was proper when placed in the context of the jury instruction on reasonable doubt that was given:

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

Id. at 13 (emphasis added).

Unlike Victor, the instruction in this case did not guide the jury by placing the phrase “moral evidence” within any proper context. In Victor, the jury was properly guided on the phrase “moral evidence” because it was conjunctively paired with the phrase “matters relating to human affairs.” Id. Here, “moral evidence” was disjunctively stated as an alternative to the phrase “relating to human affairs.” (Vol. 5, T.p. 1305-06.) Lang’s jury was not directed to consider “moral evidence” as evidence that is “related to human affairs.” Instead, his jury was instructed to consider both evidence related to human affairs “or moral evidence.” Compare

Vol. 5, T.p. 1306 with Victor, 511 U.S. at 13. Accordingly, the jury was allowed to convict Lang based on considerations of subjective morality rather than the quantum of evidentiary proof required by Due Process Clause. Victor, 511 U.S. at 21 (Kennedy J., concurring) (“[the] use of ‘moral evidence’ ... seems quite indefensible ... the words will do nothing but baffle”).

4. Conclusion

Juries in Ohio are convicting criminal defendants on a clear and convincing evidence standard. A majority of the federal courts agree that the “willing to act” language found in O.R.C. § 2901.05(D) represents a standard of proof below that required by the Due Process Clause. Furthermore, the “firmly convinced” language in the first sentence of O.R.C. § 2901.05(D) defines the presence of reasonable doubt in terms nearly identical to the accepted definition of clear and convincing evidence. Courts that have disapproved of the “willing to act” language have generally allowed it to be used only when the instruction, taken in its entirety, conveyed the true meaning of “reasonable doubt” as required by the Due Process Clause. See Holland, 384 U.S. at 140.

This is not, however, the case in Ohio. O.R.C. § 2901.05(D) defines reasonable doubt in terms far too similar to the definition of “clear and convincing” evidence. The “willing to act” language in the last sentence of O.R.C. § 2901.05(D) is defective because reasonable doubt is also defined in a clear and convincing standard from the outset in the phrase “firmly convinced.” Moreover, the reference to “moral evidence” obfuscates each juror’s duty to focus upon the evidence at trial rather than on subjective considerations of morality. O.R.C. § 2901.05(D), as applied to this case, defines reasonable doubt by an insufficient standard. Accordingly, the

instructions in Edward Lang's trial allowed his jury to find him guilty "based on a degree of proof below that required by the Due Process Clause." Cage, 498 U.S. at 41.

Edward Lang's convictions must be reversed.¹⁸

¹⁸ Similar claims have been denied on the merits by this Court. E.g. State v. Van Gundy, 64 Ohio St. 3d 230, 594 N.E.2d 604 (1992). However, under State v. Poindexter, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988), this Court has recognized the propriety of raising "settled" claims in death penalty appeals.

Proposition of Law No. 21

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

The Eighth Amendment to the 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, 592 (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, 282 (1972) (Brennan, J., concurring); Rhodes v. Chapman, 452 U.S. 337, 361 (1981); Trop v. Dulles, 356 U.S. 86, 100-01 (1958). The Ohio scheme offends this bedrock principle in the following ways:

1. **Arbitrary and Unequal Punishment.**

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

Ohio's capital punishment scheme allows imposition of the death penalty 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 therefore were 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 12% of Ohio's population, 98 or 52% of Ohio's death row inmates are African-American. See <http://quickfacts.census.gov/qfd/states/39000.html> visited April 15, 2008; Ohio Public Defender Commission Statistics, Feb. 8, 2008, available at http://www.opd.ohio.gov/dp/dp_prosta.pdf; see also The Report of the Ohio Commission on Racial Fairness, (1999). See generally The American Bar Association Report, submitted Sept. 2007, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report*, pp. 351-67. While 4 Caucasians were sentenced to death for killing African-Americans (or an African-American), 41 African-Americans sit on Ohio's death row for killing a Caucasian. Ohio Public Defender Commission Statistics, Feb. 8, 2008, available at http://www.opd.ohio.gov/dp/dp_prosta.pdf. Ohio's statistical disparity is tragically consistent with national findings. The General Accounting Office found victim's race influential at all stages, with stronger evidence involving prosecutorial discretion in charging and trying cases. Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities, U.S. General Accounting Office, Report to Senate and House Committees on the Judiciary (February 1990).

Ohio courts have not evaluated the implications of these racial disparities. While the General Assembly established a disparity appeals practice in post-conviction that should encourage this Court to adopt a rule requiring tracking the offender's race, O.R.C. § 2953.21 (A)(2), this Court has not adopted a rule. Further, this practice does not track the victim's race

and does not apply to crimes committed before July 1, 1996. In short, Ohio law fails to assure against race discrimination playing a role in capital sentencing.

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. Commonwealth v. O'Neal, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring); State 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, 488 (1960). To take a life by mandate, the State must show that it is the "least restrictive means" to a "compelling governmental end." O'Neal, 339 N.E.2d at 678.

The death penalty is neither the least restrictive nor an effective deterrent. Less restrictive means can effectively serve both isolation of the offender and retribution. Society's interests do not justify the death penalty.

2. Unreliable Sentencing Procedures.

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

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

circumstances were marginally greater than the mitigating factors. This creates an unacceptable risk of arbitrary or capricious sentencing.

Additionally, the aggravating 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. 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 are within the individual decision-maker’s discretion. State v. Fox, 69 Ohio St. 3d 183, 193, 631 N.E.2d 124, 132 (1994). Giving so much discretion to juries inevitably leads to arbitrary and capricious judgments. The Ohio open discretion scheme further risks that constitutionally relevant mitigating factors that must be considered as mitigating youth or childhood abuse (Eddings v. Oklahoma, 455 U.S. 104, 116 (1982)), mental disease or defect (Penry v. Lynaugh, 492 U.S. 302, 319 (1989) *rev’d on other grounds* Penry v. Johnson, 532 U.S. 782 (2001)), level of involvement in the crime (Enmund v. Florida, 458 U.S. 782, 798 (1982)), or lack of criminal history (Delo v. Lashley, 507 U.S. 272, 279 (1993))] will not be factored into the sentencer’s decision. While the federal constitution may allow states to shape consideration of mitigation, see Johnson v. Texas, 509 U.S. 350 (1993), Ohio’s capital scheme fails to provide adequate guidelines to sentencers, and fails to assure against arbitrary, capricious, and discriminatory results.

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

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

3. Defendant's Right to a Jury is Burdened.

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

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

4. Mandatory Submission of Reports and Evaluations.

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

5. O.R.C. § 2929.04(A)(7) is Constitutionally Invalid When Used to Aggravate O.R.C. § 2903.01(B) Aggravated Murder.

“[T]o avoid [the] constitutional flaw of vagueness and over breadth under the Eighth Amendment, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of a defendant as compared to others found guilty of (aggravated) murder.” Zant v. Stephens, 462 U.S. 862, 877 (1983). Ohio’s statutory scheme fails to meet this constitutional requirement because O.R.C. § 2929.04(A)(7) fails to genuinely narrow the class of individuals eligible for the death penalty. This precise error occurred in Lang’s case; he was convicted of felony murder along with the O.R.C. § 2929.04(A)(7) specification.

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

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

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

The killer who kills with prior calculation and design is treated less severely, which is also nonsensical because his blameworthiness or moral guilt is higher, and the argued ability to deter him is less. From a retributive stance, this is the most culpable of mental states. Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 *Hous. L. Rev.* 356, 375 (1978).

Felony-murder also fails to reasonably justify the death sentence because this Court has interpreted O.R.C. § 2929.04(A)(7) as not requiring that intent to commit a felony precede the murder. *State v. Williams*, 74 Ohio St. 3d 569, 660 N.E.2d 724, syl. 2 (1996). The asserted state interest in treating felony-murder as deserving of greater punishment is to deter the commission of felonies in which individuals may die. Generally courts have required that the killing result from an act done in furtherance of the felonious purpose. *Id.*, referencing the Model Penal Code. Without such a limitation, no state interest justifies a stiffer punishment. This Court has discarded the only arguable reasonable justification for imposition of the death sentence on such individuals, a position that engenders constitutional violations. *Zant*, 462 U.S. 862. Further, this Court's current position is inconsistent with previous cases, thus creating the likelihood of arbitrary and inconsistent applications of the death penalty. *See, e.g., State v. Rojas*, 64 Ohio St. 3d 131, 139, 592 N.E.2d 1376, 1384 (1992).

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

6. O.R.C. §§ 2929.03(D)(1) and 2929.04 are Unconstitutionally Vague.

Ohio Revised 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 weighed in favor of death. The nature and circumstances of an offense are, however, statutory mitigating factors under O.R.C. § 2929.04(B). Ohio Revised 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), *vacated on other grounds*, Ring v. Arizona, 536 U.S. 584 (2002); Godfrey, 446 U.S. at 428. Moreover, a vague aggravating circumstance is unconstitutional whether it is an eligibility or a selection factor. Tuilaepa v. California, 512 U.S. 967, 972 (1994). The aggravating circumstances in O.R.C. § 2929.04(A)(1)-(8) are both.

Ohio Revised 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 O.R.C. § 2929.04(B), the sentencer must weigh them 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, O.R.C. § 2929.03(D)(1) eviscerates the clarity and specificity of O.R.C. § 2929.04(B); selection factors that are strictly mitigating become part and parcel of the aggravating circumstance.

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

Ohio Revised Code § 2929.03(D)(1) is also unconstitutional on its face because it makes the selection factors in aggravation in O.R.C. § 2929.04(A)(1)-(8) “too vague.” See Walton, 497 U.S. at 654. Ohio Revised Code § 2929.04(A)(1)-(8) gives clear guidance as to the selection factors that the sentencer may weigh against the defendant’s mitigation. However, O.R.C. § 2929.03(D)(1) eviscerates the narrowing achieved. By referring to the “nature and circumstances of the aggravating circumstance,” O.R.C. § 2929.03(D)(1) gives the sentencer “open-ended discretion” to impose the death penalty. See Maynard, 486 U.S. at 362. That reference allows the sentencer to impose death based on (A)(1)-(8) plus any other fact in

evidence arising from the nature and circumstances of the offense that the sentencer considers aggravating. This eliminates the guided discretion provided by O.R.C. § 2929.04(A). See Stringer v. Black, 503 U.S. 222, 232 (1992).

7. Proportionality and Appropriateness Review.

Ohio Revised Code §§ 2929.021 and 2929.03 require trial courts to report data to the courts of appeals and to the Ohio Supreme Court. 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 Revised Code § 2929.021 requires only minimal information on these cases. Additional data is necessary to make an adequate comparison in these cases. This prevents 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, 50 (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. Absent a significant comparison of cases, there can be no meaningful appellate review. See State v. Murphy, 91 Ohio St. 3d 516, 562, 747 N.E.2d 765, 813 (2001) (Pfeifer, J., dissenting) ("When we compare a case in which the death penalty was imposed only to other cases in which the death penalty was imposed, we continually lower the bar of proportionality. The lowest common denominator becomes the standard.")

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

This Court's appropriateness analysis is also constitutionally infirm. Ohio Revised 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. This Court has not followed these dictates. The appropriateness review conducted is very cursory. It does not "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano v. Florida, 468 U.S. 447, 460 (1984).

The cursory appropriateness review also violates the capital defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the 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 Edward Lang's due process, liberty interest in O.R.C. § 2929.05.

8. Ohio's Statutory Death Penalty Scheme Violates International Law.

International law binds each of the states that comprise the United States. Ohio is bound by international law whether found in treaty or in custom. Because the Ohio death penalty scheme violates international law, Lang's capital convictions and sentences cannot stand.¹⁹

8.1 International Law Binds the State of Ohio.

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

8.2 Ohio's Obligations under International Charters, Treaties, and Conventions.

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

¹⁹ Medellin v. Texas, ___ U.S. ___, 128 S. Ct. 1346 (2008), does not address this issue. In Medellin, the Supreme Court simply found that the President did not have the authority to order the State of Texas to ignore state procedural bars in order to enforce an international court ruling.

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

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

Section 1. Implementation of Human Rights Obligations.

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

Ohio is not fulfilling the United States' obligations under these conventions. Rather, Ohio's death penalty scheme violates each convention's requirements and thus must yield to the requirements of international law. (See discussion infra Subsections 1-7).

8.2.1 Ohio's Statutory Scheme Violates the ICCPR's and ICERD's Guarantees of Equal Protection and Due Process.

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

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

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

8.2.2 Ohio's Statutory Scheme Violates the ICCPR's Protection against Arbitrary Execution.

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

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

8.2.3 Ohio's Statutory Scheme Violates the ICERD's Protections against Race Discrimination.

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

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

8.2.4 Ohio's Statutory Scheme Violates the ICCPR's and the CAT's Prohibitions against Cruel, Inhuman or Degrading Punishment.

The ICCPR prohibits subjecting any person to torture or to cruel, inhuman, or degrading treatment or punishment. Art. 7. Similarly, the CAT requires that states take action to prevent torture, which includes any act by which severe mental or physical pain is intentionally inflicted on a person for the purpose of punishing him for an act committed. See Art. 1-2. As administered, Ohio's death penalty inflicts unnecessary pain and suffering, see Cooley v. Strickland, Case no. 2:04cv1156 (S.D. Ohio), in violation of both the ICCPR and the CAT. Thus, there is a violation of international law and the Supremacy Clause.

8.2.5 Ohio's Obligations Under the ICCPR, the ICERD, and the CAT are not Limited by the Reservations and Conditions Placed on These Conventions by the Senate.

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

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

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

8.2.6 Ohio's Obligations Under the ICCPR are not Limited by the Senate's Declaration that it is not Self-Executing.

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

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

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

8.3 Ohio's Obligations under Customary International Law.

International law is not merely discerned in treaties, conventions, and covenants. International law “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law.” United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820). Regardless of the source “international law is a part of our law[.]” The Paquete Habana, 75 U.S. at 700.

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

The DHR guarantees equal protection and due process (Art. 1, 2, 7, 11), recognizes the right to life (Art. 3), prohibits the use of torture or cruel, inhuman, or degrading punishment (Art.

5) and is largely reminiscent of the ICCPR. Each of the guarantees found in the DHR are violated by Ohio's statutory scheme. (See discussion *infra*). Thus, Ohio's statutory scheme violates customary international law as codified in the DHR and cannot stand.

However, the DHR is not alone in its codification of customary international law. Smith directs courts to look to "the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law" in ascertaining international law. 18 U.S. (5 Wheat.) at 160-61. Ohio should be cognizant of the fact that its statutory scheme violates numerous declarations and conventions drafted and adopted by the United Nations and the OAS, which may, because of the sheer number of countries that subscribe to them, codify customary international law. See *id.* Included among these are:

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

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

3. The American Declaration of the Rights and Duties of Man adopted by the Ninth International Conference of American States in 1948. It includes numerous human rights

guarantees: the right to life (Art. 1), equality before the law (Art. 2), the right to a fair trial (Art. 16), and due process (Art. 26).

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

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

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

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

9. 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 Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution, and international law. Lang's death sentence must be vacated.²⁰

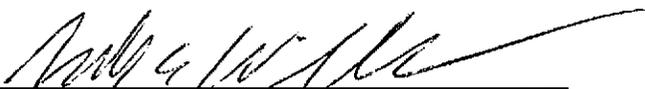
²⁰ Similar claims have been denied on the merits by this Court, e.g. State v. Stojetz, 84 Ohio St. 3d 452, 705 N.E.2d 329 (1999), and this Court may summarily reject this claim on the merits if it disagrees with Lang's arguments on Federal law. State v. Poindexter, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988). However, Lang does not concede that his claim is meritless under federal law.

Conclusion

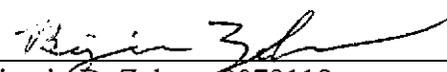
For each of the foregoing reasons, Edward Lang's convictions and sentences must be reversed.

Respectfully submitted,

Office of the Ohio Public Defender

By: 
Joseph E. Wilhelm - 0055407
Chief Counsel - Death Penalty Division
Counsel of Record

By: 
Kelly L. Culshaw - 0066394
Supervisor, Death Penalty Division

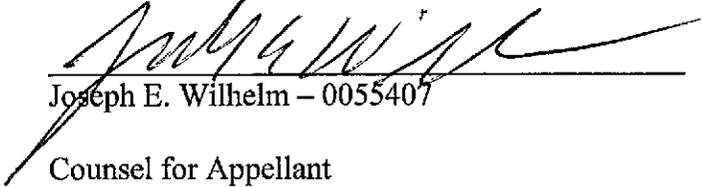
By: 
Benjamin D. Zober - 0079118
Assistant State Public Defender

8 East Long Street, 11th Floor
Columbus, Ohio 43215
(614)466-5394
(614)644-0708 (FAX)

Counsel For Appellant

Certificate of Service

I hereby certify that a true copy of Merit Brief of Appellant Edward Lang was forwarded by regular U.S. Mail to John D. Ferrero, Prosecutor and Mark Caldwell, Assistant Prosecutor, Stark County, 110 Central Plaza South, Suite 510, Canton, Ohio 44702, this 9th day of June, 2008.



Joseph E. Wilhelm - 0055407

Counsel for Appellant

In The Supreme Court Of Ohio

State Of Ohio, :
Appellee, :
-vs- : Case No. 2007-1741
Edward Lang, :
Appellant. : **Death Penalty Case**

On Appeal From the Court of Common Pleas
Stark County, Ohio
Case No. 2006 CR 1824A

Appendix to Merit Brief of Appellant Edward Lang

John D. Ferrero - 0018590
Stark County Prosecutor

Office of the
Ohio Public Defender

Mark Caldwell - 0030663
Assistant Prosecuting Attorney

Joseph E. Wilhelm - 0055407
Chief Counsel,
Death Penalty Division
Counsel of Record

Kelly L. Culshaw – 0066394
Supervisor, Death Penalty Division

Benjamin D. Zober – 0079118
Assistant State Public Defender

Stark County Office Building
Stark County Prosecutor's Office
110 Central Plaza South, Suite 510
Canton, Ohio 44702-1413

Office of the Ohio Public Defender
8 East Long Street, 11th Floor
Columbus, Ohio 43215-2998
(614)466-5394
(614)644-0708 (FAX)

Counsel For Appellee

Counsel For Appellant

In The Supreme Court of Ohio

State of Ohio, :
Appellee, : Case No. **07-1741**
-vs- : Appeal taken from Stark County
Edward Lee Lang, : Court of Common Pleas
: Case No. 2006-CR-1824A
Appellant. : **This is a death penalty case**

Notice of Appeal of Appellant Edward Lee Lang

David H. Bodiker
Ohio Public Defender

John D. Ferrero – 0018590
Prosecuting Attorney

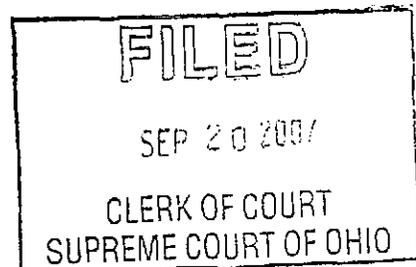
Joseph E. Wilhelm – 0055407
Chief Counsel, Death Penalty Division

Stark County
110 Central Plaza South
Suite 510
Canton, Ohio 44702
(330) 451-7935
(330) 451-7965 – Fax

Kelly L. Culshaw – 0066394
Supervisor, Death Penalty Division
Office of the Ohio Public Defender
8 East Long Street – 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394
(614) 644-0708 – Fax

Counsel For Appellee

Counsel For Appellant



In The Supreme Court of Ohio

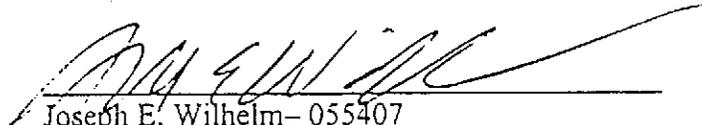
State of Ohio, :
Appellee, : Case No.
-vs- : Appeal taken from Stark County
Edward Lee Lang, : Court of Common Pleas
Appellant. : Case No. 2006-CR-1824A
: This is a death penalty case

Notice of Appeal

Appellant Edward Lee Lang hereby gives notice of appeal to the Supreme Court of Ohio from the decision and judgment entry of the Stark County Court of Common Pleas, entered on August 6, 2007. See Exhibit A. This is a capital case and the date of the offense is October 22, 2006. See Supreme Court Rule of Practice XIX, § 1(A).

Respectfully submitted,

David H. Bodiker
Ohio Public Defender



Joseph E. Wilhelm - 055407
Chief Counsel, Death Penalty Division



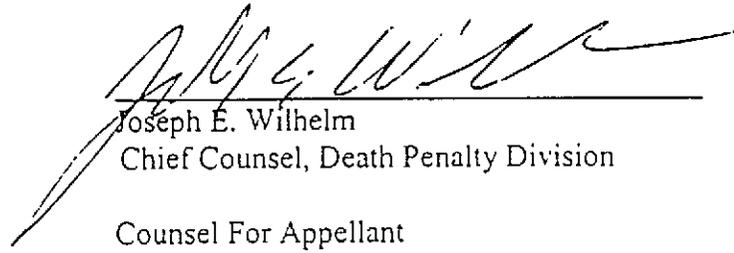
Kelly L. Culshaw - 0066394
Supervisor, Death Penalty Division

Office of the Ohio Public Defender
8 East Long Street - 11th Floor
Columbus, Ohio 43215-2998
(614) 466-5394
(614) 644-0708 - FAX

Counsel For Appellant

Certificate Of Service

I hereby certify that a true copy of the foregoing Notice of Appeal of Appellant Edward Lee Lang was forwarded by first-class, postage prepaid U.S. Mail to John D. Ferrero, Prosecuting Attorney, Stark County, 110 Central Plaza South, Suite 510, Canton, Ohio 44702, on this 20th day of September, 2007.



Joseph E. Wilhelm
Chief Counsel, Death Penalty Division
Counsel For Appellant

262735

STATE OF OHIO:
SS:
STARK COUNTY:

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO

Plaintiff(s)

-VS-

EDWARD LEE LANG

Defendant(s)

) CASE NO. 2006-CR-1824A

) JUDGE LEE SINCLAIR

) JUDGMENT ENTRY - OPINION OF
) THE COURT

INTRODUCTION

On July 14, 2007, a jury found Edward Lee Lang guilty of two (2) counts of aggravated murder and one (1) count of aggravated robbery. The first count of aggravated murder involved the death of Jaron Burditte. The second count of aggravated murder involved the death of Marnell Cheek. The jury found Edward Lee Lang guilty of a firearm specification on each of the two counts of aggravated murder and on the single count of aggravated robbery. Each count of aggravated murder also contained two (2) death penalty specifications. The count of aggravated murder involving the death of Jaron Burditte included a specification alleging that the aggravated murder occurred as part of a course of conduct involving the purposeful killing of two or more individuals by Edward Lee Lang. The second death penalty specification involving the aggravated murder of Jaron Burditte alleged that the aggravated murders were committed while Edward Lee Lang was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and that Edward Lee Lang was the principal offender in the commission of the aggravated murder. The count of aggravated murder involving the death of Marnell Cheek included two similar death penalty specifications as previously indicated. The jury returned guilty verdicts beyond a reasonable doubt on all counts and on all specifications. Edward Lee Lang declined the option of a presentence investigation

and/or a mental health evaluation. Edward Lee Lang was fully advised of all his rights before the Court proceeded to the sentencing phase.

On July 17, 2007, this Court commenced the sentencing phase of the trial. The Court permitted the State to use only select trial exhibits during the sentencing phase. The prosecution proceeded with minimal evidence and introduced only the select trial exhibits. The defendant presented mitigation evidence. Counsel presented final arguments. The defendant exercised his right to remain silent. On July 18, 2007, the jury returned a sentencing verdict of life without the possibility of parole on the count of aggravated murder involving the death of Jaron Burditte. At the same time, the jury returned a sentencing verdict finding that the State of Ohio proved beyond a reasonable doubt that the aggravating circumstances in Count Two, involving the death of Marnell Cheek, outweighed the mitigating factors. The jury sentencing verdict indicated the penalty of death on the count of aggravated murder involving Marnell Cheek.

The jury was appropriately sequestered during the trial phase and the sentencing phase deliberations. During the trial phase deliberations, the jury was sequestered overnight. During the sentencing phase, the jury deliberated for approximately eleven (11) hours over a two-day period, including being sequestered overnight.

The jury's verdict of death on the count of aggravated murder involving the death of Marnell Cheek constitutes a recommendation to the Court. This Court is required to perform an independent review of this matter pursuant to Ohio law.

Based on the sentencing verdict of the jury, this Court must now weigh the two specific aggravating circumstances involving the aggravated murder of Marnell Cheek and the mitigating factors to determine whether the jury recommendation of death as to the aggravated murder of Marnell Cheek should be the final sentence of the Court. Since the jury verdict involving the death of Jaron Burditte ordered a penalty of life without possibility of parole, this Court will not

consider the aggravating circumstances or the aggravated murder involving Mr. Burditte as part of the Court's weighing process. (It should be noted that the "course of conduct" aggravating circumstance factually involves the death of Jaron Burditte, as he was the additional person killed.)

Edward Lee Lang was found guilty beyond a reasonable doubt of purposely causing the death of Marnell Cheek while committing or attempting to commit or while fleeing immediately after committing or attempting to commit aggravated robbery. In addition, the jury convicted the defendant beyond a reasonable doubt of two (2) death penalty specifications, which are also referred to as aggravating circumstances. These aggravating circumstances found beyond a reasonable doubt by the jury are as follows:

1. That the aggravated murder of Marnell Cheek was part of a course of conduct involving the purposeful killing of two (2) or more persons by Edward Lee Lang.
2. That Edward Lee Lang did commit the aggravated murder of Marnell Cheek while he was committing, or attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and Edward Lee Lang was the principal offender in the commission of the aggravated murder. (This Court instructed the jury that the term "principal offender" was to be defined as the actual killer.)

In Ohio, a jury verdict of death is a recommendation to the Court. When such a recommendation is made, the trial judge must then deliberate and render the final sentence. Guidance is provided by case law and pursuant to the requirements of Chapter 2929 of the Ohio Revised Code. Ohio law requires that the Court set forth its specific findings as to the existence of any mitigating factors pursuant to O.R.C. §2929.04(B) as well as any other mitigating factors, the aggravating circumstances the defendant was found guilty of committing, and the reasons for the Court's reasoning behind the weighing process.

In determining this matter, this Court has considered and weighed all of the appropriate matters required by law. This Court has considered the two (2) specific aggravating circumstances found by the jury beyond a reasonable doubt involving the aggravated murder of Marnell Cheek. This Court has not considered the aggravated murder of Marnell Cheek as an aggravating circumstance.

**FACTUAL BACKGROUND AND FINDINGS BY THE COURT AS TO THE SPECIFIC
AGGRAVATING CIRCUMSTANCES**

1. The aggravated murder of Marnell Cheek was part of a course of conduct involving the purposeful killing of two or more persons by Edward Lee Lang.

The first aggravating circumstance found by the jury beyond a reasonable doubt is as follows: that the aggravated murder of Marnell Cheek was part of a course of conduct involving the purposeful killing of two or more persons by Edward Lee Lang. On October 22, 2006, Edward Lee Lang committed the aggravated murder of Marnell Cheek as part of a course of conduct involving the purposeful killing of Marnell Cheek and Jaron Burditte. On October 22, 2006, Edward Lee Lang along with Antonio Walker planned a robbery with the intended victim being Jaron Burditte. Mr. Burditte was known to sell illegal drugs in the local neighborhood and was also known to have sizable sums of cash upon his person. Edward Lee Lang contacted Mr. Burditte by cell phone to set up a drug deal. Mr. Walker and Mr. Lang planned to rob Mr. Burditte at gunpoint. Mr. Lang possessed a 9 mm pistol to use in the robbery. Mr. Burditte arrived at the agreed upon location driving his motor vehicle. Mr. Burditte initially drove past the intended location. Mr. Lang used a cell phone to call Mr. Burditte to indicate that he had past the agreed location. Mr. Burditte then turned and drove back to meet Mr. Lang. Mr. Lang entered the vehicle alone and almost instantaneously shot Mr. Burditte and his passenger, Marnell Cheek. Mr. Burditte was shot at point-blank range in what may be described as a contact wound. Marnell Cheek was shot at extremely close range. Both individuals were shot in the head by a

single gunshot, making a total of two (2) shots fired. Mr. Lang immediately jumped from the vehicle, which was still in gear. The vehicle traveled on the roadway and then off the roadway hitting various items before coming to a stop. Both victims died from gunshot wounds to the head. There is evidence that Mr. Burditte was planning to make a drug transaction at the time of the killings. However, there is no evidence to suggest that Marnell Cheek was a participant in the drug transaction. All evidence points to the fact that she was a person riding in the vehicle at the wrong place and at the wrong time. As part of this course of conduct, Mr. Burditte and Marnell Cheek were purposely executed by Edward Lee Lang.

2. Edward Lee Lang committed the aggravated murder of Marnell Cheek while he was committing or attempting to commit or fleeing immediately after committing or attempting to commit aggravated robbery and Edward Lee Lang was the principal offender in the commission of the aggravated murder of Marnell Cheek.

The second aggravating circumstance in this matter indicates: that Edward Lee Lang committed the aggravated murder of Marnell Cheek while Edward Lee Lang was committing or attempting to commit or fleeing immediately after committing or attempting to commit aggravated robbery and that Edward Lee Lang was the principal offender in the commission of the aggravated murder of Marnell Cheek. On October 22, 2006, Edward Lee Lang committed the aggravated murder of Marnell Cheek while he was committing or attempting to commit or fleeing immediately after committing or attempting to commit an aggravated robbery and Edward Lee Lang was the actual killer in the commission of the aggravated murder. Evidence was established beyond a reasonable doubt that Edward Lee Lang planned and committed the aggravated robbery. Edward Lee Lang possessed a handgun to be used in the aggravated robbery. Edward Lee Lang chambered a round in the handgun prior to committing the aggravated robbery. Edward Lee Lang opened the car door and entered the vehicle on the driver's side backseat. Almost immediately upon entering the vehicle, Edward Lee Lang purposefully shot and killed both individuals occupying the vehicle. One of the individuals killed

was Marnell Cheek. Edward Lee Lang is the actual killer of Marnell Cheek. He is the one who pulled the trigger.

This Court has presented the factual findings to provide background for the jury's verdicts. The Court has not considered the aggravated murder itself as an aggravating circumstance. See *State v. Johnson* (2006), 112 Ohio St.3d 210, 249.

MITIGATING FACTORS

1. The nature and circumstances of the offense

This Court has weighed the nature and circumstances of the offense for any mitigating factors. This has included all of the facts, including that Antonio Walker, the accomplice in this case, was a willing participant in planning the robbery. Mr. Walker knew that a firearm was going to be used in the robbery. Mr. Walker was older than Edward Lee Lang and knew Mr. Burditte. Also, Mr. Lang threw up after the shootings. The Court has also reviewed all of the other facts involving the nature and circumstances of the offense as they may relate to any mitigating factors or mitigating evidence that exists. After weighing all of the facts, the Court finds no mitigating factors exist concerning the nature and circumstances of the offense as they relate to the aggravated murder of Marnell Cheek.

2. The history, character, and background of Edward Lee Lang

Edward Lee Lang was raised in Baltimore, Maryland. He did not know his biological father until he was approximately ten (10) years of age. He was conceived while his mother was still a teenager. Edward Lee Lang's mother had a relationship with a much older man who was her landlord. This man (Edward Lee Lang, Sr.) fathered the defendant, Edward Lee Lang. Edward Lee Lang's mother had a stormy relationship with the biological father, Edward Lee Lang, Sr. She ended the relationship and put Edward Lee Lang, Sr. out of her life. This included that young Edward had no contact with his father throughout his early life. When Edward Lee

Lang was approximately ten years of age, his mother pursued a child support enforcement proceeding. As part of this child support enforcement proceeding, Edward Lee Lang was ordered to visit with his biological father. At this time, Edward Lee Lang was ten years of age. Edward Lee Lang began visits with his father. After one of the visits, he did not return. The father indicated that he had car trouble and could not return young Edward. The mother found that the father's phone number had been disconnected and she sensed the child would not be returning. For the next two years, Edward Lee Lang's mother pursued various courses of action to return her son. She was not provided with any help through the local authorities or through the court system. Finally, on her own, she was able to return Edward Lee Lang home at the age of 12. He was still in the same clothing and in the same shoes that he had been wearing when he was abducted by his father. He appeared to be undernourished. He had unexplained bruises, a cigarette burn, and a cut on his hand. All of these items were of unknown origin. After returning home, young Edward Lee Lang never spoke of the time he had spent with his father. Edward Lee Lang's mother suspects both physical and perhaps sexual abuse, but none has ever been confirmed. When Edward Lee Lang returned home, he was happy at first and then became withdrawn. He also displayed anger. This resulted in psychiatric treatment and to numerous inpatient confinements. Young Edward Lee Lang was treated on an outpatient and inpatient basis. Edward Lee Lang's mother testified that he was treated at various psychiatric facilities on over thirty (30) occasions. He was provided with medication to deal with his mental health issues, which included being withdrawn and also being angry. Young Edward Lee Lang did not always comply with taking his medications. Edward Lee Lang's mother indicated that she had requested that he receive family counseling. Instead, he received personal counseling.

Prior to Edward Lee Lang being abducted by his father, he had experienced various mental health issues. As a child, Edward Lee Lang had a problem with throwing tantrums. He

was placed on medication as a young child. His mother felt that some of this was just sibling rivalry. During the time period that Edward Lee Lang was gone with his father, his mother does not believe that he was medicated. The problems that Edward Lee Lang experienced after returning from the two-year absence were of the same type he had when younger but they did seem to be worse.

Edward Lee Lang grew up in a tough neighborhood in an urban area of Baltimore, Maryland. He is one of four children. His mother appears to have done her best to provide for the family. The mother testified at the sentencing hearing. Edward Lee Lang appears to have had a normal sibling relationship, especially with his one stepsister, Yahnena Robinson. Ms. Robinson also testified at the sentencing hearing. Young Edward Lee Lang had no relationship with his father, Edward Lee Lang, Sr. until the age of ten (10). Edward Lee Lang, Sr., was a drug user and a convicted criminal including a convicted sex offender. Edward Lee Lang was abducted by his father at age ten (10) and returned to his mother at age twelve (12). Edward Lee Lang left home at approximately age 16. Edward Lee Lang currently has a child two (2) years of age living in Baltimore, Maryland. Edward Lee Lang last saw his child in June of 2006. Edward Lee Lang is currently nineteen (19) years of age. Edward Lee Lang's mother asked the jury to spare her son's life.

The Court has weighed all of the evidence presented as it relates to Mr. Lang's history, character, and background. The Court finds some slight amount of mitigation to such evidence. The defendant had less than a perfect childhood. His two-year absence from his mother was certainly traumatic. Young Edward Lee Lang grew up with no positive role model for a father. These factors along with his entire childhood have some slight amount of mitigation value.

3. Youth of the offender

Edward Lee Lang is nineteen (19) years of age at the current time. He was eighteen (18)

years of age at the time the crime was committed. The Court gives weight to the youth of the offender as a mitigating factor.

4. Any other factors that are relevant to the issue of whether the defendant should be sentenced to death

The Court has also weighed any other factors that are relevant to the issue of whether the defendant should be sentenced to death. The Court has previously commented on Edward Lee Lang's background and will not recount those facts again. The Court has also considered the sentence of Mr. Walker, the accomplice in this matter. Mr. Walker was sentenced to a term of eighteen (18) years to life on an amended charge of murder in return for his testimony. Mr. Walker was not the actual killer. Mr. Walker did not enter the vehicle wherein the murder of Marnell Cheek took place. Mr. Walker was a willing participant in the robbery and Mr. Walker knew that Mr. Lang possessed a firearm. Mr. Walker's testimony was credible. There is no doubt that the defendant was the actual killer. The defendant's culpability far exceeds the accomplice, Antonio Walker. The Court finds no disparity in the sentencing involving Antonio Walker. The Court gives minimal mitigation weight to this factor. Further, the Court finds the fact that the defendant has a two (2) year old daughter has minimal mitigation value. The Court finds the defendant has a loving mother and stepsister. This has minimal mitigation value.

5. All other factors enumerated in O.R.C. §2929.04(B)

The defendant raised the mitigating factors previously set forth in this Opinion. Out of an abundance of caution and fairness, the Court has also reviewed all of the other factors enumerated in O.R.C. §2929.04(B). The Court finds none of these factors applicable except as previously mentioned in this Opinion. The Court has specifically not considered in its weighing process the defendant's criminal record. During the pendency of this case, the defendant was charged with two (2) counts of assault involving two police officers and one (1) count of felonious assault involving an inmate at the Stark County Jail. The defendant entered guilty pleas

to all offenses and was sentenced prior to the trial commencing in this matter. The Court has not considered these convictions or the facts relative thereto in any fashion. The Court mentions these convictions only because they are found as part of the Court record as part of the pretrial proceedings. The Court wants it to be perfectly clear that these were not considered.

6. Statements of Counsel, allocution of defendant, victim impact evidence

The Court has also considered the statements of defense counsel at the sentencing. The defendant declined to make any statement prior to sentencing. The Court has not considered any victim impact evidence in arriving at this decision. The Court has not considered the aggravated murder itself as an aggravating circumstance.

WEIGHING OF THE SPECIFIC AGGRAVATING CIRCUMSTANCES AND ALL MITIGATING FACTORS

Pursuant to O.R.C. §2929.03(F), the trial court must make certain findings. A trial court must specifically provide reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. See *State v. Fox* (1994), 69 Ohio St.3d 183; *State v. Green* (2000), 90 Ohio St.3d 352. To satisfy the statutory and case law requirements, this Court undertakes the within weighing process. It is not the intent of the Court to make the aggravated murder of Marnell Cheek itself an aggravated circumstance.

The Court has considered all of the evidence presented during both the trial and sentencing phases as it relates to the two (2) specific aggravating circumstances involving the aggravated murder of Marnell Cheek. The Court has also considered all of the mitigating evidence and mitigating factors presented at both phases of the proceeding. The Court has weighed the two (2) specific aggravating circumstances against all of the mitigating facts and mitigating evidence. The Court has weighed the mitigating factors individually and collectively. In weighing the specific aggravating circumstances against the mitigating factors, the Court finds that the State of Ohio has proved beyond a reasonable doubt that the specific aggravating

circumstances that the defendant was found guilty of committing outweigh the mitigating factors. The defendant purposely caused the death of Marnell Cheek as part of a course of conduct involving the purposeful killing of two (2) or more persons by the defendant. In this case, Edward Lee Lang was the actual killer and, without provocation, purposely murdered both Marnell Cheek and her companion, Jaron Burditte. Both people were killed execution style by a gunshot wound to each person's head. One individual was shot at point-blank range and Marnell Cheek was shot at extremely close range. Both shots were fired in rapid succession almost instantaneously upon Edward Lee Lang entering the motor vehicle. Under this aggravating circumstance, the Court must weigh the fact of a multiple homicide. Not just one life was lost. Here two people were killed by the purposeful conduct of Edward Lee Lang. The Court must weigh the seriousness of a double homicide.

The defendant also committed the aggravated murder of Marnell Cheek while he was committing or attempting to commit or fleeing immediately after committing or attempting to commit aggravated robbery and he was the principal offender in committing the aggravated murder. He is the actual killer of Marnell Cheek. This was an execution wherein Marnell Cheek lost her life by the defendant's purposeful conduct during the aggravated robbery.

Against the two specific aggravating circumstances previously discussed in this Opinion, the Court must balance and weigh the mitigating factors. Mitigating factors are factors about Edward Lee Lang or the offense that Edward Lee Lang committed that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate. Mitigating factors are factors that lessen the moral culpability of the defendant or diminish the appropriateness of a death sentence. The relevant mitigating factors to be considered by the Court have been previously outlined in this Opinion. The mitigating factors are minimal in comparison to the specific aggravating circumstances found by the jury. When weighed against the mitigating

factors, the aggravating circumstances in this case, beyond a reasonable doubt, far outweigh the mitigating factors. The Court has weighed all of the mitigating factors carefully and fully.

The strongest mitigating factor is the age of the defendant. Edward Lee Lang was eighteen (18) years of age when he committed the aggravated murder of Marnell Cheek. Edward Lee Lang's youth must be weighed against the planning of the crime, the calculated and thought-out nature, and its execution style conclusion. He did not act in a "youthful" manner. In essence, his youth must be weighed against Edward Lee Lang being the purposeful actual killer as part of the aggravated robbery and also the committing of a course of conduct involving the purposeful killing of two persons. The Court had the opportunity, as part of the trial, to listen to the taped statement of Edward Lee Lang. Edward Lee Lang is not a youthful offender. Instead, his conduct and taped statement show a street-hard individual. This was not the act of an immature impetuous youth. The overall value of his youth in mitigation is minimal at best.

The Court has weighed all of the mitigating factors. When considered alone or together, they have at best minimal mitigation value. Separately or together, they have very little weight to lessen the moral culpability of the defendant. The Court finds that the mitigating factors pale in comparison to the two aggravated circumstances.

CONCLUSION

After weighing all of the appropriate evidence, all mitigating factors, the statements of counsel, and all statutory and case law required, it is the decision of the Court that the specific aggravating circumstances in Count Two involving the aggravated murder of Marnell Cheek outweigh the mitigating factors beyond a reasonable doubt. The Court, therefore, accepts the recommendation of the jury. The Court orders that Edward Lee Lang is hereby sentenced to death for the aggravated murder of Marnell Cheek. The Court orders that the execution date of Edward Lee Lang shall be set for the third day of December, 2007, to be carried out by the

BALDWIN'S OHIO REVISED CODE ANNOTATED
CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

Current through 1996 portion of 121st G.A., laws passed and filed through 5-1-96.

O CONST I § 1 INALIENABLE RIGHTS

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

Current through 1995 portion of 121st G.A., laws passed and filed through 12-31-95.

O CONST I § 2 EQUAL PROTECTION AND BENEFIT

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.

CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

Current through 1995 portion of 121st G.A., laws passed and filed through 12-31-95.

O CONST I § 5 RIGHT OF TRIAL BY JURY

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

CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

Current through 1995 portion of 121st G.A., laws passed and filed through 12-31-95.

O CONST I § 9 BAIL; CRUEL AND UNUSUAL PUNISHMENTS

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.

CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

Current through 1995 portion of 121st G.A., laws passed and filed through 12-31-95.

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.

CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

Current through 1995 portion of 121st G.A., laws passed and filed through 12-31-95.

O CONST I § 16 REDRESS FOR INJURY; DUE PROCESS

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.

BALDWIN'S OHIO REVISED CODE ANNOTATED
CONSTITUTION OF THE STATE OF OHIO
ARTICLE I. BILL OF RIGHTS

Current through 1995 portion of 121st G.A., laws passed and
filed through 12-31-95.

O CONST I § 20 POWERS NOT ENUMERATED RETAINED BY PEOPLE

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

THE CONSTITUTION OF THE UNITED STATES
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT V

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

THE CONSTITUTION OF THE UNITED STATES
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT VI

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

THE CONSTITUTION OF THE UNITED STATES
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT VIII

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

THE CONSTITUTION OF THE UNITED STATES
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

THE CONSTITUTION OF THE UNITED STATES
AMENDMENTS TO THE CONSTITUTION

US CONST AMENDMENT XIV

Section 1

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

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.

THE CONSTITUTION OF THE UNITED STATES
ARTICLE VI. MISCELLANEOUS

US CONST ARTICLE VI

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

OHIO REVISED CODE
TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
IN GENERAL

ORC Ann. 2901.05 (2008)

§ 2901.05. Burden and degree of proof

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

(B) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.

(C) As used in this section, an "affirmative defense" is either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence.

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

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2903. HOMICIDE AND ASSAULT
HOMICIDE

ORC Ann. 2903.01 (2008)

§ 2903.01. Aggravated murder

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

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

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

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

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

- (1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.
- (2) It is the offender's specific purpose to kill a law enforcement officer.

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

(G) As used in this section:

- (1) "Detention" has the same meaning as in section 2921.01 of the Revised Code.
- (2) "Law enforcement officer" has the same meaning as in section 2911.01 of the Revised Code.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
ROBBERY

ORC Ann. 2911.01 (2008)

§ 2911.01. Aggravated robbery

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

(3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

(1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;

(2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

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

(D) As used in this section:

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

(2) "Law enforcement officer" has the same meaning as in section 2901.01 of the Revised Code and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

OHIO REVISED CODE
TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
ROBBERY

ORC Ann. 2911.02 (2008)

§ 2911.02. Robbery

(A) No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control;
- (2) Inflict, attempt to inflict, or threaten to inflict physical harm on another;
- (3) Use or threaten the immediate use of force against another.

(B) Whoever violates this section is guilty of robbery. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree.

(C) As used in this section:

- (1) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.
- (2) "Theft offense" has the same meaning as in section 2913.01 of the Revised Code.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2925. DRUG OFFENSES
CORRUPTING; TRAFFICKING

ORC Ann. 2925.03 (2008)

§ 2925.03. Trafficking in drugs

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance;

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C.A. 301, as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act.

(C) Whoever violates division (A) of this section is guilty of one of the following:

(1) If the drug involved in the violation is any

compound, mixture, preparation, or substance included in schedule I or schedule II, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated trafficking in drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(1)(b), (c), (d), (e), or (f) of this section, aggravated trafficking in drugs is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(1)(c), (d), (e), or (f) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated trafficking in drugs is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, aggravated trafficking in drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison

terms prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(e) If the amount of the drug involved equals or exceeds fifty times the bulk amount but is less than one hundred times the bulk amount and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one hundred times the bulk amount and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, aggravated trafficking in drugs is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(2) If the drug involved in the violation is any compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of trafficking in drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(2)(b), (c), (d), or (e) of this section, trafficking in drugs is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(2)(c), (d), or (e) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds

the bulk amount but is less than five times the bulk amount, trafficking in drugs is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, trafficking in drugs is a felony of the third degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the second degree, and there is a presumption for a prison term for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty times the bulk amount, trafficking in drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved equals or exceeds fifty times the bulk amount and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(3) If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of trafficking in marihuana. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(3)(b), (c), (d), (e), (f), or (g) of this section, trafficking in marihuana is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(3)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in

determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds two hundred grams but is less than one thousand grams, trafficking in marihuana is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one thousand grams but is less than five thousand grams, trafficking in marihuana is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five thousand grams but is less than twenty thousand grams, trafficking in marihuana is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds twenty thousand grams, trafficking in marihuana is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree. If the amount of the drug involved equals or exceeds twenty thousand grams and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a felony of the first degree, and the court shall impose

as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(g) Except as otherwise provided in this division, if the offense involves a gift of twenty grams or less of marihuana, trafficking in marihuana is a minor misdemeanor upon a first offense and a misdemeanor of the third degree upon a subsequent offense. If the offense involves a gift of twenty grams or less of marihuana and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in marihuana is a misdemeanor of the third degree.

(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of trafficking in cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), (f), or (g) of this section, trafficking in cocaine is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(4)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds five grams but is less than ten grams of cocaine that is not crack cocaine or equals or exceeds one gram but is less than five grams of crack cocaine, trafficking in cocaine is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within one of those ranges and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten grams but is less than one hundred grams of cocaine that is not crack cocaine or equals or exceeds five grams but is less than ten grams of crack

cocaine, trafficking in cocaine is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree. If the amount of the drug involved is within one of those ranges and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one hundred grams but is less than five hundred grams of cocaine that is not crack cocaine or equals or exceeds ten grams but is less than twenty-five grams of crack cocaine, trafficking in cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within one of those ranges and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds five hundred grams but is less than one thousand grams of cocaine that is not crack cocaine or equals or exceeds twenty-five grams but is less than one hundred grams of crack cocaine and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(g) If the amount of the drug involved equals or exceeds one thousand grams of cocaine that is not crack cocaine or equals or exceeds one hundred grams of crack cocaine and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in cocaine is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(5) If the drug involved in the violation is L.S.D. or a compound, mixture, preparation, or substance

containing L.S.D., whoever violates division (A) of this section is guilty of trafficking in L.S.D. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(5)(b), (c), (d), (e), (f), or (g) of this section, trafficking in L.S.D. is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(5)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses of L.S.D. in a solid form or equals or exceeds one gram but is less than five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in L.S.D. is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty unit doses but is less than two hundred fifty unit doses of L.S.D. in a solid form or equals or exceeds five grams but is less than twenty-five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in L.S.D. is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds

two hundred fifty unit doses but is less than one thousand unit doses of L.S.D. in a solid form or equals or exceeds twenty-five grams but is less than one hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one thousand unit doses but is less than five thousand unit doses of L.S.D. in a solid form or equals or exceeds one hundred grams but is less than five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(g) If the amount of the drug involved equals or exceeds five thousand unit doses of L.S.D. in a solid form or equals or exceeds five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in L.S.D. is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of trafficking in heroin. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(6)(b), (c), (d), (e), (f), or (g) of this section, trafficking in heroin is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a

prison term on the offender.

(b) Except as otherwise provided in division (C)(6)(c), (d), (e), (f), or (g) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses or equals or exceeds one gram but is less than five grams, trafficking in heroin is a felony of the fourth degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty unit doses but is less than one hundred unit doses or equals or exceeds five grams but is less than ten grams, trafficking in heroin is a felony of the third degree, and there is a presumption for a prison term for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the second degree, and there is a presumption for a prison term for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, trafficking in heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds five hundred unit doses but is less than two thousand five hundred unit doses or equals or

exceeds fifty grams but is less than two hundred fifty grams and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(g) If the amount of the drug involved equals or exceeds two thousand five hundred unit doses or equals or exceeds two hundred fifty grams and regardless of whether the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in heroin is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(7) If the drug involved in the violation is hashish or a compound, mixture, preparation, or substance containing hashish, whoever violates division (A) of this section is guilty of trafficking in hashish. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(7)(b), (c), (d), (e), or (f) of this section, trafficking in hashish is a felony of the fifth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) Except as otherwise provided in division (C)(7)(c), (d), (e), or (f) of this section, if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds ten grams but is less than fifty grams of hashish in a solid form or equals or exceeds two grams but is less than ten grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile,

trafficking in hashish is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds fifty grams but is less than two hundred fifty grams of hashish in a solid form or equals or exceeds ten grams but is less than fifty grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(e) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds two hundred fifty grams but is less than one thousand grams of hashish in a solid form or equals or exceeds fifty grams but is less than two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the second degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) Except as otherwise provided in this division, if the amount of the drug involved equals or exceeds one thousand grams of hashish in a solid form or equals or exceeds two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, trafficking in hashish is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree. If the amount of the drug involved is within that range and if the offense was committed in the vicinity of a school or in the vicinity of a juvenile, trafficking in hashish is a felony of the first degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree.

(D) In addition to any prison term authorized or required by division (C) of this section and sections

2929.13 and 2929.14 of the Revised Code, and in addition to any other sanction imposed for the offense under this section or sections 2929.11 to 2929.18 of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section shall do all of the following that are applicable regarding the offender:

(1) If the violation of division (A) of this section is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of section 2929.18 of the Revised Code unless, as specified in that division, the court determines that the offender is indigent. Except as otherwise provided in division (H)(1) of this section, a mandatory fine or any other fine imposed for a violation of this section is subject to division (F) of this section. If a person is charged with a violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the clerk of the court shall pay the forfeited bail pursuant to divisions (D)(1) and (F) of this section, as if the forfeited bail was a fine imposed for a violation of this section. If any amount of the forfeited bail remains after that payment and if a fine is imposed under division (H)(1) of this section, the clerk of the court shall pay the remaining amount of the forfeited bail pursuant to divisions (H)(2) and (3) of this section, as if that remaining amount was a fine imposed under division (H)(1) of this section.

(2) The court shall suspend the driver's or commercial driver's license or permit of the offender in accordance with division (G) of this section.

(3) If the offender is a professionally licensed person, the court immediately shall comply with section 2925.38 of the Revised Code.

(E) When a person is charged with the sale of or offer to sell a bulk amount or a multiple of a bulk amount of a controlled substance, the jury, or the court trying the accused, shall determine the amount of the controlled substance involved at the time of the offense and, if a guilty verdict is returned, shall return the findings as part of the verdict. In any such case, it is unnecessary to find and return the exact amount of the controlled substance involved, and it is sufficient if the finding and return is to the effect that the amount of the controlled substance involved is the requisite amount, or that the amount of the controlled substance involved is less than the requisite amount.

(F) (1) Notwithstanding any contrary provision of

section 3719.21 of the Revised Code and except as provided in division (H) of this section, the clerk of the court shall pay any mandatory fine imposed pursuant to division (D)(1) of this section and any fine other than a mandatory fine that is imposed for a violation of this section pursuant to division (A) or (B)(5) of section 2929.18 of the Revised Code to the county, township, municipal corporation, park district, as created pursuant to section 511.18 or 1545.04 of the Revised Code, or state law enforcement agencies in this state that primarily were responsible for or involved in making the arrest of, and in prosecuting, the offender. However, the clerk shall not pay a mandatory fine so imposed to a law enforcement agency unless the agency has adopted a written internal control policy under division (F)(2) of this section that addresses the use of the fine moneys that it receives. Each agency shall use the mandatory fines so paid to subsidize the agency's law enforcement efforts that pertain to drug offenses, in accordance with the written internal control policy adopted by the recipient agency under division (F)(2) of this section.

(2) (a) Prior to receiving any fine moneys under division (F)(1) of this section or division (B) of section 2925.42 of the Revised Code, a law enforcement agency shall adopt a written internal control policy that addresses the agency's use and disposition of all fine moneys so received and that provides for the keeping of detailed financial records of the receipts of those fine moneys, the general types of expenditures made out of those fine moneys, and the specific amount of each general type of expenditure. The policy shall not provide for or permit the identification of any specific expenditure that is made in an ongoing investigation. All financial records of the receipts of those fine moneys, the general types of expenditures made out of those fine moneys, and the specific amount of each general type of expenditure by an agency are public records open for inspection under section 149.43 of the Revised Code. Additionally, a written internal control policy adopted under this division is such a public record, and the agency that adopted it shall comply with it.

(b) Each law enforcement agency that receives in any calendar year any fine moneys under division (F)(1) of this section or division (B) of section 2925.42 of the Revised Code shall prepare a report covering the calendar year that cumulates all of the information contained in all of the public financial records kept by the agency pursuant to division (F)(2)(a) of this section for that calendar year, and shall send a copy of the cumulative report, no later than the first day of March in the calendar year

following the calendar year covered by the report, to the attorney general. Each report received by the attorney general is a public record open for inspection under section 149.43 of the Revised Code. Not later than the fifteenth day of April in the calendar year in which the reports are received, the attorney general shall send to the president of the senate and the speaker of the house of representatives a written notification that does all of the following:

(i) Indicates that the attorney general has received from law enforcement agencies reports of the type described in this division that cover the previous calendar year and indicates that the reports were received under this division;

(ii) Indicates that the reports are open for inspection under section 149.43 of the Revised Code;

(iii) Indicates that the attorney general will provide a copy of any or all of the reports to the president of the senate or the speaker of the house of representatives upon request.

(3) As used in division (F) of this section:

(a) "Law enforcement agencies" includes, but is not limited to, the state board of pharmacy and the office of a prosecutor.

(b) "Prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

(G) When required under division (D)(2) of this section or any other provision of this chapter, the court shall suspend for not less than six months or more than five years the driver's or commercial driver's license or permit of any person who is convicted of or pleads guilty to any violation of this section or any other specified provision of this chapter. If an offender's driver's or commercial driver's license or permit is suspended pursuant to this division, the offender, at any time after the expiration of two years from the day on which the offender's sentence was imposed or from the day on which the offender finally was released from a prison term under the sentence, whichever is later, may file a motion with the sentencing court requesting termination of the suspension; upon the filing of such a motion and the court's finding of good cause for the termination, the court may terminate the suspension.

(H) (1) In addition to any prison term authorized or required by division (C) of this section and sections 2929.13 and 2929.14 of the Revised Code, in addition to any other penalty or sanction imposed for

the offense under this section or sections 2929.11 to 2929.18 of the Revised Code, and in addition to the forfeiture of property in connection with the offense as prescribed in Chapter 2981. of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section may impose upon the offender an additional fine specified for the offense in division (B)(4) of section 2929.18 of the Revised Code. A fine imposed under division (H)(1) of this section is not subject to division (F) of this section and shall be used solely for the support of one or more eligible alcohol and drug addiction programs in accordance with divisions (H)(2) and (3) of this section.

(2) The court that imposes a fine under division (H)(1) of this section shall specify in the judgment that imposes the fine one or more eligible alcohol and drug addiction programs for the support of which the fine money is to be used. No alcohol and drug addiction program shall receive or use money paid or collected in satisfaction of a fine imposed under division (H)(1) of this section unless the program is specified in the judgment that imposes the fine. No alcohol and drug addiction program shall be specified in the judgment unless the program is an eligible alcohol and drug addiction program and, except as otherwise provided in division (H)(2) of this section, unless the program is located in the county in which the court that imposes the fine is located or in a county that is immediately contiguous to the county in which that court is located. If no eligible alcohol and drug addiction program is located in any of those counties, the judgment may specify an eligible alcohol and drug addiction program that is located anywhere within this state.

(3) Notwithstanding any contrary provision of section 3719.21 of the Revised Code, the clerk of the court shall pay any fine imposed under division (H)(1) of this section to the eligible alcohol and drug addiction program specified pursuant to division (H)(2) of this section in the judgment. The eligible alcohol and drug addiction program that receives the fine moneys shall use the moneys only for the alcohol and drug addiction services identified in the application for certification under section 3793.06 of the Revised Code or in the application for a license under section 3793.11 of the Revised Code filed with the department of alcohol and drug addiction services by the alcohol and drug addiction program specified in the judgment.

(4) Each alcohol and drug addiction program that receives in a calendar year any fine moneys under division (H)(3) of this section shall file an annual

report covering that calendar year with the court of common pleas and the board of county commissioners of the county in which the program is located, with the court of common pleas and the board of county commissioners of each county from which the program received the moneys if that county is different from the county in which the program is located, and with the attorney general. The alcohol and drug addiction program shall file the report no later than the first day of March in the calendar year following the calendar year in which the program received the fine moneys. The report shall include statistics on the number of persons served by the alcohol and drug addiction program, identify the types of alcohol and drug addiction services provided to those persons, and include a specific accounting of the purposes for which the fine moneys received were used. No information contained in the report shall identify, or enable a person to determine the identity of, any person served by the alcohol and drug addiction program. Each report received by a court of common pleas, a board of county commissioners, or the attorney general is a public record open for inspection under section 149.43 of the Revised Code.

(5) As used in divisions (H)(1) to (5) of this section:

(a) "Alcohol and drug addiction program" and "alcohol and drug addiction services" have the same meanings as in section 3793.01 of the Revised Code.

(b) "Eligible alcohol and drug addiction program" means an alcohol and drug addiction program that is certified under section 3793.06 of the Revised Code or licensed under section 3793.11 of the Revised Code by the department of alcohol and drug addiction services.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2925. DRUG OFFENSES
DRUG ABUSE

ORC Ann. 2925.11 (2008)

§ 2925.11. Possession of drugs

(A) No person shall knowingly obtain, possess, or use a controlled substance.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C.A. § 301, as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act;

(4) Any person who obtained the controlled substance pursuant to a prescription issued by a licensed health professional authorized to prescribe drugs.

(C) Whoever violates division (A) of this section is guilty of one of the following:

(1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of

marihuana, cocaine, L.S.D., heroin, and hashish, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(1)(b), (c), (d), or (e) of this section, aggravated possession of drugs is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, aggravated possession of drugs is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount but is less than one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(e) If the amount of the drug involved equals or exceeds one hundred times the bulk amount, aggravated possession of drugs is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the

Revised Code.

(2) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of possession of drugs. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(2)(b), (c), or (d) of this section, possession of drugs is a misdemeanor of the third degree or, if the offender previously has been convicted of a drug abuse offense, a misdemeanor of the second degree. If the drug involved in the violation is an anabolic steroid included in schedule III and if the offense is a misdemeanor of the third degree under this division, in lieu of sentencing the offender to a term of imprisonment in a detention facility, the court may place the offender under a community control sanction, as defined in section 2929.01 of the Revised Code, that requires the offender to perform supervised community service work pursuant to division (B) of section 2951.02 of the Revised Code.

(b) If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, possession of drugs is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds fifty times the bulk amount, possession of drugs is a felony of the second degree, and the court shall impose upon the offender as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(3) If the drug involved in the violation is marihuana or a compound, mixture, preparation, or substance containing marihuana other than hashish, whoever violates division (A) of this section is guilty of possession of marihuana. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(3)(b), (c), (d), (e), or (f) of this section, possession of marihuana is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds one hundred grams but is less than two hundred grams, possession of marihuana is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds two hundred grams but is less than one thousand grams, possession of marihuana is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds one thousand grams but is less than five thousand grams, possession of marihuana is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds five thousand grams but is less than twenty thousand grams, possession of marihuana is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds twenty thousand grams, possession of marihuana is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(4) If the drug involved in the violation is cocaine or a compound, mixture, preparation, or substance containing cocaine, whoever violates division (A) of this section is guilty of possession of cocaine. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(4)(b), (c), (d), (e), or (f) of this section, possession of cocaine is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds five grams but is less than twenty-five grams of cocaine that is not crack cocaine or equals or exceeds one gram but is less than five grams of crack cocaine, possession of cocaine is a felony of the fourth degree, and there is a presumption for a prison term for the offense.

(c) If the amount of the drug involved equals or exceeds twenty-five grams but is less than one

hundred grams of cocaine that is not crack cocaine or equals or exceeds five grams but is less than ten grams of crack cocaine, possession of cocaine is a felony of the third degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree.

(d) If the amount of the drug involved equals or exceeds one hundred grams but is less than five hundred grams of cocaine that is not crack cocaine or equals or exceeds ten grams but is less than twenty-five grams of crack cocaine, possession of cocaine is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred grams but is less than one thousand grams of cocaine that is not crack cocaine or equals or exceeds twenty-five grams but is less than one hundred grams of crack cocaine, possession of cocaine is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds one thousand grams of cocaine that is not crack cocaine or equals or exceeds one hundred grams of crack cocaine, possession of cocaine is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(5) If the drug involved in the violation is L.S.D., whoever violates division (A) of this section is guilty of possession of L.S.D. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(5)(b), (c), (d), (e), or (f) of this section, possession of L.S.D. is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of L.S.D. involved equals or exceeds ten unit doses but is less than fifty unit doses of L.S.D. in a solid form or equals or exceeds one gram but is less than five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the fourth degree,

and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of L.S.D. involved equals or exceeds fifty unit doses, but is less than two hundred fifty unit doses of L.S.D. in a solid form or equals or exceeds five grams but is less than twenty-five grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of L.S.D. involved equals or exceeds two hundred fifty unit doses but is less than one thousand unit doses of L.S.D. in a solid form or equals or exceeds twenty-five grams but is less than one hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of L.S.D. involved equals or exceeds one thousand unit doses but is less than five thousand unit doses of L.S.D. in a solid form or equals or exceeds one hundred grams but is less than five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of L.S.D. involved equals or exceeds five thousand unit doses of L.S.D. in a solid form or equals or exceeds five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form, possession of L.S.D. is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(6) If the drug involved in the violation is heroin or a compound, mixture, preparation, or substance containing heroin, whoever violates division (A) of this section is guilty of possession of heroin. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division

(C)(6)(b), (c), (d), (e), or (f) of this section, possession of heroin is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(b) If the amount of the drug involved equals or exceeds ten unit doses but is less than fifty unit doses or equals or exceeds one gram but is less than five grams, possession of heroin is a felony of the fourth degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(c) If the amount of the drug involved equals or exceeds fifty unit doses but is less than one hundred unit doses or equals or exceeds five grams but is less than ten grams, possession of heroin is a felony of the third degree, and there is a presumption for a prison term for the offense.

(d) If the amount of the drug involved equals or exceeds one hundred unit doses but is less than five hundred unit doses or equals or exceeds ten grams but is less than fifty grams, possession of heroin is a felony of the second degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the second degree.

(e) If the amount of the drug involved equals or exceeds five hundred unit doses but is less than two thousand five hundred unit doses or equals or exceeds fifty grams but is less than two hundred fifty grams, possession of heroin is a felony of the first degree, and the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(f) If the amount of the drug involved equals or exceeds two thousand five hundred unit doses or equals or exceeds two hundred fifty grams, possession of heroin is a felony of the first degree, the offender is a major drug offender, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional mandatory prison term prescribed for a major drug offender under division (D)(3)(b) of section 2929.14 of the Revised Code.

(7) If the drug involved in the violation is hashish or a compound, mixture, preparation, or substance containing hashish, whoever violates division (A) of this section is guilty of possession of hashish. The penalty for the offense shall be determined as follows:

(a) Except as otherwise provided in division (C)(7)(b), (c), (d), (e), or (f) of this section, possession of hashish is a minor misdemeanor.

(b) If the amount of the drug involved equals or exceeds five grams but is less than ten grams of hashish in a solid form or equals or exceeds one gram but is less than two grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a misdemeanor of the fourth degree.

(c) If the amount of the drug involved equals or exceeds ten grams but is less than fifty grams of hashish in a solid form or equals or exceeds two grams but is less than ten grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(d) If the amount of the drug involved equals or exceeds fifty grams but is less than two hundred fifty grams of hashish in a solid form or equals or exceeds ten grams but is less than fifty grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and division (C) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

(e) If the amount of the drug involved equals or exceeds two hundred fifty grams but is less than one thousand grams of hashish in a solid form or equals or exceeds fifty grams but is less than two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the third degree, and there is a presumption that a prison term shall be imposed for the offense.

(f) If the amount of the drug involved equals or exceeds one thousand grams of hashish in a solid form or equals or exceeds two hundred grams of hashish in a liquid concentrate, liquid extract, or liquid distillate form, possession of hashish is a felony of the second degree, and the court shall impose as a mandatory prison term the maximum prison term prescribed for a felony of the second degree.

(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so

arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness.

(E) In addition to any prison term or jail term authorized or required by division (C) of this section and sections 2929.13, 2929.14, 2929.22, 2929.24, and 2929.25 of the Revised Code and in addition to any other sanction that is imposed for the offense under this section, sections 2929.11 to 2929.18, or sections 2929.21 to 2929.28 of the Revised Code, the court that sentences an offender who is convicted of or pleads guilty to a violation of division (A) of this section shall do all of the following that are applicable regarding the offender:

(1) (a) If the violation is a felony of the first, second, or third degree, the court shall impose upon the offender the mandatory fine specified for the offense under division (B)(1) of section 2929.18 of the Revised Code unless, as specified in that division, the court determines that the offender is indigent.

(b) Notwithstanding any contrary provision of section 3719.21 of the Revised Code, the clerk of the court shall pay a mandatory fine or other fine imposed for a violation of this section pursuant to division (A) of section 2929.18 of the Revised Code in accordance with and subject to the requirements of division (F) of section 2925.03 of the Revised Code. The agency that receives the fine shall use the fine as specified in division (F) of section 2925.03 of the Revised Code.

(c) If a person is charged with a violation of this section that is a felony of the first, second, or third degree, posts bail, and forfeits the bail, the clerk shall pay the forfeited bail pursuant to division (E)(1)(b) of this section as if it were a mandatory fine imposed under division (E)(1)(a) of this section.

(2) The court shall suspend for not less than six months or more than five years the offender's driver's or commercial driver's license or permit.

(3) If the offender is a professionally licensed person, in addition to any other sanction imposed for a violation of this section, the court immediately shall comply with section 2925.38 of the Revised Code.

(F) It is an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge of a fourth degree felony violation under this section that the

controlled substance that gave rise to the charge is in an amount, is in a form, is prepared, compounded, or mixed with substances that are not controlled substances in a manner, or is possessed under any other circumstances, that indicate that the substance was possessed solely for personal use.

Notwithstanding any contrary provision of this section, if, in accordance with section 2901.05 of the Revised Code, an accused who is charged with a fourth degree felony violation of division (C)(2), (4), (5), or (6) of this section sustains the burden of going forward with evidence of and establishes by a preponderance of the evidence the affirmative defense described in this division, the accused may be prosecuted for and may plead guilty to or be convicted of a misdemeanor violation of division (C)(2) of this section or a fifth degree felony violation of division (C)(4), (5), or (6) of this section respectively.

(G) When a person is charged with possessing a bulk amount or multiple of a bulk amount, division (E) of section 2925.03 of the Revised Code applies regarding the determination of the amount of the controlled substance involved at the time of the offense.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

ORC Ann. 2929.02 (2008)

§ 2929.02. Penalties for aggravated murder or murder

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

(B) (1) Except as otherwise provided in division (B)(2) or (3) of this section, whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life.

(2) Except as otherwise provided in division (B)(3) of this section, if a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code, the victim of the offense was less than thirteen years of age, and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the court shall impose an indefinite prison term of thirty years to life pursuant to division (B)(3) of section 2971.03 of the Revised Code.

(3) If a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code and also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information that charged the murder, the court shall impose upon the offender a term of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(4) In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

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

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

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

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

ORC Ann. 2929.021 (2008)

§ 2929.021. Notice to supreme court of indictment charging aggravated murder; plea

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

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

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

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

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

ORC Ann. 2929.022 (2008)

§ 2929.022. Determination of aggravating circumstances of prior conviction

(A) If an indictment or count in an indictment charging a defendant with aggravated murder contains a specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, the defendant may elect to have the panel of three judges, if the defendant waives trial by jury, or the trial judge, if the defendant is tried by jury, determine the existence of that aggravating circumstance at the sentencing hearing held pursuant to divisions (C) and (D) of section 2929.03 of the Revised Code.

(1) If the defendant does not elect to have the existence of the aggravating circumstance determined at the sentencing hearing, the defendant shall be tried on the charge of aggravated murder, on the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, and on any other specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code in a single trial as in any other criminal case in which a person is charged with aggravated murder and specifications.

(2) If the defendant does elect to have the existence of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code determined at the sentencing hearing, then, following a verdict of guilty of the charge of aggravated murder, the panel of three judges or the trial judge shall:

(a) Hold a sentencing hearing pursuant to division (B) of this section, unless required to do otherwise under division (A)(2)(b) of this section;

(b) If the offender raises the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and is not found at trial to have been eighteen years of age or older at the time of the

commission of the offense, conduct a hearing to determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. After conducting the hearing, the panel or judge shall proceed as follows:

(i) If that aggravating circumstance is proven beyond a reasonable doubt or if the defendant at trial was convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence according to division (E) of section 2929.03 of the Revised Code.

(ii) If that aggravating circumstance is not proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance, except as otherwise provided in this division, the panel or judge shall impose sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender. If that aggravating circumstance is not proven beyond a reasonable doubt, the defendant at trial was not convicted of any other specification of an aggravating circumstance, the victim of the aggravated murder was less than thirteen years of age, and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the panel or judge shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(B) At the sentencing hearing, the panel of judges, if the defendant was tried by a panel of three judges, or the trial judge, if the defendant was tried by jury, shall, when required pursuant to division (A)(2) of this section, first determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. If the

panel of judges or the trial judge determines that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt or if they do not determine that the specification is proven beyond a reasonable doubt but the defendant at trial was convicted of a specification of any other aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge and trial jury shall impose sentence on the offender pursuant to division (D) of section 2929.03 and section 2929.04 of the Revised Code. If the panel of judges or the trial judge does not determine that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge shall terminate the sentencing hearing and impose sentence on the offender as follows:

(1) Subject to division (B)(2) of this section, the panel or judge shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the victim of the aggravated murder was less than thirteen years of age and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the panel or judge shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

ORC Ann. 2929.023 (2008)

§ 2929.023. Defendant may raise matter of age

A person charged with aggravated murder and one or more specifications of an aggravating circumstance may, at trial, raise the matter of his age at the time of the alleged commission of the offense and may present evidence at trial that he was not eighteen years of age or older at the time of the alleged commission of the offense. The burdens of raising the matter of age, and of going forward with the evidence relating to the matter of age, are upon the defendant. After a defendant has raised the matter of age at trial, the prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the defendant was eighteen years of age or older at the time of the alleged commission of the offense.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

ORC Ann. 2929.03 (2008)

§ 2929.03. Imposing sentence for aggravated murder

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

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

(a) Life imprisonment without parole;

(b) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(c) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(d) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(e) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (A)(1)(a) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be served pursuant to that section.

(2) If the offender also is convicted of or pleads

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

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

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

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

(i) Life imprisonment without parole;

(ii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(iii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iv) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(v) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (C)(1)(a)(i) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

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

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

(i) Except as provided in division (C)(2)(a)(ii) or (iii) 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) Except as provided in division (C)(2)(a)(iii) of this section, if the victim of the aggravated murder

was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of death or life imprisonment without parole on the offender pursuant to division (C)(2)(a)(i) of this section, the penalty to be imposed on the offender shall be an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.

(iii) 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), (ii), or (iii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:

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

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

(D) (1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or

be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

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

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

outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following:

(a) Except as provided in division (D)(2)(b) or (c) 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) Except as provided in division (D)(2)(c) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the jury does not recommend a sentence of life imprisonment without parole pursuant to division (D)(2)(a) of this section, to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.

(c) 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, life imprisonment with parole eligibility after serving thirty full years of imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment imposed as described in division (D)(2)(b) of this section or a sentence of life imprisonment without parole imposed under division (D)(2)(c) of this section, the sentence shall be served pursuant to section 2971.03 of the Revised Code. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence

pursuant to division (D)(3) of this section.

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

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

(i) Life imprisonment without parole;

(ii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(iv) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (D)(3)(a)(i) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

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

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

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

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

(a) Life imprisonment without parole;

(b) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(d) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (E)(2)(a) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

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

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the

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

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

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

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

ORC Ann. 2929.04 (2008)

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

being charged with a violation of a section of the Revised Code.

(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:

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

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

(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.

(2) The offense was committed for hire.

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

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

(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.

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

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

(a) The offender was in the facility as a result of

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

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

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

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

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

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

(4) The youth of the offender;

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

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

(7) Any other factors that are relevant to the issue

of whether the offender should be sentenced to death.

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

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

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

ORC Ann. 2929.05 (2008)

§ 2929.05. Appellate review of death sentence

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

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

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

(C) At any time after a sentence of death is imposed pursuant to section 2929.022 [2929.02.2] or 2929.03 of the Revised Code, the court of common pleas that sentenced the offender shall vacate the sentence if the offender did not present evidence at trial that the offender was not eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced and if the offender shows by a preponderance of the evidence that the offender was less than eighteen years of age at the time of the commission of the aggravated murder for which the offender was sentenced. The court is not required to hold a hearing on a motion filed pursuant to this division unless the court finds, based on the motion and any supporting information submitted by the defendant, any information submitted by the prosecuting attorney, and the record in the case, including any previous hearings and orders, probable cause to believe that the defendant was not eighteen years of age or older at the time of the commission of the aggravated murder for which the defendant was sentenced to death.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

ORC Ann. 2929.06 (2008)

§ 2929.06. Resentencing after sentence of death or life imprisonment without parole is set aside, nullified, or vacated

(A) If a sentence of death imposed upon an offender is set aside, nullified, or vacated because 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, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by section 2929.05 of the Revised Code, is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, is set aside, nullified, or vacated pursuant to division (C) of section 2929.05 of the Revised Code, or is set aside, nullified, or vacated because a court has determined that the offender is mentally retarded under standards set forth in decisions of the supreme court of this state or the United States supreme court, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall impose upon the offender a sentence of life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of section 2929.03 of the Revised Code, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section, the court shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court shall impose sentence, shall be the same sentences of life imprisonment that were available under division

(D) of section 2929.03 or under section 2909.24 of the Revised Code at the time the offender committed the offense for which the sentence of death was imposed. Nothing in this division regarding the resentencing of an offender shall affect the operation of section 2971.03 of the Revised Code.

(B) Whenever any court of this state or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because of error that occurred in the sentencing phase of the trial and if division (A) of this section does not apply, the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing. If the offender was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing. At the hearing, the court or panel shall follow the procedure set forth in division (D) of section 2929.03 of the Revised Code in determining whether to impose upon the offender a sentence of death, a sentence of life imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment. If, pursuant to that procedure, the court or panel determines that it will impose a sentence other than a sentence of death, the court or panel shall impose upon the offender one of the sentences of life imprisonment that could have been imposed at the time the offender committed the offense for which the sentence of death was imposed, determined as specified in this division, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of section 2929.03 of the Revised Code, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section, the court or panel

shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court or panel shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 or under section 2909.24 of the Revised Code at the time the offender committed the offense for which the sentence of death was imposed.

(C) If a sentence of life imprisonment without parole imposed upon an offender pursuant to section 2929.021 [2929.02.1] or 2929.03 of the Revised Code is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of life imprisonment without parole that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, the trial court that sentenced the offender shall conduct a hearing to resentence the offender to life imprisonment with parole eligibility after serving twenty-five full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(D) Nothing in this section limits or restricts the rights of the state to appeal any order setting aside, nullifying, or vacating a conviction or sentence of death, when an appeal of that nature otherwise would be available.

(E) This section, as amended by H.B. 184 of the 125th general assembly, shall apply to all offenders who have been sentenced to death for an aggravated murder that was committed on or after October 19, 1981, or for terrorism that was committed on or after May 15, 2002. This section, as amended by H.B. 184 of the 125th general assembly, shall apply equally to all such offenders sentenced to death prior to, on, or after March 23, 2005, including offenders who, on March 23, 2005, are challenging their sentence of death and offenders whose sentence of death has been set aside, nullified, or vacated by any court of this state or any federal court but who, as of March 23, 2005, have not yet been resentenced.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2941. INDICTMENT
FORM AND SUFFICIENCY

ORC Ann. 2941.145 (2008)

§ 2941.145. Specification that offender displayed, brandished, indicated possession of or used firearm

(A) Imposition of a three-year mandatory prison term upon an offender under division (D)(1)(a) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense)."

(B) Imposition of a three-year mandatory prison term upon an offender under division (D)(1)(a) of section 2929.14 of the Revised Code is precluded if a court imposes a one-year or six-year mandatory prison term on the offender under that division relative to the same felony.

(C) The specification described in division (A) of this section may be used in a delinquent child proceeding in the manner and for the purpose described in section 2152.17 of the Revised Code.

(D) As used in this section, "firearm" has the same meaning as in section 2923.11 of the Revised Code.

OHIO REVISED CODE
TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2945. TRIAL
WITNESSES

ORC Ann. 2945.59 (2008)

§ 2945.59. Proof of defendant's motive

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2947. JUDGMENT; SENTENCE
SENTENCE AND PROCEEDINGS

ORC Ann. 2947.23 (2008)

§ 2947.23. Judgment for costs and jury fees

(A) (1) In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following:

(a) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

(b) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.

(2) The following shall apply in all criminal cases:

(a) If a jury has been sworn at the trial of a case, the fees of the jurors shall be included in the costs, which shall be paid to the public treasury from which the jurors were paid.

(b) If a jury has not been sworn at the trial of a case because of a defendant's failure to appear without good cause, the costs incurred in summoning jurors for that particular trial may be included in the costs of prosecution. If the costs incurred in summoning jurors are assessed against the defendant, those costs shall be paid to the public treasury from which the jurors were paid.

(B) If a judge or magistrate has reason to believe that a defendant has failed to pay the judgment described in division (A) of this section or has failed to timely make payments towards that judgment under a payment schedule approved by the judge or magistrate, the judge or magistrate shall hold a hearing to determine whether to order the offender to perform community service for that failure. The judge or magistrate shall notify both the defendant and the prosecuting attorney of the place, time, and date of the hearing and shall give each an opportunity to present evidence. If, after the hearing, the judge or magistrate determines that the defendant has failed to pay the judgment or to timely make payments under the payment schedule and that imposition of community service for the failure is appropriate, the judge or magistrate may order the offender to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the judge or magistrate is satisfied that the offender is in compliance with the approved payment schedule. If the judge or magistrate orders the defendant to perform community service under this division, the defendant shall receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed shall reduce the judgment by that amount. Except for the credit and reduction provided in this division, ordering an offender to perform community service under this division does not lessen the amount of the judgment and does not preclude the state from taking any other action to execute the judgment.

(C) As used in this section, "specified hourly credit rate" means the wage rate that is specified in 26 U.S.C.A. 206(a)(1) under the federal Fair Labor Standards Act of 1938, that then is in effect, and that an employer subject to that provision must pay per hour to each of the employer's employees who is subject to that provision.

OHIO REVISED CODE

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2953. APPEALS; OTHER POSTCONVICTION REMEDIES
POSTCONVICTION REMEDIES

ORC Ann. 2953.21 (2008)

§ 2953.21. Petition for postconviction relief

(A) (1) (a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the

petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic

background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any

time thereafter.

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(H) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(I) (1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (I)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (I)(1) of this

section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (I) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (I)(2) of this section.

(J) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

UNITED STATES CODE SERVICE

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCY AND ITS LIMITS

USCS Fed Rules Evid R 404

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

UNITED STATES CODE SERVICE

FEDERAL RULES OF EVIDENCE
ARTICLE VIII. HEARSAY

USCS Fed Rules Evid R 801

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if--

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 6 (2008)

Rule 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.

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 11 (2008)

Rule 11. Pleas, Rights Upon Plea

(A) Pleas.

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas.

With reference to the offense or offenses to which the plea is entered:

- (1) The plea of guilty is a complete admission of the defendant's guilt.
- (2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.
- (3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim. R. 32.

(C) Pleas of guilty and no contest in felony cases.

- (1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.
- (2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first

addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more

specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses.

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses.

In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of Crim. R. 44(B) and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases.

When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea.

If the court refuses to accept a plea of guilty or no

contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity.

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 16 (2008)

Rule 16. Discovery and Inspection

(A) Demand for discovery.

Upon written request each party shall forthwith provide the discovery herein allowed. Motions for discovery shall certify that demand for discovery has been made and the discovery has not been provided.

(B) Disclosure of evidence by the prosecuting attorney.

(1) Information subject to disclosure.

(a) Statement of defendant or co-defendant.

Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any of the following which are available to, or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:

(i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof;

(ii) Written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer;

(iii) Recorded testimony of the defendant or co-defendant before a grand jury.

(b) Defendant's prior record.

Upon motion of the defendant the court shall order the prosecuting attorney to furnish defendant a copy of defendant's prior criminal record, which is available to or within the possession, custody or control of the state.

(c) Documents and tangible objects.

Upon motion of the defendant the court shall order

the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant.

(d) Reports of examination and tests.

Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, available to or within the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney.

(e) Witness names and addresses; record.

Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(f) Disclosure of evidence favorable to defendant.

Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment. The certification and the perpetuation provisions of subsection (B)(1)(e) apply to this subsection.

(g) In camera inspection of witness' statement.

Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the defense attorney and he shall not be permitted to cross-examine or comment thereon.

Whenever the defense attorney is not given the entire statement, it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Information not subject to disclosure.

Except as provided in subsections (B)(1)(a), (b), (d), (f), and (g), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.

(3) Grand jury transcripts.

The discovery or inspection of recorded proceedings of a grand jury shall be governed by Rule 6(E) and subsection (B)(1)(a) of this rule.

(4) Witness list; no comment.

The fact that a witness' name is on a list furnished under subsections (B)(1)(b) and (f), and that such witness is not called shall not be commented upon at the trial.

(C) Disclosure of evidence by the defendant.

(1) Information subject to disclosure.

(a) Documents and tangible objects.

If on request or motion the defendant obtains discovery under subsection (B)(1)(c), the court shall, upon motion of the prosecuting attorney order the defendant to permit the prosecuting attorney to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, available to or within the possession, custody or control of the defendant and which the defendant intends to introduce in evidence at the trial.

(b) Reports of examinations and tests.

If on request or motion the defendant obtains discovery under subsection (B)(1)(d), the court shall, upon motion of the prosecuting attorney, order the defendant to permit the prosecuting attorney to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, available to or within the possession or control of the defendant, and which the defendant intends to introduce in evidence at the trial, or which were prepared by a witness whom the defendant intends to call at the trial, when such results or reports relate to his testimony.

(c) Witness names and addresses.

If on request or motion the defendant obtains discovery under subsection (B)(1)(e), the court shall, upon motion of the prosecuting attorney, order the defendant to furnish the prosecuting attorney a list of the names and addresses of the witnesses he intends to call at the trial. Where a motion for discovery of the names and addresses of witnesses has been made by the prosecuting attorney, the defendant may move the court to perpetuate the testimony of such witnesses in a hearing before the court in which hearing the prosecuting attorney shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the defendant's case in chief in the event the witness has become unavailable through no fault of the defendant.

(d) In camera inspection of witness' statement.

Upon completion of the direct examination, at trial, of a witness other than the defendant, the court on motion of the prosecuting attorney shall conduct an in camera inspection of the witness' written or recorded statement obtained by the defense attorney or his agents with the defense attorney and prosecuting attorney present and participating, to determine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

If the court determines that inconsistencies exist the statement shall be given to the prosecuting attorney for use in cross-examination of the witness as to the inconsistencies.

If the court determines that inconsistencies do not exist the statement shall not be given to the prosecuting attorney, and he shall not be permitted to cross-examine or comment thereon.

Whenever the prosecuting attorney is not given the entire statement it shall be preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Information not subject to disclosure.

Except as provided in subsections (C)(1)(b) and (d), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the defense attorney or his agents in connection with the investigation or defense of the case, or of statements made by witnesses or prospective witnesses to the defense attorney or his agents.

(3) Witness list; no comment.

The fact that a witness' name is on a list furnished under subsection (C)(1)(c), and that the witness is not called shall not be commented upon at the trial.

(D) Continuing duty to disclose.

If, subsequent to compliance with a request or order pursuant to this rule, and prior to or during trial, a party discovers additional matter which would have been subject to discovery or inspection under the original request or order, he shall promptly make such matter available for discovery or inspection, or notify the other party or his attorney or the court of

the existence of the additional matter, in order to allow the court to modify its previous order, or to allow the other party to make an appropriate request for additional discovery or inspection.

(E) Regulation of discovery.

(1) Protective orders.

Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by a party the court may permit a party to make such showing, or part of such showing, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Time, place and manner of discovery and inspection.

An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted, and may prescribe such terms and conditions as are just.

(3) Failure to comply.

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(F) Time of motions.

A defendant shall make his motion for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. The prosecuting attorney shall make his motion for discovery within seven days after defendant obtains discovery or three days before trial, whichever is earlier. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

Ohio Rules Of Criminal Procedure

Ohio Crim. R. 52 (2008)

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.

Ohio Evid. R. 401

Ohio Rules Of Evidence
Article IV Relevancy And Its Limits

Ohio Evid. R. 401 (2008)

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Ohio Evid. R. 402

Ohio Rules Of Evidence
Article IV Relevancy And Its Limits

Ohio Evid. R. 402 (2008)

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible.

Ohio Evid. R. 403

Ohio Rules Of Evidence
Article IV Relevancy And Its Limits

Ohio Evid. R. 403 (2008)

Rule 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.

Ohio Rules Of Evidence
Article IV Relevancy And Its Limits

Ohio Evid. R. 404 (2008)

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(A) Character evidence generally.

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

(3) Character of witness. Evidence of the character of a witness on the issue of credibility is admissible as provided in Rules 607, 608, and 609.

(B) Other crimes, wrongs or acts.

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

Ohio Evid. R. 702

Ohio Rules Of Evidence
Article VII Opinions And Expert Testimony

Ohio Evid. R. 702 (2008)

Rule 702. Testimony by Experts

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

Ohio Evid. R. 801

Ohio Rules Of Evidence
Article VIII Hearsay

Ohio Evid. R. 801 (2008)

Rule 801. Definitions

The following definitions apply under this article:

(A) Statement.

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(B) Declarant.

A "declarant" is a person who makes a statement.

(C) Hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(D) Statements which are not hearsay.

A statement is not hearsay if:

(1) The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with declarant's testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification.

(2) The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.