

In the Supreme Court of Ohio

State of Ohio,

Plaintiff-Appellee,

v.

Wayne S. Powell,

Defendant-Appellant.

Case No. 2007-2027

On Appeal from the
Court of Common Pleas
Lucas County, Ohio
Case No. CR06-3581

Merit Brief of Wayne S. Powell

The Case Involves the Affirmance of the Death Penalty

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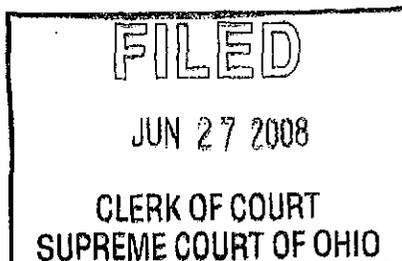


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Statement of Facts

Trial proceedings

Wayne S. Powell was indicted for what occurred on November 11, 2006 at 814 St. Johns in Toledo. Mr. Powell was indicted for Arson, OHIO REV. CODE § 2909.02(A)(1). Specifically, he was indicted for Aggravated Murder, OHIO REV. CODE § 2903.01 (A), and (F), murder with prior calculation and design; OHIO REV. CODE § 2903.01(B) and (F), felony murder; and OHIO REV. CODE § 2903.01(C) and (F), death of one under 13. Specifically, the charges were as follows, death of Mary McCollum, murder with prior calculation and design (Count 2) and felony murder (Count 6); death of Rose McCollum, murder with prior calculation and design (Count 3) and felony murder (Count 7); death of Jamal McCollum, murder with prior calculation and design (Count 4), felony murder (Count 8), and murder of one under 13 (Count 10); death of Sanaa Thomas, murder with prior calculation and design (Count 5), felony murder (Count 9), and murder of a child under 13 (Count 11). Each count of Aggravated Murder for Mary and Rose included two specifications, more than one person, OHIO REV. CODE § 2901.02(A)(5); and felony murder, OHIO REV. CODE § 2901.02(A)(7). Those counts involving Jamal and Sanaa included the above two, plus the specification of a child under 13, OHIO REV. CODE § 2901.02(A)(9).

After various pretrial motions, the matter was tried to a jury during late summer 2007. The jury returned verdicts of guilty on all counts.¹ The jury returned recommendations of death on Counts 7, 9, 10, and 11.²

¹ Dkt. -255-91.

Trial Phase Facts

This case is about an arson fire at 814 St. Johns on November 11, 2006. Four people died in the fire, two adult women, one an invalid,³ and two children, both under 12 years old. Three children and one adult, Lynita Stuart, survived.⁴

The fire started on the landing inside the side entrance to the house, an entrance that lead both to the basement and the kitchen.⁵ This door was blocked by a 2x4.⁶ The arson investigators based this on a process of elimination—they ruled all of the other locations.

- Q. Were you able to exclude any natural causes for an accidental fire?
A. In the basement we did. We excluded everything down the basement and we also reconstructed rooms. We reconstructed each room as we went in to exclude different rooms.
- Q. Were you able to exclude the second floor as being the origin of the fire?
A. Yes.
- Q. And the basement?
A. Yes.
- Q. And how about the first floor?
A. First floor we excluded the living room first. That's the first room. We excluded that. That room helped lead us to show where the fire was.
- Q. Were you able to determine based upon your investigation where the origin of this fire was?
A. Yes.
- Q. Where was the origin of the fire?
A. The origin of the fire was in the stairwell leading from the basement to the kitchen area right on that landing right on the landing in entering the side door.
- Q. And after you were able to determine the origin of the fire were you able to determine the cause?
A. Yes.
- Q. And how did you do that?
A. Well, after we eliminated every room, again, we eliminated the living room first and then the dining room and the table and things. We re-

² Dkt. 294, 295, & 296.

³ Tr. Vol. IV, p.1287.

⁴ Tr. Vol. IV, p.1348.

⁵ Tr. Vol. VI, p.1654.

⁶ Tr. Vol. IV, p.1319.

constructed the entire dining room, put the stereo where they were. Put the table back, because the fire never really destroyed anything or changed the appearance of it. Once we reconstruct everything and rule out we eliminate things.

Once we reconstructed the dining room we found that was all exposure fire. The fire didn't start there. Then the kitchen—we had to reconstruct the kitchen. And we checked all the appliances and we ruled out the appliances for any kind of electrical things, heating sources in the kitchen.

As we start going down off the kitchen door we seen the basement. Going down the basement—we start going down there and that's where we seen the heart of the fire as it started burning through walls there. Once we start cleaning that area up we start seeing signs of low burning, something that a normal fire just don't do. Fire never burns down. We seen all the damage on the floor area like that we knew it had some kind of accelerant or something to help it burn low like that.

Q. So based upon your years of experience and the numerous fires that you investigated and also based upon the report of the lab that you reviewed did you make a determination as to what the accelerant was?

A. Yes.

Q. What was that?

A. Gasoline.

Q. And you determined it was an arson fire?

A. It was definitely an arson fire.⁷

The fire was started by an accelerant on the inside of the house.⁸

Mr. Powell had long-term relationship with one of the victims, Mary McColum.⁹

The fire attracted many firefighters: Terrance C. Glaze,¹⁰ David Fought,¹¹ Brian Henry,¹² Mike Roemmele,¹³ Glen Hill,¹⁴ Pete Jaegly,¹⁵ Many of those involved attended a special debriefing session for officers under stress.¹⁶ The fire

⁷ Tr. Vol. VI at 1653-56.

⁸ Tr. Vol. IV at 1405.

⁹ Tr. Vol. IV at 1284-85.

¹⁰ Tr. Vol. IV at 1176.

¹¹ Tr. Vol. IV at 1192.

¹² Tr. Vol. IV at 1206.

¹³ Tr. Vol. IV at 1218.

¹⁴ Tr. Vol. IV at 1226.

¹⁵ Tr. Vol. IV at 1244.

¹⁶ Tr. Vol. IV, p.1240.

also attracted Jerry Schriefer,¹⁷ who was at the scene as an evidence technician.

Annette McCollum connected Mr. Powell to the fire. The fire department had been called to 814 St. Johns about a month before with a complaint that gasoline had been poured on the front porch. Annette linked Mr. Powell to this incident by reporting that Mr. Powell had confessed to her that he had put the gasoline on the porch because Mary was not paying him enough attention.¹⁸ She also included in her rendition of the conversation a warning from her about her mother being an invalid living in the house.¹⁹ Annette had no reason not to contact the police about the confession when she heard it.²⁰ Ebony Smith testified that she heard Mr. Powell confess to this but only mentioned this after the fire.²¹

Annette also connected Mr. Powell to the phone messages that were found on a phone connected to the Mr. Powell family.²² Annette lied to the telephone company to get access to the voice-mail messages.²³

Stuart connected Mr. Powell to 814 St. Johns the night of the fire. Mr. Powell had come by before the fire.²⁴ He picked up boots and underwear.²⁵ Stuart

¹⁷ Tr. Vol. IV at 1254.

¹⁸ Tr. Vol. IV at 1294.

¹⁹ Tr. Vol. IV at 1295.

²⁰ Tr. Vol. IV at 1311.

²¹ Tr. Vol. V at 1551-52.

²² Tr. Vol. IV at 1301

²³ Tr. Vol. IV at 1304.

²⁴ Tr. Vol. IV at 1326.

²⁵ Tr. Vol. IV at 1336.

was a close friend of both Annette and Mary.²⁶ She reported that Mr. Powell said that he threatened Mary:

He said, I am going to fuck her up. Wayne told Mary probably got the dike bitch listening to my phone call. You going to make me fuck you up.²⁷

While Stuart testified about how Mr. Powell frightened them, neither she nor Mary called the police the night of the fire.²⁸

Mitigation Facts

The jury heard from family members of Mr. Powell, a former juvenile court probation officer, as well as a licensed psychologist.

Antonio Garrett, Lucas County Juvenile Justice Center Detention Administrator, formerly a probation officer with the Lucas County Juvenile Court, testified that he served as Mr. Powell's probation officer. Mr. Powell had been placed on probation for setting fires with other children. Mr. Garrett told the jury that it was his recollection that Mr. Powell's mother was actively involved with her son's life, but the father was never involved.²⁹

According to Mr. Garrett, Mr. Powell's only positive role models were his mother, some school teachers, and his probation officer. The other males in his life presented negative role models. He did not know of Mr. Powell having any substance abuse issues. If he had, he would have referred him for counseling.

²⁶ Tr. Vol. IV at 1327-28.

²⁷ Tr. Vol. IV at 1342-43.

²⁸ Tr. Vol. IV at 1356.

²⁹ Tr. Vol. XI at 2407-10, 2414.

Eventually, Mr. Powell completed his probation successfully. According to Mr. Garrett, Mr. Powell was “a good kid.”³⁰

Isaac Powell, IV, Mr. Powell’s father, testified that his parents, both of whom are deceased, drank a lot and beat him and his siblings with various objects. He maintained a relationship with Elloise Fletcher, with whom they had a child, Darrell. He then married Beatrice and they had three children together, Wayne, Charles, and Isaac. He told the jury that Charles and Wayne were very close while growing up.³¹

Isaac Powell told the jury that while young he often drank a lot and used illegal narcotics. In 1981 he and another man had an altercation that resulted in him going to prison for twenty years. Upon his release he regained contact with his family. He told the jury that Mr. Powell, while growing up, “was a regular kid.”³²

Pricilla Fletcher, a deputy with the Lucas County Sheriff’s Office, told the jury that she is the wife of Wayne’s brother Darrell. She told the jury that Wayne and Darrell are “close,” that he gets along well with all his brothers. Ms. Fletcher told the jury that Wayne and his daughter Markisha were very close as well.³³

Beatrice Lucas, Wayne’s mother, testified that when she was pregnant with Wayne she contracted a venereal disease. This required a period of hospitalization. During this time she attempted suicide. In addition, her husband’s family were drug users and engaged in violent behavior. Her husband was often vio-

³⁰ Tr. Vol. XI at 2410-13, 2419.

³¹ Tr. Vol. XI at 2421-28.

³² Tr. Vol. XI at 2428-37.

³³ Tr. Vol. XI at 2445-48.

lent with her, often in view of the children, including Wayne. Eventually he was sent to prison for murdering a relative.³⁴

The effect of his father's incarceration, as well as the fact that it was a relative, meant that Wayne and his siblings endured a period of isolation from his father's family. Any support from that family ceased to exist, albeit minor as it was. Due to her employment responsibilities, she could not afford day care and the children were often left alone, unsupervised. Tr. Vol. XI at 2478-82.

While in his early years of school, third grade, Wayne was held back a year. At the same time Charles was advanced a year. Wayne, she told the jury, struggled while in school.³⁵

While a juvenile Wayne was sent to TICO, a juvenile prison. Wayne reported to her that while at TICO he was sexually assaulted. Upon his return, she told the jury, Wayne was a different person.³⁶

Charles Powell, a brother of Wayne, testified about their relationship. He told the jury that they were close as children and remained close to this day. For many years they shared a bedroom. He told the jury that Wayne was held back year while in elementary school, most likely the fifth grade. Their father drank a lot and was not involved in their upbringing. During his infrequent times with the children, he would discipline the boys by striking them with a belt.³⁷

Charles spoke of Wayne prior to and after his time at TICO. According to Charles, Wayne was not the same person when he returned. He would be prone

³⁴ Tr. Vol. XI at 2460-78.

³⁵ Tr. Vol. XI at 2465-68.

³⁶ Tr. Vol. XI at 2481-83.

³⁷ Tr. Vol. XI at 2403-09.

to being involved in fights with others, while prior to TICO he would not be much of a fighter.³⁸

According to Charles, Wayne and he worked together in various jobs. Charles told the jury that Wayne was a good worker.³⁹

Finally, Charles spoke of Wayne's relationship with Jamal. According to Charles, Wayne loved Jamal like a son. They had, according to Charles, "a serious bond." In Charles' opinion, Wayne was trying to make up for his previous failings as a father.⁴⁰

Isaac Powell, V, a brother of Wayne, testified about his relationship with his brother. He told the jury that he loves all of his brothers, including Wayne.⁴¹

Darrell Fletcher, a brother of Wayne, told the jury that as a youngster he and his brothers were often the object of corporal punishment. As they grew older, he and Wayne were close, often speaking to one another. When their father went to prison things became "crazy" and there was no guidance.⁴²

Wayne Graves, Ph.D., a clinical psychologist and forensic psychologist, described his involvement in Mr. Powell's case. He told the jury that he and Wayne met ten times for 17 or 18 hours. Dr. Graves administered a battery of tests and reviewed a variety of records. The tests included the MMPI, as well as other tests. The records consisted of court records, divorce records, employment, child support, and a variety of other records, some twelve inches worth of records.⁴³

³⁸ Tr. Vol. XI at 2414-15.

³⁹ Tr. Vol. XI at 2415-16.

⁴⁰ Tr. Vol. XI at 2417-18.

⁴¹ Tr. Vol. XI at 2526-28.

⁴² Tr. Vol. XI at 2529-36.

⁴³ Tr. Vol. XII at 2456-53.

According to Dr. Graves, Wayne is of average intellectual capability. His verbal skills are a little better than his test performance. Wayne tested out a fourth grader for spelling, a seventh grader for math skills, and reading at the tenth grade level. Dr. Graves observed: "It's evident he didn't get a great deal out of school while he was there."⁴⁴

Dr. Graves spoke of Wayne's drug and alcohol use. According to Dr. Graves, Wayne was fairly open about his use of these substances. Wayne would freely use illegal substances in whatever quantities were available. His drugs of choice include cocaine, crack cocaine, marijuana, as well as other drugs.⁴⁵

Utilizing family history documentation, Dr. Graves concluded that Wayne was born to a mother and father who were not married. The father was a heavy drug user, as well as his father's father. In short, there is a family tradition of drug and alcohol use and abuse.⁴⁶

Wayne's mother was angry toward his father, and blamed him for much of her own difficulties. Wayne began to be the object of his mother's anger toward his father, and took much abuse as a result. In Dr. Graves' opinion, he was rejected by his mother, with long term effects. Complicating these limitations was that Wayne grew up in an atmosphere in which people stole things and cheated to survive.⁴⁷

The family misuse of substances created an environment where it is likely that the children would become abusers themselves. According to Dr. Graves' research, Wayne's father fed him marijuana laced brownies when he was nine

⁴⁴ Tr. Vol. XII at 2553-54.

⁴⁵ Tr. Vol. XII at 2254-55.

⁴⁶ Tr. Vol. XII at 2557-58.

⁴⁷ Tr. Vol. XII at 2560-61.

years old, and beer while in his early teens. He was taught to lie and engage in violence at an early age. This breeds mistrust in and around the community.⁴⁸

Wayne was the object of violence while a youngster from his siblings, as well as the community around him. He later, while at TICO, also was the object of violence. This continued for much of his younger years.⁴⁹

Dr. Graves told the jury that Wayne suffers from some significant health issues, including diabetes, high cholesterol, high blood pressure, a heart condition, and other chronic illnesses. He was, at the time of Dr. Graves' examination, on psychotropic medication.⁵⁰

Wayne's adjustment to an institutional environment, specifically Ohio's prison system, was also discussed by Dr. Graves. His review of Wayne's records indicated that there were only a few minor incidents. According to Dr. Graves:

So for the most part his adjustment was good with some isolated incidents. No regular pattern of acting out. Managed his life pretty well there once he established he wasn't going to be assaulted.⁵¹

Wayne, according to Dr. Graves, has been unsuccessful in starting or maintaining a relationship with a female. His first marriage was brief. He vowed never to trust women again. Dr. Graves stated: "I don't know where he would have learned a history of trust and sure don't know where he would have learned to be able to communicate and successfully talk to women."⁵²

⁴⁸ Tr. Vol. XII at 2561-62.

⁴⁹ Tr. Vol. XII at 2562-68.

⁵⁰ Tr. Vol. XII at 2468-72.

⁵¹ Tr. Vol. XII at 2569-71.

⁵² Tr. Vol. XII at 2572-74.

Wayne's relationship with his children has not been good. He has not, for the most part, Dr. Graves told the jury, been involved in their lives. His attempts at a relationship have been, as Dr. Graves described it, as "clumsy."⁵³

It was with Jamal that Wayne developed a real relationship, according to Dr. Graves. He took it as a second chance at fatherhood. He took pride in the relationship and Jamal and he had some sort of connection.⁵⁴

When asked to summarize his findings, Dr. Graves opined as follows:

This is an individual who was born to a crummy family history and genetic history. If you could put together a set of genetics that would be worse it would be hard to find. His family history was disruptive, violent, unpredictable, mistrusting, and laced with or actually immersed in drugs and alcohol all of the time.

He was - he became the symbol of his mother's anger at dad. He was rejected. He had both parents disturbed in some way. Dad tried to commit suicide as well.

He had - he was sidelined. He had no good role models for how to behave in any effective way, and he grew up living that out and mimicking some of the things he saw, wanting to steal, having difficulties in school. And basically, though, being more shy and needy and uncertain than anything.

If pushed enough he would impulsively act out with violence kind of like he had seen in any other relationship in his life.⁵⁵

⁵³ Tr. Vol. XII at 2574-75.

⁵⁴ Tr. Vol. XII at 2575-76.

⁵⁵ Tr. Vol. XII at 2577-78.

Argument

Failure to Instruct on Limited Use of Evidence

Proposition of Law No. One:

The Rules of Evidence and Due Process require that the trial court restrict evidence to its proper scope by instructing the jury about its limited use. When the government introduces evidence to impeach one of its own witnesses with evidence that also implicates the defendant, the trial court must give a limiting instruction, so that the jurors do not use the evidence substantively.

EVID. R. 105 requires that the court instruct jurors that evidence is admitted for only limited purposes. The government presented a very detailed case about the actual fire, using a plethora of fire fighters and police officers. Connecting Mr. Powell to the case used many fewer witnesses. The government was able to present detailed testimony about the fire scene but had only the testimony of a witness who admitted lying to the police about an earlier incident. This incident was attributed to Mr. Powell after the events in this case. The only testimony outside of the victim's family or close friends was that of the Mr. Powell's brother, Isaac.

The government had to explain how the fire was started when the doors were all locked and Mr. Powell had no key.⁵⁶ The explanation offered to the jurors rested on an interpretation of a crack noted in a photograph,⁵⁷ a crack that never found its way into the written reports of the lead investigator on the case.⁵⁸ Nor did the fire investigators preserve the door as evidence.⁵⁹ The out-

⁵⁶ Tr. Vol. IV at 1354.

⁵⁷ Tr. Vol. VI at 1649.

⁵⁸ Tr. Vol. VI at 1667.

side of the door was relatively unburned while the inside was very badly burned.⁶⁰ It was blocked by a 2x4.⁶¹ The fire did not start on the exterior of the door.⁶² Nothing was verifiable at the time of trial because the door and the rest of the house were destroyed by the government before the defense team could examine them.⁶³

The jurors focused on this evidence. They asked for the tape of the Isaac Powell statement during deliberations—this was one of two items that they requested.⁶⁴ Under EVID. R. 105, they were never told Isaac Powell's statements about what his brother said were introduced for limited purposes .

A. The government repeatedly allowed reference to a prior statement without a limiting instruction.

EVID. R. 105 requires an instruction when evidence is admissible for a limited purpose:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request of a party, shall restrict the evidence to its proper scope and instruct the jury accordingly.

The government introduced testimony by Isaac Powell that his brother told him that he had put gasoline on the door. Defense counsel made repeated requests for a limiting instruction, yet the Court admitted the testimony and evidence without any limiting instruction.

⁵⁹ Tr. Vol. VI at 1667.

⁶⁰ Tr. Vol. IV at 1281.

⁶¹ Tr. Vol. IV at 1319.

⁶² Tr. Vol. IV at 1401.

⁶³ Tr. Vol. IV at 1401.

⁶⁴ Tr. Vol. X at 2313, Court's Exhibit M.

1. During the testimony of Isaac Powell

The jurors heard the testimony initially during the testimony of Isaac Powell. The initial objection was made at a point of transition in the direct testimony:

Q. You cooperated with the police?

A. Yes.

Q. You told your brother Charles he had to get Wayne out of your house?

A. Right. They close to age and they get along better than me and him do, so I use him as a mediator.⁶⁵

Q. Okay. Now, you have testified in a prior hearing in this case; is that correct?

A. Yes.

Q. And in that hearing did you testify regarding things your brother told you about the fire?

I testified that—

MR. THEBES: Judge, may we approach?

THE COURT: Yes.

The testimony continued because the objection was overruled as premature.

Q. Do you recall testifying at a prior hearing about what your brother had told you regarding the fire?

A. Yes.

Q. What did he tell you?

A. I had seen the fire on T.V. I say about two or 5 three minutes before he threw the rock at the window. 6 You know, intoxicated, half in and half out. I leave the T.V. on all night to break the monotony of the traffic riding by my house, buses, trucks and whatnot, and I heard about the fire. My brother come up. I really didn't want to hear nothing.

He like, man, I really fucked up. I fucked up. I fucked up. I didn't know what he was referring to. Could have been many things. I told him I really didn't want to hear it. I wanted to go to sleep. I got to go to work.

Q. Did your brother ever talk to you about gasoline?

A. No.⁶⁶

At this point the jury was excused, and the government requested that the brother be declared a hostile witness under EVID. R. 611(C),⁶⁷ which would

⁶⁵ Tr. Vol. V at 1428-29.

⁶⁶ Tr. Vol. V at 1431-32.

⁶⁷ Tr. Vol. V at 1432-33, 1441.

have permitted leading questions on direct examination. The defense did not object to such a determination.⁶⁸ Nonetheless, the Court had Isaac Powell's memory refreshed using an informal transcript of the testimony to the Grand Jury.⁶⁹ This informal transcript did not even indicate that Isaac Powell had been sworn.⁷⁰ The defense did not object to the statement being shown to Isaac Powell:

MR. BRAUN: That's correct. As I said before I don't have an objection to doing this on refresh recollection allowing him to see his prior testimony which would be the gentler way to do this for everybody involved.⁷¹

The government temporarily withdrew the request to proceed under EVID. R. 611(C). Instead, the Court, although initially confused with EVID. R. 607, on impeachment, proceeded under EVID. R. 612:

THE COURT: Correct. Under 612 you are asking to use a writing to refresh his memory. That writing would purportedly be the information contained in Court's Exhibit C which is a unofficial transcript of Grand Jury testimony; is that correct?

MR. BRAUN: That's correct, Judge, and we would be referring him specifically to page three which deals with the issue of gasoline.

THE COURT: All right. Mr. Thebes.

MR. THEBES: Judge, we are well aware of the process and procedure, and we have the transcript. We have just asked prior to this hearing that it be done outside the presence of the jury, and I think we are ready to accomplish that.

THE COURT: All right. Then if that is acceptable to both parties we will bring Mr. Powell into chambers, allow him to review that question, and I guess the only question I would ask outside the hearing of the jury at this point would be whether or not that refreshes his recollection, all the questions thereafter would have to be asked in front of the jury. Counsel agree?

MR. THEBES: Yes.

MR. BRAUN: Yes, Judge.

⁶⁸ Tr. Vol. V at 1434-35.

⁶⁹ Tr. Vol. V at 1435-36.

⁷⁰ Court Ex. C.

⁷¹ Tr. Vol. V at 1441-42.

THE COURT: Let's go ahead and bring Mr. Powell in.⁷²

Isaac Powell was then brought into chambers and presented with Court Ex, C. His attention was specifically drawn to the statement on gasoline:

MR. BRAUN: Mr. Powell, for your benefit Court's Exhibit C is a transcript of what you said under oath in Grand Jury.

THE WITNESS: Okay.

MR. BRAUN: And I asked you a question regarding gasoline. You didn't seem to recall that. I want to give you a chance to look over your prior testimony on page three, okay? And the gasoline comments are on the bottom of the page.

THE WITNESS: Okay. Yes.

THE COURT: He said okay. Yes. Did you review the whole passage, sir?

THE WITNESS: Right here at the bottom, yes.

THE COURT: Then Mr. Braun, one simple question.

MR. BRAUN: Mr. Powell, after having reviewed your prior statement is your memory refreshed regarding gasoline?

THE WITNESS: Not really. I remember when they had me come down for questioning, okay, Mr. Gaston told me that if I didn't give any information that I knew of that they could hold me liable as a—you know, a—

THE COURT: All right. We are going to stop here. I think this is stuff that needs to be done in front of the jury. I think the jury has to understand the whole act of this. When I go back in the Court I will have the Court Reporter review the transcript for the jury hearing and we will have to come back in here.

This all does have weight and bearing for the jury to consider. We need to continue in front of the jury. And then we will most likely be back in here. That's fine.

MR. THEBES: I agree.⁷³

The trial continued in the presence of the jury without any limiting instruction:

Q. Mr. Powell, I am not trying to give you a hard time about this but this is very important. Do you recall making a statement to the Grand Jury regarding gasoline?

A. Yes.

Q. What did your brother tell you about gasoline?

A. See, this is the thing right here.

⁷² Tr. Vol. V at 1443-44.

⁷³ Tr. Vol. V at 1446-47

Q. Mr. Powell, I have to object at this point. Pay attention to the question I asked. I want you to answer the question I asked, not one you want to answer.

MR. THEBES: Judge—

THE COURT: Objection sustained. Last remark by Counsel will be disregarded. Jury is instructed to disregard. Mr. Braun, you may continue.

Q. Thank you. Did you make that statement to the Grand Jury?

A. Yes, I did.

Q. What did you tell the Grand Jury that your brother had told you?

MR. THEBES: Again, I object.

THE COURT: Objection noted. Overruled.

MR. THEBES: I would like to approach and place some things on the record. (Whereupon, the following discussion was held at the Bench:)

MR. THEBES: Judge, unless you don't mind me kneeling to the Court.

THE COURT: Fine. It's to the Court Reporter.

MR. THEBES: My objection is I think we now have moved into leading questions which I am really not objecting to at this point because there is an adverse party on the stand, and I believe it is probably warranted under the rules. But now we are getting into prior inconsistent statements, and in my opinion given what has transpired in open court recently with the exchange between Mr. Braun and Isaac Powell the witness, we have prior inconsistent statement from what he is going to say on the stand.

They are attempting to impeach their own witness with a prior inconsistent statement, more specifically self-contradiction according to rule 607, I believe. His statements go to the heart of the matter about pouring gasoline on a side door. They are so prejudicially unfair, prejudicially since they go to the heart of the matter that if this evidence testimony is being proffered for impeachment only that its prejudice outweighs its probative value. If the Court, however, does allow the evidence and the testimony to go forward, the Defense in the alternative is requesting a limiting instruction in that the evidence testimony regarding his Grand Jury testimony is used only for impeachment purposes and not for substantive value.

THE COURT: Mr. Braun.

MR. BRAUN: Judge, we haven't gotten to this point yet. Mr. Thebes, let me finish. At this point that witness was prepared to state on the record what he said in Grand Jury. That is not impeachment. That's testimony.

THE COURT: I have to agree with the State at this time. My interpretation of it is potentially about to be a refreshed recollection articulated for the record. Until the witness answers it would be premature for the Court to make that ruling.

I understand the protections that we are all trying to place on this, and keep on it Mr. Thebes. So the objection is duly noted but the Court's interpretation of what was about to occur was a statement by this witness of potentially refreshed recollection of what he stated to the Grand Jury. So the objection is overruled.

And the record is protected. Go ahead, Mr. Braun. You can ask that question.

(Whereupon, the following took place in open court:)

THE COURT: All right. First of all, for the record, the objection is overruled. Mrs. Wingate, could you read the last question of Mr. Braun back to the jury.

(Whereupon, the requested testimony was read back.)

THE COURT: Mr. Braun.

BY MR. BRAUN:

Q. Same question, Mr. Powell. What did you tell the Grand Jury under oath November 21st last year regarding gasoline that your brother had told you?

A. Again, what I started to say was after I had been seen by Mr. Gaston
MR. BRAUN: Objection, Your Honor. Court direct the witness to answer the question he' is asked.

THE COURT: Mr. Powell, you do have to answer the question as it is asked. So please if you would answer the question.

THE WITNESS: I said that he told me that he put gas on the outside of the side door.

MR. BRAUN: No further questions, Judge.

MR. ANDERSON: Wait. Wait.

(Whereupon, a discussion was held off the record.)

MR. BRAUN: Judge, there is one other matter I wanted to inquire. I'm sorry.⁷⁴

2. During the testimony of Detective Gast

The statement by Isaac Powell that Mr. Powell told him that he put gas on the outside of the side door was raised during the testimony of Detective Gast. Isaac Powell's statement was reiterated at the very conclusion of the government's case. The government sought to introduce the statement made by Isaac Powell to Detective Gast that preceded the Grand Jury testimony.⁷⁵ The government, for the first time, asserted that the statement would come in as substantive evidence. The government cited two Ohio cases for this proposition: *State v. Bock*, 16 Ohio App. 3d 146, 474 N.E.2d 1228 (1984); and *State v. Pritchard*, 2001 WL 898427 (2001). The Court ruled that the jurors could hear the

⁷⁴ Tr. Vol. V at 1449-53.

⁷⁵ Tr. Vol. VI at 1727.

statement to Detective Gast by Isaac Powell that Mr. Powell told him that he had poured gasoline on the door:

No further questions were asked on that subject. By that exchange as reconstructed, this statement being offered by the State is a prior consistent statement. The statement that the witness made on the stand was clear. It said or Mr. Isaac Powell stated as his answer, as he was not allowed to ever give a complete answer prior to this, this is his first and only complete answer, I said he told me he put gas on the side of the door. That's a direct quote out of the record. Therefore it is a consistent statement. Therefore under request of the state under Rule 801(D) (1) (b), the evidence proffered to the Court is consistent with his testimony, and is offered to rebut and expressed or implied charge of improper influence against him of improper influence.

Mr. Thebes on Cross Examination of Mr. Powell allowed Mr. Powell to explain his answer where he went into great detail about light weight pressure being placed upon him by Detective Gaston, which we all know is Detective Gast, and the testimony carried there on. Therefore the information will be allowed to be played to the Court's—or presented to the jury.

Mr. Thebes, I note your continuing objection to this. Anything else by Defense at this time?

MR. THEBES: In that record, no.

MR. BRAUN: It's about 3 minutes and 40 seconds.

MR. ANDERSON: Excerpt from his actual statement so they can see him make the statement.

THE COURT: Yes. The evidence is admissible. I have no problem with that. The only thing is I ask the parties next time We have anticipated a situation like this, and the court is on an hour recess if it is brought to our attention at the beginning of the recess in regards to the end of the recess I could have used my lunch and not wasted an hour of valuable Court time.⁷⁶

Finally the defense objected to the jury considering the evidence without a limiting instruction just before the closing arguments:

Particularly this is in view of Mr. Isaac Powell's tape. We made an objection during the course of trial. We are renewing that objection now that there should be an instruction that says that particular piece of evidence is in fact not allowable as a piece of substantive evidence in this case.

⁷⁶ Tr. Vol. VI at 1734-35.

Again I make this argument not only the Ohio Rules of Evidence and the 6, 8, 9, and 14th amendments to the United States Constitution, Article I Sections 9 and 10 of the Ohio Constitution.⁷⁷

B. The statement was not properly before the jurors as refreshing the memory.

Refreshing memory is controlled by EVID R. 612.

Except as otherwise provided in criminal proceedings by Rules 16(B)(1)(g) and 16(C)(1)(d) of Ohio Rules of Criminal Procedure, if a witness uses a writing to refresh memory for the purpose of testifying, either: (1) while testifying; or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing. The adverse party is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

In *State v. Sanders*, 130 Ohio App. 3d 789, 797, 721 N.E.2d 433, 348-49 (1998), *app denied* 85 Ohio St. 3d 1476, 709 N.E.2d 848 (1999), the case was reversed. It was reversed because the trial court abused its discretion in permitting the government to introduce a police report. The police report recited the officer's observations during the traffic stop. The court relied on the text of the rule:

It is clear, however, that EVID. R. 612 allows only an adverse party to introduce the writing into evidence. Here, Trooper March was the state's witness and, therefore, the state was not permitted to have the report admitted on the basis of EVID. R. 612.⁷⁸

⁷⁷ Tr. Vol. VIII at 2046-47.

⁷⁸ *Id.* 130 Ohio App. 3d at 797, 721 N.E.2d at 439.

The Court also quoted from *State v. Ward*, 15 Ohio St.3d 355, 358, 474 N.E.2d 300, 302 (1984). There this Court specifically noted that the official records exception to the Hearsay Rule⁷⁹ does not allow the observations of police officers to be introduced by the state. The official-records exception to the hearsay rule does allow the state to introduce the log of the calibrations of the intoxilyzer equipment maintained under the requirements of the Ohio Department.⁸⁰ Here the hearsay testimony went to the specific acts that the defendant was accused of committing, not to peripheral matters, such as a calibration log.

The government may not use refreshing a recollection to get innuendo and inferences before the jury.⁸¹

Thus the statements should not have been presented to the jurors as refreshing the witness's recollection.

C. The statement was not properly before the jurors as impeaching evidence by prior inconsistent statement.

Impeachment by a prior statement is covered by EVID. R. 613:

(A) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(B) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:

(1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;

(2) The subject matter of the statement is one of the following:

⁷⁹ EVID. R. 803(8).

⁸⁰ See also *State v. Breeze*, 89 Ohio App. 3d 464, 624 N.E.2d 1092 (1993).

⁸¹ *State v. Liberatore*, 69 Ohio St. 2d 583, 588, 433 N.E.2d 561, 565 (1982).

- (a) A fact that is of consequence to the determination of the action other than the credibility of a witness;
- (b) A fact that may be shown by extrinsic evidence under EVID. R. 608(A), 609, 616(A), 616(B) or 706;
- (c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence.

(C) Prior inconsistent conduct. During examination of a witness, conduct of the witness inconsistent with the witness's testimony may be shown to impeach. If offered for the sole purpose of impeaching the witness's testimony, extrinsic evidence of the prior inconsistent conduct is admissible under the same circumstances as provided for prior inconsistent statements by EVID. R. 613(B)(2).

If the testimony was to be used to only impeach Isaac Powell, then the jurors should have been instructed on its limited purpose, something that the Court refused to do. The evidence showing Isaac Powell making the statement should not have been admitted.

D. The statements were not admissible as substantive evidence.

The fact that a prior inconsistent statement can be used to impeach does not answer the question of whether the jurors may consider the evidence on the merits:

It should be noted that Rule 613 does not govern the issue of whether the prior statement or conduct may be considered by the trier of fact as substantive evidence, i.e., for the truth of what the statement asserts or of what the conduct implies. These issues are essentially hearsay issues and are discussed in Chapter 80I of this treatise. Fundamentally, if the prior inconsistent statement is not admissible under the hearsay rules, or if prior inconsistent conduct is not admissible as an implied admission of a party, the only function of the evidence is to aid the trier of fact in assessing the credibility of the witness. In this situation, a limiting instruction from the trial judge should direct the jury to consider the prior statement or conduct not for its truth, but rather for the restricted purpose of assessing the trustworthiness of the witness. Where a prior statement or conduct is admissible under the hearsay rules, however, the evidence serves a dual purpose. The

evidence operates to impeach the witness, and it may be considered as substantive evidence in the case.⁸²

The exceptions to the hearsay rule provide no basis for using the statement as substantive evidence. Ohio has 23 exceptions:⁸³

- (1) Present sense impression.
- (2) Excited utterance.
- (3) Then existing, mental, emotional, or physical condition.
- (4) Statements for purposes of medical diagnosis or treatment.
- (5) Recorded recollection.
- (6) Records of regularly conducted activity.
- (7) Absence of entry in record kept in accordance with the provisions of paragraph (6).
- (8) Public records and reports.
- (9) Records of vital statistics.
- (10) Absence of public record or entry.
- (11) Records of religious organizations.
- (12) Marriage, baptismal, and similar certificates.
- (13) Family records.
- (14) Records of documents affecting an interest in property.
- (15) Statements in documents affecting an interest in property.
- (16) Statements in ancient documents.
- (17) Market reports, commercial publications.
- (18) Learned Treatises.
- (19) Reputation concerning personal or family history.
- (20) Reputation concerning boundaries or general history.
- (21) Reputation as to character.
- (22) Judgment of previous conviction.
- (23) Judgment as to personal, family, or general history, or boundaries.

None of these exceptions provide a basis for admitting the earlier statement by Isaac Powell implicating his brother as substantive. Where the trial court improperly admits hearsay, the reviewing court must find beyond a reasonable doubt that the error did not contribute to the verdict. Where the improperly admitted hearsay evidence corroborates the testimony of a onetime suspect, and may have been used by the jury to convict the defendant, the error was not

⁸² GLEN WEISSENBERGER, WEISSENBERGER'S OHIO EVIDENCE TREATISE, 331, § 613.2 (2006).

⁸³ EVID. R. 803.

harmless beyond a reasonable doubt.⁸⁴ Here the hearsay corroborates the testimony of two people who were present in the house that night, a house that was locked for which Mr. Powell had no key.

E. The statements had an impact on the trial.

The government was able to present detailed testimony about the fire scene but had only the testimony of witnesses who admitted lying to the police about an earlier incident, an incident that was attributed to Mr. Powell after the events in this case. The only testimony outside of the McCollum family or its close friends was testimony of Mr. Powell's brother, Isaac, that Mr. Powell told Isaac that he had put gasoline on the door.

The government had to explain how the fire was started when the doors were all locked and Mr. Powell had no key.⁸⁵ The explanation offered to the jurors rested on an interpretation of a crack noted in a photograph,⁸⁶ a crack that never found its way into the written reports of the lead investigator on the case.⁸⁷ Nor did the fire investigators preserve the door as evidence.⁸⁸ The outside of the door was relatively unburned while the inside was very badly burned.⁸⁹ It was blocked by a 2x4.⁹⁰ The fire did not start on the exterior of the door.⁹¹ Nothing was verifiable at the time of trial because the door and the rest

⁸⁴ *State v. Johnson*, 71 Ohio St. 3d 332, 338-39, 643 N.E.2d 1098, 1105 (1994).

⁸⁵ Tr. Vol. IV at 1354.

⁸⁶ Tr. Vol. VI at 1649.

⁸⁷ Tr. Vol. VI at 1667.

⁸⁸ Tr. Vol. VI at 1667.

⁸⁹ Tr. Vol. IV at 1281.

⁹⁰ Tr. Vol. IV at 1319.

⁹¹ Tr. Vol. IV at 1401.

of the house were destroyed by the government before the defense team could examine them.⁹²

Here the jurors heard the statement by Mr. Powell's brother implicating Mr. Powell, not once but twice. First the prosecutor presented them during the cross-examination of Isaac Powell. The government was allowed to accentuate this sworn statement by repeating the statements made in the interview with Detective Gast. The evidence was accentuated because it was presented at the end of the government's case through Detective Gast. Here the only other proper evidence linking Mr. Powell to the events that night came from one of the survivors and her close friend.

The first thing that the jurors asked to hear was the recording of the statement by Isaac Powell, the statement where Isaac Powell said that his brother said that he put gasoline on the outside door.

The jurors heard the statement used to impeach Isaac Powell without any instruction from the Court telling them to only consider it for impeachment of Isaac Powell, not as substantive evidence against Mr. Powell. Powell was not able to confront this evidence as required by *Crawford v. Washington*, 541 U.S. 36 (2004).

The admission of this evidence violated Mr. Powell's rights under the Ohio rules of evidence. In addition the admission of these statements and not enforcing the rules of evidence also violated Mr. Powell's rights under the OHIO CONST. art. I, §§ 9, 10, and 16, and U.S. CONST. amend. V, VI, and XIV.

⁹² Tr. Vol. IV at 1401.

Proposition of Law No. Two:

The government may not attack a defendant by introducing evidence of someone else's opinion of his character.

The use of character evidence is limited. EVID. R. 404 provides for limitations on the use of character evidence:

- (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.

The government was able to attack Mr. Powell's character. They did this by introducing evidence about how a witness answered the door the night of the fire, that she answered the door with weapons:

Q. Okay. 12:30 in the morning looking for boots and drawers?

A. Uh-huh.

Q. How mad were you about all of that, Lynnita?

MR. THEBES: Objection, Judge. Goes to relevance.

MR. BRAUN; Goes to her state of mind, Your Honor.

THE COURT: Objection overruled. Go ahead.

THE WITNESS: At the time I just wanted Wayne to get his stuff and go.
Q. You didn't—
A. I didn't want no problems.
Q. Okay. Did you think you were going to get in a fight with him on that porch?
A. For a minute. When I opened up the door I was ready. I had things in my hand.
Q. What did you have in your hand?
A. I had a baseball bat. I had a potato grinder and a fork.
Q. Calm yourself down. You had a baseball bat and what else?
A. A potato grinder and a fork.
Q. Okay. Did you get those things because you knew who was at the door?
A. Yes.

MR. THEBES: Judge, may we approach.

THE COURT: Yes.

(Whereupon, the following discussion was held at the Bench on the record:)

MR. THEBES: Judge, I am going to object. We are into character evidence, or at least that's the way it is being portrayed for the jury. Even if she -- he's allowed why she's afraid, I don't understand the relevance, but really it is character evidence at this point, Judge. And I would object.

THE COURT: At this point I have not heard any evidence that would be classified as character evidence unless you are anticipating what is about to come next. I have only heard recitation of occurrence is -- I'm not quite sure if I am missing your objection. Go ahead.

MR. THEBES: I will articulate it further. I apologize. She sees Mr. Powell at the door and grabs a baseball bat and fork and the indication is character evidence, Judge, clearly.

MR. ANDERSON: State versus Apanovitch allows for testimony as to either the victim being afraid but can't go into the reasons for the fear.

THE COURT: I am going to overrule the objection in regards to the case cite. This is clearly the testimony of a witness and what she was doing and why she was doing it. She didn't even articulate as to a specific reason as to why she grabbed the stuff. She just did. Whatever is going on in her own mind and whatever she thinks she testified to it. I am not taking it as character evidence, but of character of herself and not necessarily Mr. Powell.

(Whereupon the following took place in open court.)

BY MR. BRAUN:

Q. He left?⁹³

This evidence of how the witness answered the door had no relevance to the arson or the homicides. This evidence did not show any motive, plan, or intent

⁹³ Tr. Vol. IV at 1339-40.

by Mr. Powell. Such a showing is required by OHIO REV. CODE § 2945.59, and EVID. R. 404.

Allowing the jury the unrestricted access to Isaac Powell's testimony about a statement allegedly made to him by Mr. Powell violates the statutory and evidentiary provisions outlined above. In addition not enforcing these rules violates the OHIO CONST., art. I, §§ 10 and 16, and the U.S. CONST., amend. V, VI, VIII and XIV.

Statement Not Suppressed

Proposition of Law No. Three:

Where the government initiates two separate interrogations, more than a day apart, the government must provide the Miranda warnings at both interrogations.

Mr. Powell was interrogated twice. Both times Mr. Powell was in custody.⁹⁴ The first interrogation was on November 12 at 1:50 a.m., where Mr. Powell received the Miranda warnings.⁹⁵ The second interrogation occurred thirty hours later, on November 13, where Mr. Powell did not receive the Miranda warnings.⁹⁶ At the time of the first interview, Gast noted that Mr. Powell appeared to have been drinking.⁹⁷ Mr. Powell smelled of alcohol.⁹⁸ Even though the interview was occurring in the middle of the night, Gast made no inquiries about the last time that Mr. Powell had slept or what types of drugs he had taken.⁹⁹

⁹⁴ May 18, Hearing Tr. p. 170.

⁹⁵ May 18, Hearing Tr. p. 178, Ex. One.

⁹⁶ May 18, Hearing Tr. p. 178, Ex. Two.

⁹⁷ May 18, Hearing Tr. p. 153, 155.

⁹⁸ May 18, Hearing Tr. p. 156.

⁹⁹ May 18, Hearing Tr. p. 156.

The second interview took place over 30 hours later,¹⁰⁰ around 12:30 p.m. on November 13. Gast had Mr. Powell brought over from the jail.¹⁰¹ Ostensibly, Gast had Mr. Powell brought over from the jail to maintain the chain of custody of the fruits of a search warrant.

Both the defense and the government cited this Court's decision in *State v. Clark*, 38 Ohio St. 3d 252, 513 N.E.2d 720 (1987).¹⁰² There the warnings had been given by police officers at the scene before the defendant was arrested. This Court determined that the government failed to meet its burden of proof when a probation officer interrogated the defendant two hours later at the police station. There this Court applied a totality of the circumstances test.¹⁰³

This Court has relied on this test since then. None of those cases have sanctioned a period of time of 30 hours. Furthermore, during the time in jail the effects of the alcohol would have worn off. Finally, he was ostensibly brought to the interrogation because of a search warrant. This Court's subsequent cases have allowed statements made under much more limited circumstances. A defendant who is given his Miranda warnings at the time of arrest by one police agency and three hours later is questioned by another agency is considered to have properly waived his rights.¹⁰⁴ A defendant who receives warnings at the time of arrest, 9:15 p.m., receives them again before the beginning of questioning, 10:30 a.m., and is questioned with three interruptions is

¹⁰⁰ May 18, Hearing Tr. p. 179.

¹⁰¹ May 18, Hearing Tr. p. 166.

¹⁰² Post Hearing Brief: Motion Suppress Statements (Mot. #2), Dkt. 135, June 4, 2007; State's Response Contra Defendant's Motion to Suppress Statements (Motion No. 2), Dkt. 138, p. 4.

¹⁰³ *State v. Clark*, 38 Ohio St. 3d at 232, 513 N.E.2d at 726.

¹⁰⁴ *State v. Treesh*, 90 Ohio St.3d 460, 471, 739 N.E.2d 749, 764 (2001).

considered to have waived his rights.¹⁰⁵ A defendant who is given the Miranda warnings at around 6:45 p.m. and is interrogated until around 2:30 a.m. the next morning with interruptions, is considered to have waived his rights.¹⁰⁶

The use of the second statement violated Mr. Powell's rights OHIO CONST. art. I, §§ 9, 10, and 16, and U.S. CONST. amend. V, VI, and XIV.

Prosecutorial Misconduct

Proposition of Law No. Four:

Prosecutorial misconduct during the trial phase closing arguments deprived Mr. Powell of a fair and reliable trial in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

During Mr. Powell's trial the prosecution engaged in misconduct during closing argument. This misconduct was pervasive and prejudicial to Mr. Powell's right to a fair and reliable trial.

During closing arguments the prosecutor made a number of improper statements and comments. The first consisted of improper victim impact argument. The prosecutor made the following statement:

This is a case about a family, a close family. They didn't have much. Little house, not in the best neighborhood, but they had each other, mothers, daughters, sisters, brothers, cousins. They would all gather to help each other out, to watch each other's kids. Mary McColum's house was the social center of this family.

Three generations came together on November 11, 2006 at 814 St. Johns in Toledo. Eight people walked into that house and only four people walked out.¹⁰⁷

¹⁰⁵ *State v. Cooley*, 46 Ohio St.3d 20, 28, 544 N.E.2d 895, 907-08 (1989).

¹⁰⁶ *State v. Brewer*, 48 Ohio St.3d 59, 52-53, 60, 549 N.E.2d 491, 495, 501 (1989).

¹⁰⁷ Tr. Vol. IX at 2075.

Trial counsel failed to object to this reference to victim impact. However, the prosecutor did not stop there. He continued to comment in a manner that attacked Mr. Powell for something as innocuous as wearing a suit in court. The prosecutor told the jury:

But, ladies and gentlemen, you are not here to judge this man as he sits here today in his nice suit and his pleasant demeanor which you have seen all week. ¹⁰⁸

Trial counsel objected to this improper comment, and the trial court sustained the objection.¹⁰⁹

Later, the prosecutor commented on Mr. Powell exercising his right to remain silent. The prosecutor told the jury:

Next. The defendant refuses to come in even after his brother talks to him at the insistence of Detective Gast. He refuses to come in. Imagine what has just occurred. *And he refuses to come in to assist.* ¹¹⁰

Trial counsel objected to this reference of Mr. Powell exercising his right not to testify, which was sustained by the trial court. The trial court's sustaining of defense counsel's objection had no effect on the prosecutor, who continued with improper argument.

Later, the prosecutor commented on facts not in evidence. The prosecutor discussed the matter of the destroyed house and the inability of the defense to have their own expert to review the damage and cause of the fire. The mischaracterization consisted of telling the jury that a defense expert's conclusions would have been no different, when no one can say what conclusion they may have reached.¹¹¹

¹⁰⁸ Tr. Vol. IX at 2088.

¹⁰⁹ Tr. Vol. IX at 2088-89.

¹¹⁰ Tr. Vol. IX at 2099 (emphasis added).

¹¹¹ Tr. Vol. IX at 2105-06.

Although the trial court admonished the jury to disregard some of these comments by the prosecutor, the damage was done.¹¹² It is of course true that a prosecutor is entitled to substantial latitude in his closing remarks.¹¹³

Mr. Powell recognizes that some of these instances of misconduct were not objected to by trial counsel. As such, this Court must examine some of these errors on the basis of plain error.¹¹⁴ And these errors, it is submitted, constitute plain error. And plain error is, necessarily harmful, for it "affect[s] substantial rights."¹¹⁵

The errors addressed here violated Mr. Powell's rights to due process and equal protection of the laws, represented a violation of his right to effective assistance of counsel, all in violation of OHIO CONST. art. I, §§ 1, 2, 5, 9, 10, 16, and 20, and U.S. CONST. amend. V, VI, VIII and XIV.

Burden of Proof

Proposition of Law No. Five:

The accused's right to due process under the fourteenth amendment to the United States Constitution is violated when the state is permitted to convict upon a standard of proof below proof beyond a reasonable doubt.

In the trial phase of Mr. Powell's case, the jury was required to employ Ohio's statutory definition of reasonable doubt. OHIO REV. CODE § 2901.05(D) defines reasonable doubt as:

¹¹² Tr. Vol. IX at 2111-12.

¹¹³ E.g., *State v. Beuke*, 38 Ohio St.3d 29, 32, 526 N.E.2d 274, 279 (1988); *State v. Brown*, 38 Ohio St.3d 305, 316, 528 N.E.2d 523, 537 (1988).

¹¹⁴ CRIM.R. 52(B).

¹¹⁵ CRIM.R. 52(B).

“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’s statutory definition of “beyond a reasonable doubt” does not require the constitutionally mandated quantum of proof in two key respects.¹¹⁶ First, the “firmly convinced” language in the first sentence of the statute defines reasonable doubt in terms nearly identical to the accepted definition of clear and convincing evidence. Second, as many courts have recognized, the “willing to act” language in the last sentence of the statute represents a standard of proof below that required by Due Process.

The Supreme Court of the United States in *In re Winship* 397 U.S. 358 (1970), 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 to be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”¹¹⁷ To maintain confidence in our system of laws, the Court continued, proof beyond a reasonable doubt must be held to be proof

¹¹⁶ The arguments advanced in this Proposition of Law were rejected by this Court in *State v. Van Gundy*, 64 Ohio St. 3d 230, 594 N.E.2d 604 (1992); See also *State v. Taylor*, 78 Ohio St. 3d 15, 29, 676 N.E.2d 82, 96 (1997). But see *State v. Goff*, 82 Ohio St. 3d 123, 132, 694 N.E.2d 916, 924 (1998). As explained *infra*, the *Van Gundy* and *Taylor* decisions are in direct contradiction of United States Supreme Court precedent. Therefore, Mr. Powell is making a good faith effort to argue for a change in the law, and preserving this issue for federal review. *Engle v. Isaac*, 456 U.S. 107, 130 (1982).

¹¹⁷ *Winship* at 364.

of guilt “with utmost certainty.”¹¹⁸ Accordingly, the Supreme Court reversed a Louisiana defendant’s capital conviction and death sentence because the reasonable doubt definition could have led the sentencing authority to find guilt “based on a degree of proof below that required by the Due Process Clause.”¹¹⁹

Likewise, the definition of reasonable doubt utilized by the three judge panel allowed the trial court to find guilt on proof below that required by the Due Process Clause. While this Court has held that the statutory reasonable doubt definition is not an unconstitutional dilution of the State’s burden of proof,¹²⁰ the Supreme Court of the United States, the majority of 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.”

In *Holland v. United States*, 348 U.S. 121, 140 (1994), 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 [trier of fact] verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him.”¹²¹ 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

¹¹⁸ *Id.*

¹¹⁹ *Cage v. Louisiana*, 498 U.S. 39, 41 (1990).

¹²⁰ *State v. Nabozny*, 54 Ohio St. 2d 195, 202-03, 375 N.E.2d 784, 791 (1978).

¹²¹ *Scurry v. United States*, 347 F.2d 468, 470 (D.C. Cir. 1965).

right judgment. *Id.* Indeed, the majority of the 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.¹²²

Ohio courts have also criticized the “willing to act” language of OHIO REV. CODE § 2901.05 (D). In *State v. Frost*, 1978 WL 216816. at 8 (Ohio App. May 2, 1978), the court concluded that the final sentence of OHIO REV. CODE § 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 triers of fact 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 held 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 [trier of fact] ... reflects adversely upon the accused.” A majority of federal courts and several Ohio courts have recognized, the “willing to act” language in OHIO REV. CODE § 2901.05 (D) does not meet the standard of proof beyond a reasonable doubt. 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.

¹²² 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).

The willing to act language is not the only defect in the reasonable doubt definition. The “firmly convinced” language in the first sentence of OHIO REV. CODE § 2901.05 is not reasonable doubt, but rather it defines the clear and convincing standard. In *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), the Court defined clear and convincing evidence as that “which will provide in the mind of the [trier of fact] a firm belief or conviction to the facts sought to be established.” That definition is similar to OHIO REV. CODE § 2901.05 (D), where reasonable doubt is present only if the trier of fact “cannot say they are firmly convinced of the truth of the charge.” Resultantly, the definition of reasonable doubt in OHIO REV. CODE § 2901.05(D) fails to satisfy the Due Process Clause.

The OHIO REV. CODE § 2901.05 definition of reasonable doubt is further flawed because it informs the trier of fact that “[r]easonable 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.” The phrase “moral evidence” improperly shifted the focus of the trier of fact to the subjective morality of Mr. Powell, and from the required legal quantum of proof, *Victor v. Nebraska*, 511 U.S. 1 (1994), notwithstanding.

In *Victor*, the Court rejected a due process challenge to a reasonable doubt definition that included the phrase “moral evidence”.¹²³ The Court found no error because the phrase “moral evidence” was proper when placed in the context of the definition 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 mor-

¹²³ *Id.* at 13. But see *id.* at 21 (Kennedy J., concurring).

al 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.¹²⁴

Unlike *Victor*, the definition in this case did not guide the trier of fact by placing the phrase “moral evidence” within any proper context. In *Victor*, the trier of fact was properly guided on the phrase “moral evidence” because it was conjunctively paired with the phrase “matters relating to human affairs.” *Id.* The trier of fact was not directed to consider “moral evidence” as evidence that is “related to human affairs.” Instead, the trial court considered both evidence related to human affairs “or moral evidence.”¹²⁵ Accordingly, the trial court was allowed to convict Grady Powell based on considerations of subjective morality, rather than evidentiary proof required by Due Process Clause. *Victor*, 511 U.S. at 21 (Kennedy J., concurring) (“[the] use of ‘moral evidence’ ... seems quite indefensible ... the words will do nothing but baffle”).

This Court in *State v. Taylor*, 78 Ohio St. 3d 15, 29, 676 N.E.2d 82, 96 (1997), held that the reasonable doubt definition is *generally* acceptable. However this Court partially retreated from this holding in *State v. Goff*, 82 Ohio St. 3d 123, 132, 694 N.E.2d 916, 924 (1998). In *Goff*, this Court recognized that the OHIO REV. CODE § 2901.05(D) definition of reasonable doubt is not appropriate during the penalty phase of a capital case. This Court held that the trier of fact “must be firmly convinced that the aggravating circumstance(s) outweigh the mitigating factor(s)”. *Id.* The use of the OHIO REV. CODE § 2901.05 definition

¹²⁴ *Id.* at 13 (emphasis added).

¹²⁵ See *Victor*, 511 U.S. at 13.

of reasonable doubt in the penalty phase violates the Due Process Clause and renders the death sentence invalid.

Triers of fact 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 OHIO REV. CODE § 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 OHIO REV. CODE § 2901.05(D) defines the presence of reasonable doubt in terms nearly identical to the accepted definition of clear and convincing evidence. Courts that have disapproved the “willing to act” language have generally allowed it to be used only when the instruction, taken in its entirety, conveyed the true meaning of “reasonable doubt” as required by the Due Process Clause.¹²⁶

This is not, however, the case in Ohio. OHIO REV. CODE § 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 OHIO REV. CODE § 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 the trier of fact’s duty to focus upon the evidence at trial rather than on subjective considerations of morality. OHIO REV. CODE § 2901.05(D), as applied to this case, defines reasonable doubt by an insufficient standard. Accordingly, this definition of reasonable doubt allowed the trier of fact to find guilt “based on a degree of proof below that required by the Due Process Clause.”¹²⁷ These convictions

¹²⁶ See *Holland*, 384 U.S. at 140.

¹²⁷ *Cage*, 498 U.S. at 41.

must be reversed or at the minimum the death sentence of Mr. Powell must be vacated.

The admission of this evidence violates the above statutory provisions as well as OHIO CONST. art. I, §§ 1, 2, 5, 9, 10, 16, and 20, and U.S. CONST. amend. V, VI, VIII and XIV.

Trial phase Instructions

Proposition of Law No. Six:

In a death penalty case improper first phase jury instructions deprive a criminal defendant of his protections under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under the corresponding provisions of the Ohio Constitution.

In this case, the trial court made a number of errors in its instructions to the jury during the first phase of the trial.

A. The Causation

During the jury instructions the trial court instructed the jury as follows concerning causation:

Three, cause of death of another. Cause is an essential element of the offense of aggravated murder. The State charges that an act of the defendant caused the death of another Cause is an act which directly produces the death of a person and without which it would not have occurred. The Defendant is also responsible for the natural and foreseeable results that follow, in the ordinary course of the events, from the unlawful act

The test for foreseeability is not whether the Defendant should have foreseen the injury in the precise form. The test is whether a reasonably prudent person, in light of all the circumstances, would have anticipated the death of another was likely to result from the performance of the unlawful act.¹²⁸

¹²⁸ Tr. Vol. IX at 2176-77.

Prior to the trial court instructing the jury, Mr. Powell objected to this instruction.¹²⁹

This instruction transformed the State's burden from a requirement of proving specific intent to cause the death of another person to allowing the jury to convict for aggravated murder on a finding of less than specific intent.

In arguing to the trial court, the defense referred to two cases by this Court, *State v. Burchfield*, 66 Ohio St.3d 261, 611 N.E.2d 819 (1993); and *State v. Getsy*, 84 Ohio St.3d 180, 702 N.E.2d 866 (1998). Trial counsel for Mr. Powell argued that the proposed instruction would confuse the jury and that the State's burden of proof would be reduced as a result. Trial counsel also reminded the trial court that the Ohio Supreme Court, in *Burchfield*, had cautioned courts from issuing the instruction in a murder case where specific intent was an issue.¹³⁰

In *Burchfield* this Court was faced with a situation similar to that of Mr. Powell. There this Court found that the foreseeability instruction was inappropriate, but found no error. However, this Court concluded by stating:

We are concerned, however, with the use of the OJI foreseeability instruction in this case. While OJI is widely used in this state, its language should not be blindly applied in all cases. The usefulness in murder cases of the foreseeability instruction is questionable, especially given its potential to mislead jurors. While the use of that instruction would not have led to our reversal of the conviction in this case, its unnecessary inclusion would have made the question closer than it need have been. The OJI foreseeability instruction should be given most cautiously in future murder cases. ¹³¹

¹²⁹ Tr. Vol. VIII at 2032-40; Tr. Vol. IX at 2070-71.

¹³⁰ Tr. Vol. VIII at 2032-40.

¹³¹ *State v. Burchfield*, 66 Ohio St.3d at 263, 611 N.E.2d at 821.

In *Getsy* this Court found no error, but since there was no objection at trial, reviewed the error under a plain error standard of review. Still, this Court, noting that in *Burchfield* it had cautioned trial courts from using this instruction in homicide cases, stated “We reiterate this caution today.”¹³²

The trial court’s issuance of this instruction comprises error for several reasons. First, unlike *Burchfield*, where the issue was presented for the first time, or like *Getsy*, where the instruction was not objected to and this Court’s review was restricted to plain error, the error here was preserved at trial. Second, the trial court was presented with specific authority from this Court disapproving of this instruction and was thus on direct notice of its inappropriateness. Third, despite being appraised of the relevant case law, the trial court did not undertake a detailed analysis or offer reasons sufficient to suggest why it chose to ignore clear Ohio Supreme Court precedent and advice.

B. Transferred Intent

The trial court, once again after objection by Mr. Powell, instructed the jury as to transferred intent. The trial court charged the jury as to this issue as follows:

The propose required is to cause the death of another, not any specific person. If the act missed the person intended, but caused the Defendant [sic] another the element of purpose remains and the offense is as complete as though the person for whom the act was intended had died.¹³³

Trial counsel objected. The trial court, after considering *Bradshaw v. Richey* (2005), 546 U.S. 74, 2040-43, stated that it would charge the jury accordingly.

¹³² *State v. Getsy*, 84 Ohio St.3d at 196, 702 N.E.2d at 883-84.

¹³³ Tr. Vol. IX at 2175.

Tr. Vol. IX at 2040-43. Although a similar instruction in *Richey* was found by the United States Supreme Court to not be error, it is submitted that under the facts and circumstances of this case the instruction was wrongly given. As argued by the defense, the instruction diluted the instructions as to purpose and for that reason the given instruction was error.

For these reasons, it is requested that this Court reverse the judgment of the trial court and remand the matter for a new trial, at which time the causation, or foreseeability, and transferred intent instructions would not be given to the jury. This relief is necessary to protect Mr. Powell's due process rights as guaranteed under the OHIO CONST. art. I, §§ 1, 2, 5, 9, 10, 16, and 20, and U.S. CONST. amend. V, VI, VIII and XIV.

Improper Use of Victim-Impact Evidence During Trial

Proposition of Law No. Seven:

A trial court commits error to the prejudice of a criminal defendant where it permits victim-impact testimony during the trial phase of the case, victim-impact testimony that does not cover the impact on the decedents.

Proposition of Law No. Eight:

A criminal defendant is denied his right to effective assistance of counsel when trial counsel fails to object to victim-impact testimony during the trial phase of the case, victim-impact testimony that does not cover the impact on the decedents.

Terrance C. Glaze, a 23-year veteran of the Toledo Fire Department testified about entubating one adult, and his own injuries.¹³⁴ Glenn J. Hill, a 15-year

¹³⁴ Vol. IV at 1191.

veteran of the Toledo Police Department, testified about accompanying a child to the hospital.¹³⁵ Felicia McCollum testified about the horrible condition of her daughter, Dashi, and her son, Antonio, both of whom spent two days in the intensive care unit.¹³⁶ Felicia McCollum testified that she spent the two days in the hospital with them.¹³⁷ Antonio was allowed to testify about his stay in the hospital, in fact it was the conclusion of his testimony.¹³⁸

Lynnita Stuart was allowed to testify on direct examination in considerable detail about her hospitalization:

- Q. You yourself needed medical treatment when you got to the hospital?
A. Yes.
Q. Where did you have to go into the hospital?
A. ICU.
Q. Intensive care?
A. Yes.
Q. How many days did you spend in intensive care?
A. Two days.
Q. Why did you need to be in intensive care?
A. I couldn't breathe. When I got there I had from the fall a speck of blood in my head, my leg was swelled up real bad. There was a lot of fluid in it. To this day my leg is still messed up. I don't think it will ever be the same. But other than that—
Q. I want to talk about this, Lynnita. You had a closed head injury, didn't you?
A. Yes.
Q. You hurt your head when you jumped?
A. Yes.
Q. Did you break your leg?
A. No.
Q. Did you mess your leg up?
A. Yes.
Q. What's the difference?
A. It holds a lot of fluid. It stays swollen now. I got a hole in my leg from the infection that was inside my leg.
MR. BRAUN: Judge, the record should reflect she showed the jury the scar on her leg.

¹³⁵ Vol. IV at 1239.

¹³⁶ Vol. IV at 1323.

¹³⁷ Vol. IV at 1324.

¹³⁸ Vol. V at 1532.

THE COURT: Record will so reflect. That is which leg, please, right leg or left leg?

MR. BRAUN: Right.

THE COURT: Thank you.

Q. Did you have any ligament or tendon damage?

A. No but my—the tightness in my leg messing up all the time they have to keep me on Motrin to keep the swelling up out of my leg, and when it rains and things like that my leg swells up. I can't stand up no more periods of time. I am an outgoing person. I dance a I can't do that no more. There is a lot of things that my life has to stand—

MR. THEBES: Objection. Objection. Relevance.

THE COURT: Objection is overruled. Carry on.

MR. BRAUN: Thank you, Judge.¹³⁹

Stuart also testified that her son Dashawn was physically fine but was affected emotion.¹⁴⁰

Two officers testified about attending a critical incident debriefing session designed to treat the various participants.

Michael Roemmele, a 28-year veteran of the Fire Department testified about attending the critical engine debriefing session and its purpose:

Q. Ultimately how did your evening end or night end?

A. Went through a second bottle. Went outside with the other crews. Took a break, kind of talked amongst ourselves, what happened, what we did. Then we were ordered to go to what we call critical engine debriefing. After a traumatic event lots of time they try to bring in counselors and psychiatrist and to talk to us and let us talk about what happened.¹⁴¹

Roemmel returned to the same topic later—in more detail:

Q. How did your night end?

A. We returned to the engine house and from there we went to a debriefing that we had, a stress debriefing.

MR. MEADER: Can I have one moment, Your Honor. (Whereupon, a discussion was held off the record.)

Q. Where is this critical incident debriefing held?

A. This is held at 911 building, 2000 block of Monroe Street where our dispatch offices are.

Q. In Toledo?

¹³⁹ Vol. IV at 1348-50.

¹⁴⁰ Vol. IV at 1351.

¹⁴¹ Vol. IV at 1225.

A. Yes, it is.

Q. What's the purpose of these?

A. Purpose is to help the firefighters on scene deal with the situation that we just encountered. Anytime we have a fatality we tend to take it personally. We feel we didn't do our job, so it's to help us, you know, realize that, you know, sometimes we can't do everything and save every person. Sometimes our efforts are not enough. It's to help us to realize that, you know, we are not super heroes.

Q. Now, is that mandatory meetings or voluntary?

A. It is voluntary, yeah, but almost everybody attends at all times. It's good to talk about the situation. It helps us deal with it.

Q. These arranged for any fatality?

A. Anytime you have a fatality and you are at the 4 fire you are encouraged to.

Q. Civilians or firefighters?

A. Civilians and firefighters, yes.¹⁴²

Pete Jaegly, another lieutenant on the Toledo Fire Department, testified that he attended the same session.

At trial, defense counsel did not object to the State's failure to have the trial court find the witness qualified as required by EVID. R. 702. As a result, appellant raises this Proposition of Law under the plain error standard. Under Ohio case law, plain error occurs where "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804, 808 (1978), paragraph two of the syllabus.

Victim-impact testimony is not relevant during the trial process.¹⁴³ Victim-impact testimony about noncapital victims is improper.¹⁴⁴ Appropriate victim impact evidence may be relevant during the mitigation phase of a death eligible trial.¹⁴⁵ Here during the trial level phase, the government presented evidence of the impact on various participants the night of the fire, including those present

¹⁴² Vol. IV at 1239-41.

¹⁴³ *State v. Tyler*, 50 Ohio St.3d 24, 35-36, 553 N.E.2d 576, 591 (1990).

¹⁴⁴ *State v. White*, 85 Ohio St.3d 433, 446-47, 709 N.E.2d 140, 154-55 (1999).

¹⁴⁵ *State v. Fautenberry*, 72 Ohio St.3d 435, 438-40, 650 N.E.2d 878, 881-83 (1995).

in the house and those who arrived to address the fire. The testimony was not on those who died.

In order to prevail on a claim that his Sixth Amendment right to effective assistance of counsel has been violated, an appellant must show that his counsel's representation fell below an objective standard of reasonableness by presenting evidence of specific acts or omissions.¹⁴⁶ To prevail under an ineffective assistance of counsel claim, appellant must demonstrate that his defense was prejudiced by counsel's actions or omissions to such an extent that there is a reasonable probability that, but for counsel's error, a different result would have occurred.¹⁴⁷

For reasons set forth above, it appears clear that a different result would indeed have occurred had trial counsel objected to the victim-impact testimony of the various witnesses during the trial phase. The unchallenged testimony regarding the victim-impact testimony outlined above was damaging.

Since the rule regarding the use of victim-impact testimony is clear, it can be said there is a reasonable probability that a different result indeed would have occurred had trial counsel objected to victim-impact testimony. Under these factors, the prejudice to Mr. Powell is clear.

This Court is urged to find that Mr. Powell's trial counsel's performance fell below the *Strickland* standard and that performance prejudiced his right to effective assistance of counsel.

¹⁴⁶ *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 142, 538 N.E.2d 373, 379 (1989).

¹⁴⁷ *Strickland*, at 466 U.S. at 691-96; *Bradley*, 42 Ohio St. 3d at 137, 538 N.E.2d at 375.

In addition, the failure of the trial court to ban the use of victim-impact testimony, particularly focusing on those surviving rather than on the deceased, during the trial phase denied Mr. Powell his right to a fair trial and all attendant due process rights, as guaranteed under OHIO CONST. art. I, §§ 1, 2, 5, 9, 10, 16, and 20, and U.S. CONST. amend. V, VI, VIII and XIV. For these reasons, it is respectfully requested that the verdict against Mr. Powell and resultant death sentence be vacated and the entire cause remanded to the trial court for a new trial.

Expert Witness

Proposition of Law No. Nine:

A trial court commits error to the prejudice of a criminal defendant where it permits a witness to render an expert opinion when that witness has not been qualified as an expert as required by Evid. R. 702.

Proposition of Law No. Ten:

A criminal defendant is denied his right to effective assistance of counsel when trial counsel fails to object to the testimony of a witness who renders an expert opinion without being qualified as required by Evid. R. 702.

During the State's case in chief two witnesses, Christa Rajendran, a forensic scientist from the State Fire Marshall Forensic Laboratory, and Frank Reitmeier, also with the State Fire Marshall, testified regarding the cause and other aspects of the fire at St. Johns. Ms. Rajendran opined that some of the items contained the presence of gasoline, including clothing taken from Mr. Powell.¹⁴⁸

¹⁴⁸ Tr. Vol. V at 1487-1504.

Mr. Reitmeier testified about his involvement and, at the end of his direct testimony, opined that the cause of the fire at the St. Johns home was that of arson.¹⁴⁹

An examination of each witnesses' testimony reveals that at no point did the trial court qualify either Ms. Rajendran or Mr. Reitmeier as expert witnesses prior to them rendering opinions regarding the presence of gasoline on the items tested nor the cause of the fire. It is the position of Mr. Powell that he was denied a fair trial for the reason that this witness was permitted to testify without being qualified pursuant to EVID. R. 702, resulting in a deprivation of appellant's due process rights.

It is also the position of Mr. Powell that his trial counsel were ineffective in failing to object to the testimony of Ms. Rajendran and Mr. Reitmeier, again depriving him of his due process rights guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the Ohio Constitution.

EVID. R. 702 provides, in pertinent part, that:

A witness may testify as an expert if[:]

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training or education regarding the subject matter of the testimony. (emphasis added)

At trial, defense counsel did not object to the State's failure to have the trial court find the witness qualified as required by EVID. R. 702. As a result, appellant raises this Proposition of Law under the plain error standard. Under Ohio

¹⁴⁹ Tr. Vol. IV at 1358-92.

case law, plain error occurs where “but for the error, the outcome of the trial clearly would have been otherwise.” *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804, 808 (1978), paragraph two of the syllabus.

The testimony of Ms. Rajendran affected the result of the trial to the extent that without her testimony the outcome would have indeed been different. For example, Ms. Rajendran testified that sweat pants, jeans, boxer shorts, t-shirt, gold gym shorts, black sweatshirt with gold lettering, and other clothing items taken from Mr. Powell all contained gasoline. This testimony provided physical and scientific support for the testimony of various witnesses, many of whom pointed to Mr. Powell as the person setting the fire at the St. John Avenue home.

Similarly, Mr. Reitmeier’s testimony established for the jury that the cause of the fire was arson. This had the effect of placing in the jury’s mind that if it was arson, the only person that caused the arson was Mr. Powell. It also had the effect of removing an alternative theory, such as an appliance or some other non-arson cause for the fire. Of course, the destruction of the St. John’s home also prevented the defense from having its own expert view the home.

In order to prevail on a claim that his Sixth Amendment right to effective assistance of counsel has been violated, an appellant must show that his counsel's representation fell below an objective standard of reasonableness by presenting evidence of specific acts or omissions.¹⁵⁰ To prevail under an ineffective assistance of counsel claim, appellant must demonstrate that his defense was prejudiced by counsel's actions or omissions to such an extent that there

¹⁵⁰ *Strickland and Bradley*.

is a reasonable probability that, but for counsel's error, a different result would have occurred.¹⁵¹

For reasons set forth above, it appears clear that a different result would indeed have occurred had trial counsel objected to the testimony of Ms. Rajendran and Mr. Reitmeier. The unchallenged testimony regarding the presence of gasoline on various items of clothing taken from Mr. Powell was damaging. Certainly it is counsel's duty to ensure that a witness is competent to testify in the area or matter for which she is testifying.

Because the rule regarding the qualifying of expert witnesses under EVID. R. 702 is clear, it can be said there is a reasonable probability that a different result indeed would have occurred had trial counsel objected to Ms. Rajendran's and Mr. Reitmeier's testimony. Under these factors, the prejudice to Mr. Powell is clear.

This Court is urged to find that Mr. Powell's trial counsel's performance fell below the *Strickland* standard and that performance prejudiced his right to effective assistance of counsel.

In addition, the failure of the trial court to qualify Ms. Rajendran as provided in EVID. R. 702 denied Mr. Powell his right to a fair trial and all attendant due process rights, as guaranteed under the OHIO CONST. art. I, §§ 1, 2, 5, 9, 10, 16, and 20, and U.S. CONST. amend. V, VI, VIII and XIV. For these reasons, it is respectfully requested that the verdict against Mr. Powell and resultant death sentence be vacated and the entire cause remanded to the trial court for a new trial.

¹⁵¹ *Strickland*, at 466 U.S. at 691-96; *Bradley*, 42 Ohio St. 3d at 137, 538 N.E.2d at 375.

Proposition of Law No. Eleven:

A criminal defendant's due process rights are violated where key evidence is not properly preserved by the state and is unavailable to the defense for testing and analysis, all in violation of the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

Proposition of Law No. Twelve:

A criminal defendant is denied effective assistance of counsel where his counsel fails to file a motion, pre trial, to seek preservation of critical evidence, all in violation of his right to counsel and due process under the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

Because these propositions of law are related, they will be argued together.

The defense, on February 1, 2007, filed a motion seeking to have the State's evidence available for inspection and testing by defense experts. Defense counsel did not file a timely motion for the preservation of evidence, such as the home on St. Johns that was the subject of the fire.

On June 29, 2007, the defense filed a motion to dismiss the case based on the destruction of the house on St. Johns. The State, on July 20, 2007, filed a response to that motion. The defense, on August 1, 2007, filed a brief in support of its motion to dismiss.

At a hearing held August 6, 2007, the matter of the house on St. John was addressed by the trial court. Defense counsel told the trial court that in June, 2007 he and Detective Gast visited the address, only to discover the home had been demolished on or about January 26, 2007. According to defense counsel,

Detective Gast was surprised to find the home demolished.¹⁵² The trial court, in a journal entry dated August 7, 2007, denied the motion to dismiss.

It is the position of Mr. Powell that the trial court erred in denying the motion to dismiss. In the alternative, it is the position of Mr. Powell that trial counsel were ineffective in not seeking an order, at the time of arraignment, to preserve all evidence in the case. Such an order, if submitted, would have prevented the destruction of the St. Johns home and provided a defense expert an opportunity to make an independent inspection of the property and the cause of the fire.

Initially, it is important to note that counsel were appointed on December 4, 2006. The St. Johns home was destroyed, by all accounts, on or about January 26, 2007. It was not until February 1, 2007, nearly two months after being appointed, that defense counsel filed motions seeking to preserve evidence and to make the State's evidence available for examination and testing by defense experts. However, by the time these motions were filed, the St. Johns home was destroyed and thus unavailable for examination by defense experts.

It is clear that defense counsel, upon being appointed, did not take immediate steps to require that all physical evidence, including, but not limited to, the St. Johns home, be preserved. It of course cannot be said with certainty that such a motion would have been granted by the trial court. However, it appears likely that, given that one of the charges involved arson, and that one of the specifications to the aggravated murder counts cited arson, that such a motion would have been entertained by the trial court.

¹⁵² Tr. of 08/06/2007 hearing at 22-27.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects a criminal defendant from being convicted of a crime where the state fails to preserve materially exculpatory evidence.¹⁵³ Evidence is materially exculpatory where:

1. the evidence possesses an exculpatory value that was apparent before the evidence was destroyed, and;
2. is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable means.¹⁵⁴

The progeny of *Trombetta* and *Youngblood* clearly state that a defendant is not required to prove conclusively that the destroyed evidence was exculpatory. However, the burden rests with the defendant to prove that the evidence in question was materially exculpatory. *See State v. Jackson*, 57 Ohio St.3d 29, 33, 565 N.E.2d 549, 554 (1991). Such evidence is deemed materially exculpatory if “there is a ‘reasonable probability’ that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *State v. Johnston*, 39 Ohio St.3d 48, 61, 529 N.E.2d 898, 911 (1988), *citing United States v. Bagley*, 473 U.S. 667 (1985): “A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”¹⁵⁵

Here, since only the State’s fire and arson experts viewed the remains of the St. Johns home before it was destroyed, Mr. Powell cannot show that the evidence was materially exculpatory. The remains may have supported an alternative cause of the fire, such as an appliance or other cause unrelated to arson, and is, therefore, potentially useful. As a result, if Mr. Powell is to persuade

¹⁵³ *California v. Trombetta*, 467 U.S. 479, 489 (1984); *Arizona v. Youngblood*, 488 U.S. 51 (1988).

¹⁵⁴ *Trombetta*, 467 U.S. at 489; *Columbus v. Forest* (1987), 36 Ohio App.3d 169, 173.

¹⁵⁵ *Johnston*, 39 Ohio St.3d at 61, 529 N.E.2d at 911.

this Court that his due process rights were violated, he must demonstrate that the State's actions amounted to bad faith.

Since it is likely that Mr. Powell or his experts would have asked to view the St. Johns home remains, and it has obvious evidentiary value and importance to substantiate the State's theory of the cause of the fire, the remains of the home must have been preserved, just as any other evidence regarding an alleged crime or arrest would be preserved.

The State's actions in this case may not have been totally intentional. Indeed, defense counsel conceded that Detective Gast was as surprised as himself when it was discovered that the house had been demolished. Rather, the destruction of the St. Johns home remains occurred due to the State's complete and utter failure to safeguard highly relevant evidence of a crime.

With the relative ease in which the property could have been secured, the failure to protect and preserve the home's remains under these circumstances demonstrates more than mere negligence or an error in judgment. It is the position of Mr. Powell that such a casual and unconcerned attitude toward the preservation of such a key piece of evidence rises to the level of bad faith. The St. John's house remains was the only direct evidence available to Mr. Powell and his experts to evaluate and demonstrate an alternative cause of the fire.

Should this Court find that the destruction of the St. John's home was not the result of bad faith, then it is urged that this Court find that defense counsel were ineffective in not seeking an immediate order, upon appointment, to preserve all relevant physical evidence, in particular the St. Johns remains.

In order to prove that his Sixth Amendment right to effective assistance of counsel has been violated, an appellant must show that his counsel's representation fell below an objective standard of reasonableness by presenting evidence of specific acts or omissions.¹⁵⁶ To prevail under an ineffective assistance of counsel claim, appellant must demonstrate that his defense was prejudiced by counsel's actions or omissions to such an extent that there is a reasonable probability that, but for counsel's errors, a different result would have occurred.¹⁵⁷

Here, it appears that there was some indication at trial that an alternative cause of the fire exists.¹⁵⁸ Without the benefit of having an expert directly examining the remains of the St. Johns home, only the State's experts could testify regarding an examination of the home to support their conclusions of the fire's origins. At a minimum, defense counsel were ineffective in not seeking an order to preserve all relevant evidence, including the remains of the house on St. John.

The only remedy is to reverse the trial court's order denying the motion to dismiss the case due to the failure to preserve potentially exculpatory evidence. Such a course of action is necessary to protect Mr. Powell's due process rights under the OHIO CONST. art. I, §§ 1, 2, 5, 9, 10, 16, and 20, and U.S. CONST. amend. V, VI, VIII and XIV.

¹⁵⁶ *Strickland v. Washington* (1984), 466 U.S. 668, 688; *State v. Bradley* (1989), 42 Ohio St.3d 136, 142.

¹⁵⁷ *Strickland*, at 466 U.S. at 691-96; *Bradley*, 42 Ohio St. 3d at 137, 538 N.E.2d at 375.

¹⁵⁸ See Proposition of Law No. — where the issue of the cause of the fire is discussed more fully.

Proposition of Law No. Thirteen:

When counsel in a capital case do not adequately preserve the record for appellate purposes, they provide constitutionally ineffective assistance of counsel.

Part of the job of trial counsel is to preserve issues for appellate review.

While there may be some reason not to repeatedly object to the only marginally objectionable issue, there can be no justifiable reason for failing to preserve whole categories of issues for review. In this case, the record is replete with objections not made and issues therefore ripe for review only for plain error.

Appointed capital counsel are required to attend specialized training in the trial of capital cases.¹⁵⁹ At seminar after seminar, they have been told of the importance of preserving issues for appellate review. Yet counsel too often ignore that obligation to their client. In doing so, they deny him the effective assistance of counsel. This is such a case.

Counsel's failures to object, and thereby preserve issues, deprived Mr. Powell of his rights under the OHIO CONST. art. I, §§ 1, 2, 5, 9, 10, 16, and 20, and U.S. CONST. amend. V, VI, VIII and XIV. Where, in a capital case at which multiple levels of review are likely, the defendant's life is literally at stake, and trial counsel have received special training as mandated by C.P.SUP.R. 20, the failure to preserve error must be deemed inherently deficient, and the deficiency will necessarily have prejudiced the defendant as it precludes his receiving the level of review to which he would otherwise be entitled.

¹⁵⁹ C.P.SUP.R. 20.

Proposition of Law No. Fourteen:

A trial court errs in a death penalty case when it denies a defense motion to have a complete copy of the prosecutor's file turned over to the court and sealed for appellate review.

In a pre trial motion the defense, on February 1, 2007, filed a motion directing that a complete copy of the prosecutor's file be made and turned over to the trial court for review and to be sealed for appellate review, if necessary. The State, in a response filed February 27, 2007, opposed the motion. In an order dated July 5, 2007, the trial court denied the motion. It is the position of Mr. Powell that the trial court erred in denying this motion, causing him prejudice and denying him his right to due process under the the OHIO CONST. art. I, §§ 1, 2, 5, 9, 10, 16, and 20, and U.S. CONST. amend. V, VI, VIII and XIV.

It is well-established that in a criminal case, the prosecutor is required to disclose to the Defendant evidence that, if suppressed, would deprive the Defendant of a fair trial. This includes exculpatory as well as impeachment evidence.¹⁶⁰ If such suppressed evidence is material in that it undermines confidence in the outcome of the trial, constitutional error occurs and the conviction must be reversed.¹⁶¹

The United States Supreme Court has stated “[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.”¹⁶² In cases in which courts have found that evidence was

¹⁶⁰ See *Brady v. Maryland* (1963), 373 U.S. 83, and *United States v. Bagley* (1985), 473 U.S. 667, 675-76.

¹⁶¹ *Bagley, id.*, at 678. See also *State v. Johnston* (1988), 39 Ohio St. 3d 48; *City of Chillicothe v. Knight* (1992), 75 Ohio App. 3d 544; *State v. Sowell* (1991), 73 Ohio App. 3d 672; *State v. Walden* (1984), 19 Ohio App. 3d 141.

¹⁶² *Bagley, id.*, at 681, quoting *United States v. Agurs* (1976), 427 U.S. 97, 111.

wrongly suppressed, the records do not state how such suppression was discovered.

This Court, in *State v. Brown* 115 Ohio St.3d 55, 873 N.E.2d 858 (2007), reversed a conviction and death sentence at least in part for the reason that certain exculpatory evidence was not revealed to the defense. This Court found that the withheld material was of such a character to cast doubt on the confidence of the jury's verdict. This Court was in a position to make that determination for the reason that the trial court in *Brown* had ordered, at defense request, that a copy of the prosecutor's file be made available for appellate review. Without this request and order by the trial court, and the information contained in the prosecution file, the result in *Brown* would not have occurred.¹⁶³

In Mr. Powell's case a conviction occurred. The prosecutor's file is necessary to determine whether the State has complied with defense counsel's requests for disclosure that were filed at the trial court level. However, the failure of the trial court to grant the motion has resulted in this information not being before this Court. The result is an inability of this Court to ensure that all procedures and rights under *Brady* and its progeny were protected.

Under the authority of *Brown*, the only remedy is for this matter to be remanded to the trial court for a new trial or, in the alternative, for a limited remand that the prosecutor's file be copied and transferred to this Court for its review. This relief is necessary to protect Mr. Powell's right to due process un-

¹⁶³ *Brown*, 115 Ohio St. 3d at 63-66, 873 N.E.2d at 866-68.

der the OHIO CONST. art. I, §§ 5, 9, 10, and 16, and U.S. CONST. amend. V, VI, VIII and XIV.

Ineffective Assistance of Counsel

Proposition of Law No. Fifteen:

A criminal defendant is denied Due Process and the Right to effective assistance of counsel where the actions of his trial counsel fall below any accepted standard of competence in violation of his Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution and the Ohio Constitution.

It is the position of Mr. Powell that he was denied his constitutional right to effective assistance of counsel due to the actions (and substantial inactions) of his trial counsel. It is submitted that this lack of effective assistance infected Mr. Powell's due process rights at both the trial and penalty phases to the extent that the only remedy is a new trial at which point appellant would be provided competent and effective counsel.

In order to prove that his Sixth Amendment right to effective assistance of counsel has been violated, an appellant must show that his counsel's representation fell below an objective standard of reasonableness by presenting evidence of specific acts or omissions.¹⁶⁴ To prevail under an ineffective assistance of counsel claim, appellant must demonstrate that his defense was prejudiced by counsel's actions or omissions to such an extent that there is a reasonable

¹⁶⁴ *Strickland v. Washington* (1984), 466 U.S. 668, 688; *State v. Bradley* (1989), 42 Ohio St.3d 136, 142.

probability that, but for counsel's errors, a different result would have occurred.¹⁶⁵

The record is replete with instances where counsel failed to provide effective assistance within the meaning of the Sixth Amendment, as set forth in *Strickland* and *Bradley*. Each of these instances is detailed, individually, below.

A. Voir dire-lack of follow up to jurors

The trial court conducted individual voir dire to determine the prospective juror's views on the death penalty and whether they could follow the law. During the individual voir dire a number of prospective jurors told the trial court that they could not vote for or deliver a verdict that would result in a death penalty sentence. Despite the importance of having jurors who could follow the law, trial counsel, on a number of occasions, did not conduct any follow up of these prospective jurors who said they could not impose the death penalty.

These prospective jurors included Lois Morgan; Virginia Nelson¹⁶⁶ and Craig Crego.¹⁶⁷ Each of the jurors displayed a reluctance to impose a death penalty verdict. Yet none of these jurors were the object of any attempt by defense counsel to determine if they could set aside that belief and nevertheless follow the law.

It cannot be said that the lack of follow up in some was a strategic or tactical course of action, particularly given that the voir dire at this point was in-

¹⁶⁵ *Strickland*, at 466 U.S. at 691-96; *Bradley*, 42 Ohio St. 3d at 137, 538 N.E.2d at 375.

¹⁶⁶ Tr. Vol. II at 638-48

¹⁶⁷ Tr. Vol. III at 833-840

dividual, and thus no other prospective juror would be affected by questions of defense counsel.

B. Lack of ensuring a complete record

This Court has made it clear that a complete record is necessary for the development of an effective appeal.¹⁶⁸ This failure includes numerous conferences at the bench that were not recorded and no record of the jury instruction conference. As developed more fully in Proposition of Law No. 13, this failure to ensure that a complete record is made renders effective appellate review by this Court difficult.

C. Failure to obtain a drug/alcohol expert and present testimony of substance abuse by Mr. Powell and its effects on his life

A constant theme of the State's case involved the use by Mr. Powell of alcohol and drugs.

At the mitigation hearing there was testimony offered by Dr. Graves regarding Mr. Powell's drug and alcohol abuse. Yet this testimony was not as effective or credible as testimony from a person certified as an expert in drug and alcohol issues. This lack undoubtedly contributed in part to the jury's decision to impose the death penalty.

It is Mr. Powell's position that had trial counsel contacted and engaged such an expert the resultant sentence would have been other than death. Once again, the only remedy is to remand the matter to the trial court for a new trial so that effective and competent counsel may be appointed to represent Mr. Powell at the new trial. Such a course of action is necessary to protect Mr.

¹⁶⁸ *State, ex. rel. Spirko v. Court of Appeals*, 27 Ohio St. 3d 13, 501 N.E.2d 625 (1986).

Powell's due process rights under the the OHIO CONST. art. I, §§ 5, 9, 10, and 16, and U.S. CONST. amend. V, VI, VIII and XIV.

D. Ineffective of assistance in calling Antonio Garrett as a witness

During the mitigation phase of the trial, the defense called Antonio Garrett, Mr. Powell's probation officer while he was a juvenile. The testimony, to put it charitably, was a disaster. It is obvious he was not prepared and had no real knowledge of the reason for Mr. Powell's being placed on probation in the first place, nor his performance while on probation.

Mr. Garrett told the jury that Beatrice Mr. Powell was doing her best to raise the children, including Wayne. The problem with this is that it countered other, more persuasive, evidence offered at mitigation that portrayed Beatrice as a neglectful mother, who was overwhelmed with the responsibilities of raising a family while the father was in prison for murder.

Most damaging was the admission, by Mr. Garrett, that he did not know the reason that Wayne was on probation in the first place. It was not until on cross-examination that Mr. Garret learned (or was reminded) that Wayne was on probation for setting a fire in school – the last thing the jury deciding life or death on a case -- where the cause of four deaths was arson – needed to hear.

It is clear that a properly prepared witness would have been made aware of these salient facts. It is also clear that had properly prepared defense counsel been aware of these facts they would not have called Mr. Garrett as a witness. His testimony, on balance, did much more harm than good.

For these reasons counsel were ineffective in not properly preparing Mr. Garrett as a witness and failing to anticipate the content and basis for Mr.

Powell's probation. There is nothing "strategic" in having a jury know that the man on trial for causing a fire that killed four people had been previously in trouble for setting fires. The prejudice is clear and this Court is urged to find that the calling of Mr. Garrett constituted ineffective assistance of counsel under *Strickland* and *Bradley*.

E. Other areas

There are other examples in the record to demonstrate the sub standard performance of trial counsel. These include the failure to object to improper first phase closing argument by the prosecutor (Proposition of Law No. 4); failure to object to improper first phase jury instructions (Proposition of Law No. 6), the failure to object, during the prosecutor's improper closing argument during the second phase, where he urged the jury to treat the nature and circumstances of the offense as aggravating circumstances and other examples of prosecutorial misconduct (Proposition of Law No. 17), failure to object to improper penalty phase jury instructions (Proposition of Law No. 18).

It is difficult to see how any of the factors outlined above can—at best—be viewed as either "tactical" or "strategic." Rather, it should be viewed as exactly what it is—a substandard performance by two attorneys who were not keeping their client's best interest at heart.

The United States Supreme Court has written that defense counsel is required to maintain a role as an "active advocate" at all times.¹⁶⁹ Moreover, defense counsel must, during the course of representation, pursue a course of

¹⁶⁹ *Evitts v. Lucey*, 469 U.S. 387, 394 (1985).

“zealous and loyal representation.”¹⁷⁰ It is clear from an examination of trial counsels’ performance that they not only did not meet the minimum standards contemplated by *Strickland* and *Bradley* but permitted revulsion of the facts of the case to permeate their performance to the extent that a reading of the transcript confuses one as to who was arguing against whom.

The effects the substandard representation had with the jury is, of course, unknown.

For years, *Strickland* has been a fragile shield, its requirement of competent representation more illusory than real. How else may we really imagine a system where an en banc panel of federal appellate judges could not unanimously agree that a capital defendant whose lawyer slept through significant portions of his trial was constitutionally ineffective?¹⁷¹ But the Court has begun to indicate that, in fact, *Strickland* has some teeth. In *Williams v. Taylor*, 529 U.S. 362 (2000), the Court recognized that counsel’s failure to investigate a capital defendant’s background and to present evidence to a jury could be ineffective assistance. More recently in *Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005), and *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003), the Court has effectively held that capital counsel have an affirmative duty to conduct a full mitigation investigation and to present the mitigation they find to the jury. That clearly did not happen here.

It is suggested that the only remedy is to remand the matter to the trial court for a new trial so that effective and competent counsel may be appointed to represent Mr. Powell at the new trial. Such a course of action is necessary to

¹⁷⁰ *Nix v. Whiteside*, 475 U.S. 157, 188 (1986). See also DR7-101(A)(3).

¹⁷¹ See *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001).

protect Mr. Powell's due process rights under the the OHIO CONST. art. I, §§ 9, 10, and 16, and U.S. CONST. amend. V, VI, VIII and XIV.

Constitutionality of Death Penalty

Proposition of Law No. Sixteen:

Ohio's Death Penalty Law is unconstitutional both in the abstract and as applied.

For at least the following reasons, Ohio's death penalty scheme is unconstitutional in general and as applied to Mr. Powell because it violates a capital defendant's rights to a fair trial and both substantive and procedural due process under the Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution and the comparable provisions of the Ohio Constitution. In addition, Ohio's death penalty law violates the Cruel and Unusual Punishment Clauses of both the federal and Ohio Constitutions. In addition, Ohio's death penalty law unconstitutionally violates international law and treaties to which the United States has made itself a party. Violating international law and treaties violates also the Supremacy Clause of the United States Constitution. Article VI.

It is a too-often used catchphrase that "death is different."¹⁷² In truth, however, it is. As various appellants have repeatedly argued before this Court, the finality and irreversibility of the death penalty requires heightened standards of due process and a greater assurance of reliability and appropriateness.

Admittedly, the death penalty is an established part of Ohio's law. And while there may be frustration on the part of some in the failure of the state not

¹⁷² *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

to have executed more than it has, though the pace is certainly speeding up, the reasons are not nefarious. Rather, the State's failure to kill is a function of the very processes the State has elected to set in motion. What is telling is not that so many have been sentenced to die but not killed. It is that so many who have been sentenced to die get some sort of judicial relief or have, at least, substantial claims to present to the courts.

The problem, in short, is that the alleged "procedural safeguards," too often work not at the time of charging defendants or trying them but years down the road. In *State v. McGuire* (1997), 80 Ohio St.3d 390, 686 N.E.2d 1112 (1997), Justice Pfeifer reviewed the case of the factually innocent Randall Dale Adams, *McGuireI*, 80 Ohio St. 3d at 405, 686 N.E.2d at 1124 (Pfeifer, J., concurring in judgment only), who spent some twelve years in prison in Texas, many of them on death row. There have now been [1998] 100 exonerations from death rows around the country.¹⁷³ Perhaps more horribly, there is significant evidence that at least some factually innocent persons have been executed, a state of affairs which, in the words of Justice Blackmun, is "close to simple murder."¹⁷⁴

Beyond the danger of executing the innocent, however, and it seems likely more frequently, is the danger of executing those who simply do not deserve death. The effort to weigh the aggravating circumstances of a crime against the mitigation presented about a defendant's life is inherently fanciful, requiring the balance of things of altogether different sorts, the comparison not of apples and oranges but apples and automobiles. Precision is simply not possible, and

¹⁷³ See Death Penalty Information Center, *Innocence and the Death Penalty*, viewed March 16, 2006, <http://deathpenaltyinfo.org/article.php?did=412&scid=6>.

¹⁷⁴ *Herrera v. Collins*, 506 U.S. 390, 446 (1993).

the fact that an imprecise process is repeated by an appellate court or two does not add precision to it but, rather, as any statistician can explain, multiplies the imprecision.

As Justice Blackmun recognized in *Callins v. Collins* 510 U.S. 1141, 1145 (1994), (Blackmun, J., dissenting from the denial of certiorari), “the death penalty experiment has failed.” And the failure is due, simply, to the fact that there is no rational way to determine who shall live and who shall die. What cannot rationally and consistently be decided, cannot, without violating the Due Process and Cruel and Unusual Punishment Clauses, be imposed. What cannot be done right ought not be done at all.

This Court has repeatedly, and without reaching the core issues involved, chanted the mantra of constitutionality. In *State v. Reynolds*, 80 Ohio St.3d 670, 685, 687 N.E.2d 1358, 1373 (1998), for instance, it was written:

Reynolds argues that Ohio's capital sentencing scheme violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution. We summarily reject this argument.

Appellant asks this Court to reconsider. The short of it is that Ohio's death penalty law is unconstitutional for at least the following reasons:

(1) it permits imposition of the death penalty in an arbitrary and capricious and discriminatory manner due to the uncontrolled discretion afforded elected county prosecutors in determining when to seek the death penalty;

(2) it requires proof of aggravating circumstances at the guilt phase of a capital trial rather than segregating statutory aggravating circumstances from the determination of guilt thereby providing a mechanism for individu-

alized determination and narrowing of the categories of defendants eligible for the death penalty.¹⁷⁵

(3) the statutory capital felony murder scheme permits aggravating circumstances merely to repeat elements of the aggravated felony murder thereby providing no effective and meaningful narrowing, see *Lowenfield v. Phelps*, 484 U.S. 231 (1988);

(4) because a trial court has no discretion to dismiss death specifications in the interests of justice when a capital defendant goes to trial—discretion a judge has when such a defendant elects to enter a plea of guilty, see Crim.R. 11(C)(3)—it penalizes capital defendants who exercise their constitutional right to trial;

(5) by failing to require either the conscious desire to kill or premeditation and deliberation as the culpable mental states for a death sentence, Ohio violates the constitutional requirements of heightened reliability and the avoidance of arbitrariness and caprice in death sentences;

(6) it wrongfully requires that any pre-sentence report requested by the defendant be submitted to the sentencer, even if the report contains prejudicial or otherwise irrelevant and inadmissible material, OHIO REV. CODE § 2929.03(D)(1);

(7) it does not require the state to prove either that there are no mitigating factors or that death is the only appropriate penalty in a particular case;

(8) it does not provide any means for ensuring proper and consistent weighing of aggravating and mitigating circumstances;

¹⁷⁵ See *Zant v. Stephens*, 462 U.S. 862 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983);

(9) it shifts the burden of proof at the mitigation phase of the trial from the State to the defendant as the defendant is required to prove by a preponderance of the evidence the existence of mitigating factors, thereby preventing the sentencer from considering mitigation which, while persuasive, is insufficiently proved;

(10) it precludes considerations of sympathy and mercy both in the abstract and in reaching the individualized determinations necessary; a jury which might, on a particular set of facts, wish to afford a defendant mercy is precluded by its oath from doing so;

(11) it fails to provide the option of a life sentence when there are no mitigating factors;

(12) it fails to permit a sentencer to grant mercy based on mitigation if mitigation is outweighed beyond a reasonable doubt by aggravating circumstances;

(13) it fails to require – or even to permit, the sentencer to determine whether a death sentence is appropriate to the nature and circumstances of the offense and offender or proportional to other cases where death sentences were sought, and it fails to require that such determinations – when resulting in a sentence of death, be made in such a way as to be reviewable;

(14) because it does not require the sentencing jury to identify mitigating factors it found, it makes meaningful appellate review impossible;

(15) because it provides appellate proportionality review only through examination of cases where a death sentence has been imposed, *State v. Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383 (1987). paragraph one of the

syllabus, it creates a closed, self-referential system that allows for no real, fair, and adequate determination of proportionality and appropriateness;

(16) it fails in practice to require appellate review of whether a death sentence is appropriate, although OHIO REV. CODE § 2929.05(A) requires such a determination and due process requires that a state, having decided to provide a process, must do so in a constitutionally adequate manner and may not ignore those processes it has created, see, generally, *Ross v. Moffitt*, 417 U.S. 600 (1974); *Mayer v. Chicago*, 404 U.S. 189 (1971); *Douglas v. California*, 372 U.S. 353 (1963);

(17) it fails to satisfy the Eighth Amendment prohibition against cruel and unusual punishment by “the evolving standards of decency that mark the progress of a maturing society,” *Trop v. Dulles*, 356 U.S. 86, 101 (1958);

(18) it fails to satisfy due process by interfering with the fundamental right to life absent compelling evidence of its necessity or any showing that the same interest cannot be served by a less restrictive means such as life without the possibility of parole, see, e.g., *Commonwealth v. O’Neal*, 327 N.E.2d 622 (Mass. 1975);

(19) it utilizes lethal injection absent a specific request from the condemned, but lethal injection is cruel and unusual punishment because the state cannot demonstrate the ability to carry out a death sentence without unnecessarily inflicting torture and pain on the person being executed;

(20) it inflicts extreme psychological, emotional, and physical distress and anxiety prior to the execution, see *Trop*, *supra* (analyzing the extreme

psychological anxiety and distress of a punishment in determining that it was unconstitutional); and

(21) it violates the Supremacy Clause, Paragraph II, Article VI, United States Constitution, providing that the judges of every state are bound by international treaties which the United States has entered “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,” for Ohio's death penalty law violates the Organization of American States Treaty which binds the United States to the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. When state law conflicts with international law, state law must yield. See, *e.g.* *Zschernig v. Miller*, 389 U.S. 429, 440 (1968);

(22) as a reimposed death penalty, it violates the custom and practice of civilized nations, which determine customary law, see *The Paquete Habana*, 175 U.S. 677 (1900);

(23) it violates the expectations of the United Nations and the Council of Europe, see United Nations Charter, Articles 55 and 56; International Covenant on Civil and Political Rights; Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty, European Treaty Series No. 114, May 1983;

(24) it also violates United States treaty obligations under the International Covenant on Civil and Political Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment all of which are binding on Ohio through the Supremacy Clause.

Because Mr. Powell was sentenced to an unconstitutional punishment by unconstitutional means, his death sentence violates his rights under the OHIO CONST. art. I, §§ 5, 9, 10, and 16, and U.S. CONST. amend. V, VI, VIII and XIV.

And because his sentence violates both international customary law and also treaties to which the United States is a party, his sentence also violates the Supremacy Clause, U.S. CONST. art. VI.

Prosecutorial Misconduct

Proposition of Law No. Seventeen:

Prosecutorial misconduct during closing argument at the mitigation phase of the trial deprives a criminal defendant of a fair sentencing determination.

Mr. Powell recognizes that a prosecutor is entitled to substantial latitude in his closing remarks.¹⁷⁶ The test is whether it is clear beyond a reasonable doubt that the jury would have recommended the death penalty absent the prosecutor's improper remarks.¹⁷⁷ In this case, appellant submits that the conclusion is far from clear.

Initially, the prosecutor, in the litigation-phase closing argument, committed misconduct by commenting on Mr. Powell exercising his right to remain si-

¹⁷⁶ *E.g.*, *State v. Beuke*, 38 Ohio St.3d 29, 32, 526 N.E.2d 274, 279 (1988); *State v. Brown*, 38 Ohio St.3d 305, 316, 528 N.E.2d 523, 537 (1988).

¹⁷⁷ *E.g.*, *State v. Maurer* 15 Ohio St.3d 239, 267-68, 473 N.E.2d 768, 793-94, (1984), (reformulating the test of *State v. Smith*, 14 Ohio St.3d 13, 14-15, 470 N.E.2d 883, 885-86 (1984), for application to the penalty phase of a capital trial).

lent at all times. The prosecutor told the jury. "You have Wayne Powell not even acknowledging the act." ¹⁷⁸

This remark is highly improper and there is nothing in the record that suggests that Mr. Powell in any way "invited" such a statement by the prosecutor. It is highly improper for a prosecutor to comment on a defendant exercising his constitutional rights.

It cannot be disputed that Mr. Powell had been given his Miranda rights prior to questioning by Detective Gast shortly after the fire. Clearly the use of a criminal defendant's post-Miranda silence to prove his guilt violates his Fifth Amendment right to remain silent. Of course, Mr. Powell was under no obligation to testify or otherwise present evidence, be it at the first phase of the trial or, as relevant here, the mitigation phase.

For the prosecutor to make such a comment is in direct violation of the rule in *Doyle v. Ohio*, 426 U.S. 610 (1976), that prohibits any comment on an accused's assertion of his right to remain silent. On this basis alone the prosecutor's remark and violation of Mr. Powell's United States and Ohio Constitutional rights are of such a quality to require a new mitigation hearing. In addition, it can be construed as commenting on a lack of remorse by Mr. Powell, which is also improper.¹⁷⁹

But this is not all the prosecutor stated in the mitigation-phase closing argument that was improper. The prosecutor urged the jury to aggregate the aggravating circumstances by telling the jury:

¹⁷⁸ Tr. Vol. XII at 2611.

¹⁷⁹ *State v. Stumpf*, 32 Ohio St.3d 95, 512 N.E.2d 598 (1987); *State v. DePew*, 38 Ohio St.3d 275, 528 N.E.2d 542 (1988).

Because I submit to you the aggravating circumstances in this case have incredibly great weight.

During the course of conduct or killing or attempting to kill two or more people. There were eight people in that house. Four people died. That's a huge significant item.¹⁸⁰

The problem with this comment is that it encouraged the jury to "stack" or not treat each aggravating factor and count of conviction individually. This is of course highly improper and a direct violation of the established case law.

Later, during the rebuttal closing argument, the prosecutor made additional, improper comments. First, the prosecutor commented on the nature and circumstances of the offense by stating; "He set a fire in such a way that he trapped people inside a house." Trial counsel immediately objected to this reference to non-statutory aggravating factors, but was overruled by the trial court.¹⁸¹

The prosecutor then went on to tell the jury:

Knowing people were going to die. Knowing there was going to be more than one person that was going to die. He knew Rosemary McCollum was not going to get out of that house because she was an invalid in a bed. He knew ht the house was full of kids. Tant's what he did.

How does that relate to these aggravating circumstances? He used fire as a weapon. How serious is fire as a weapon? You heard from a whole bunch of witnesses during the first phase what the house was like. You heard from the firefighters crawling on their hands and knees looking for bodies because they couldn't see, and they had to feel their way along the floor, and they were men in protective gear. *Can you imagine what is was like inside that house?*¹⁸²

Once again trial counsel objected, and once again the trial court overruled the objection, giving the jury the impression that the trial court approved of this highly improper remark.

¹⁸⁰ Tr. Vol. XII at 2611-12.

¹⁸¹ Tr. Vol. XII at 2623.

¹⁸² Tr. Vol. XII at 2623-24 (emphasis added).

While it is true that the jury is required to consider the nature and circumstances of the offense, it may consider those things only as mitigation.¹⁸³ In this case, what the prosecutor did through his remarks was to treat the nature and circumstances of the offense as an aggravating factor. That is a clear contravention of the rule enunciated in the first syllabus paragraph of *Wogenstahl*.

Referencing the suffering of a individual, or asking a jury to place themselves in the victims' shoes, would not be admissible at trial as substantive testimony.¹⁸⁴

This remark of the prosecutor also consisted of arguing facts not in evidence and improper victim impact, either of which is improper.

Later, the prosecutor in the rebuttal closing argument went on even further. After commenting on the mitigation evidence offered, the prosecutor then told the jury:

Think about that. Never takes responsibility. How is a life sentence going to be adequate in a case like this?¹⁸⁵

Besides once again commenting on Mr. Powell exercising his constitutional right to remain silent, this remark also has the effect of encouraging the jury to have sympathy for the victim, which is improper. This Court has found similar

¹⁸³ See, e.g., *State v. Wogenstahl*, 75 Ohio St.3d 344, 662 N.E.2d 311 (1996), paragraphs one and two of the syllabus.

¹⁸⁴ See, generally, *State v. White*, 85 Ohio St.3d 433, 445 46, 709 N.E.2d 140, 153-54 (1999). The prosecutor's invocation of the victims' suffering in argument was improper. See *State v. Reynolds*, 80 Ohio St.3d 670, 679, 687 N.E.2d 1358, 1369 (1998).

¹⁸⁵ Tr. Vol. XII at 2628.

remarks improper.¹⁸⁶ It is also significant that counsel for Mr. Powell did not have the opportunity to counter this improper argument after rebuttal.

Mr. Powell recognizes that some of these instances of misconduct were not objected to by trial counsel. As such, this Court must examine the errors on the basis of plain error.¹⁸⁷ And these errors, it is submitted, constitute plain error. And plain error is, necessarily harmful, for it “affect[s] substantial rights.”¹⁸⁸

The errors addressed here violated Mr. Powell’s rights to due process and equal protection of the laws, represented a violation of his right to effective assistance of counsel, and subjected him to cruel and unusual punishment, all in violation of the OHIO CONST. art. I, §§ 1, 2, 5, 9, 10, 16, and 20, and U.S. CONST. amend. V, VI, VIII and XIV.

Mitigation Instructions

Proposition of Law No. Eighteen:

Errors in the mitigation phase jury instructions of a capital trial violate a defendant’s constitutional rights and require resentencing.

During the penalty phase jury instructions the trial court made a number of errors in its instructions. These errors were of such magnitude as to deprive Mr. Powell of a fair mitigation hearing. The result is a violation of his right to due process and protection from cruel and unusual punishment as guaranteed under the Sixth, Eighth, Ninth, and Fourteenth Amendments to the United

¹⁸⁶ *State v. Mills*, 62 Ohio St.3d 357, 582 N.E.2d 972 (1992).

¹⁸⁷ CRIM.R. 52(B).

¹⁸⁸ CRIM.R. 52(B).

States Constitution and by Sections 9, 10, and 16, Article I of the Ohio Constitution.

In a motion filed early in the case,¹⁸⁹ Mr. Powell asked that the trial court instruct the jury, in the penalty phase, to consider mercy in its deliberations. The State, on March 15, 2007, filed a memorandum opposing the defense request. In an order dated July 5, 2007, the trial court denied the motion. As a result, in its preliminary instructions, the trial court told the jury that mitigating factors are those which “weigh in favor of a decision that a life sentence rather than a death sentence is appropriate.”¹⁹⁰ The same statement was made in the final jury charge.¹⁹¹

While this Court has repeatedly held that an actual instruction on mercy is improper,¹⁹² it is proper to tell a sentencing jury that mitigating factors should be considered with “fairness and mercy.”¹⁹³

The trial court also erred in not instructing the jury that Mr. Powell must prove the mitigating factors by a preponderance of the evidence. The instructions are silent as to what burden of proof to apply in proving the mitigating factors. The jury, at each phase, was repeatedly instructed that the burden is proof beyond a reasonable doubt. It is conceivable that they jury, in the absence of an explicit instruction, was of the view that the mitigating factors must be proven beyond a reasonable doubt, which is, of course, completely wrong.

¹⁸⁹ Motion to Instruct Jury to Consider Mercy in Mitigation Phase, Motion No. 46, Dkt. 63,

¹⁹⁰ Tr. Vol. XI at 2385.

¹⁹¹ Tr. Vol. XI at 2642-43.

¹⁹² *E.g.*, *State v. O’Neal* (2000), 87 Ohio St.3d 402, 416.

¹⁹³ *See, e.g.*, *State v. Garner*, 74 Ohio St.3d 49, 57, 656 N.E.2d 623, 632 (1995), where the court held that “Such a charge constitutes adequate instruction concerning the extension of mercy to a capital defendant.”

Finally, the instructions for the penalty phase failed to define the term “principal offender” although that term was used throughout the instructions. The term “principal offender,” as it is used in OHIO REV. CODE § 2929.04(A)(7), means “the actual killer.”¹⁹⁴ This Court has found that a jury must be instructed as to that term.¹⁹⁵ Thus, the penalty phase instructions were deficient in this regard as well.

These are not trivial errors. These errors in the mitigation phase jury instructions deprived Mr. Powell of his right to due process, a fair trial and reliable verdict and subjected him to cruel and unusual punishment, all as protected by OHIO CONST. art. I, §§ 9, 10, and 16, and U.S. CONST. amend. V, VI, VIII and XIV.

Judicial contact with Jurors before independent sentencing

Proposition of Law No. Nineteen:

The trial judge in a capital case may not hold an off-the-record, *ex parte* discussion with the jury after they return their sentencing verdict but before the judge imposes the sentence.

Capital trials in Ohio differ from all other trials in a number of respects. In particular, they are the only trials in which the jury has a direct role in sentencing. Yet the jury's verdict, at least if it is death, is not final. The trial court judge must determine whether to impose the recommended death sentence or, instead, to impose one of the legislatively authorized life sentences. OHIO REV. CODE § 2929.03(D).

¹⁹⁴ *State v. Penix*, 32 Ohio St.3d 369, 371, 513 N.E.2d 744, 746 (1987).

¹⁹⁵ *State v. Chinn*, 85 Ohio St.3d 548, 559-60, 709 N.E.2d 1166, 1177 (1999).

The trial court's specific job is set forth in OHIO REV. CODE § 2929.03(D)(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. [The statute then itemizes the life sentence options.]

Importantly, the statute specifically lists the factors the trial court is to consider in making its sentencing determination, and the jury's sentencing recommendation is not among them. That exclusion emphasizes the importance of the requirement that the trial court's sentencing determination be independent. It must be based solely on the evidence presented, and may not be influenced by the jury.

In this case, the jury returned its death recommendation on August 23, 2007. The verdict was read, the jury was polled, and the verdict received by the trial court and ordered filed. The trial court then thanked the jury, released them from the requirement of secrecy, and released them from jury service. The trial court then told the jury:

I do believe it would be appropriate to spend a little bit of time with you. We thank you for your service in advance and on behalf of all the parties, and we will see you back in the jury deliberation room in just a moment.¹⁹⁶

No objection was lodged by defense counsel to this procedure.

¹⁹⁶ Tr. Vol. XII at 2672.

The issue is simple; May a trial judge, consistent with his duty to make an independent determination of whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, meet with the jury and, one must assume, discuss their verdict with them, before making an independent determination of the appropriate verdict?

Mr. Powell suggests that for a judge to meet with the jury under these circumstances, particularly when the meeting is *ex parte*, impairs the judge's duty to determine independently the appropriate sentence, and to draw into question the integrity of the entire sentencing proceeding. Moreover, and despite the judge's declaration that he in fact made an independent determination, the meeting with the jury created an appearance of impropriety and violated the terms of Canon 3B(7) of the Code of Judicial Conduct, which provides, in relevant part:

A judge shall not initiate, receive, permit, or consider communications made to the judge outside the presence of the parties or their representatives concerning a pending or impending proceeding

This is structural error which strikes at the fundamental integrity of the sentencing process and cannot be cured by independent reweighing in this Court.¹⁹⁷

The net effect is that the trial court's actions violated Mr. Powell's rights to fair trial and sentencing, to due process, and to avoid cruel and unusual punishment. See OHIO CONST. art. I, §§ 9, 10, and 16, and U.S. CONST. amend. V, VI, and XIV.

¹⁹⁷ See *State v. Esparza*, 74 Ohio St.3d 660, 662, 660 N.E.2d 1194, 1195-96 (1996), quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), (“presence on the bench of a judge who is not impartial, is structural constitutional error”).

Proposition of Law No. Twenty:

Lethal injection as administered in Ohio constitutes cruel and unusual punishment and violates Mr. Powell's rights under the fifth, sixth, eighth and fourteenth amendments to the United States Constitution and Article One, Sections Nine, Ten and Sixteen of the Ohio Constitution.

The trial court in this matter imposed a sentence of death as to the aggravated murder charge. In doing so the trial court ordered that Mr. Powell's death sentence "be carried out with lethal injection." It is the position of Mr. Powell that the practice in Ohio of putting to death a person through lethal injection violates all standards of decency and is cruel and unusual punishment as that term is defined by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article One, Sections Nine, Ten and Sixteen of the Ohio Constitution.

OHIO REV. CODE § 2949.22 (B)(1) provides that death by lethal injection "shall be executed by causing the application to the person of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death[.]" This mode of punishment offends contemporary standards of decency.¹⁹⁸ It also violates the United States' obligations under the International Convention on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT). Lethal injection causes unnecessary pain. See Marian J. Borg and Michael Radelet, *Botched Lethal Injections*, 53 Capital Report, March/April 1998; Kathy Sawyer, *Protracted Execution In Texas Draws Criticism; Lethal Injection Delayed by*

¹⁹⁸ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Search for Vein, Washington Post, March 14, 1985; *Killer Lends a Hand to Find Vein for Execution*, LA Times, August 20, 1986; *Killer's Drug Abuse Complicates Execution*, Chicago Tribune, April 24, 1992; *Murderer Executed After a Leaky Lethal Injection*, New York Times, December 14, 1988; *Rector's Time Came, Painfully Late*, Arkansas Democrat Gazette, January 26, 1992; *Moans Pierced Silence During Wait*, Arkansas Democrat Gazette, January 26, 1992; *Gacy Lawyers Blast Method: Lethal Injections Under Fire After Equipment Malfunction*, Chicago Sun-times, May 11, 1994; Lou Ortiz and Scott Fornek *Witnesses Describe Killer's 'Macabre' Final Few Moments*, Chicago Sun-Times, May 11, 1994; Cf. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (Eighth Amendment proscribes "the unnecessary and wanton infliction of pain.")

Prisoners have been repeatedly stuck with a needle for almost an hour in an effort to find a vein suitable for use. Marian J. Borg and Michael Radelet, *Botched Lethal Injections*, 53 Capital Report, March/April 1998; *Murderer of Three Women is Executed in Texas*, NY Times, March 14, 1985; Kathy Sawyer, *Protracted Execution In Texas Draws Criticism; Lethal Injection Delayed by Search for Vein*, Washington Post, March 14, 1985; *Killer's Drug Abuse Complicates Execution*, Chicago Tribune, April 24, 1992; *Rector's Time Came, Painfully Late*, Arkansas Democrat Gazette, January 26, 1992. Prisoners have actually had to assist technicians in finding a vein suitable to use. *Killer Lends a Hand to Find Vein for Execution*, LA Times, August 20, 1986; *Moans Pierced Silence During Wait*, Arkansas Democrat Gazette, January 26, 1992. Equipment failures are not uncommon. *Murderer Executed After a Leaky Lethal Injection*, New York Times, December 14, 1988; Marian J. Borg and Michael Radelet, *Botched*

Lethal Injections, 53 Capital Report, March/April 1998. Gasping and choking from the prisoner is not uncommon. Marian J. Borg and Michael Radelet, *Botched Lethal Injections*, 53 Capital Report, March/April 1998. Because the prisoner is restrained and paralyzed there may be no reaction to the pain felt, but death by lethal injection is not painless. Rather, it is cruel and unusual punishment prohibited under the Eighth Amendment to the United States Constitution, the ICCPR, and the CAT.

The United States Supreme Court's decision in *Baze v. Rees*, 128 S. Ct. 1520 (2008), does not resolve this issue. The Court in *Baze* appears to have intimated that challenges to lethal injection are not foreclosed by its decision. *Baze*, 128 S. Ct. at 1537-38. See also concurring opinions of Justices Stevens and Alito, *Baze*, 128 S. Ct. at 1538-52.

It is requested that the Proposition of Law be sustained and that, under current technology, that any death sentence by lethal injection cannot be imposed without violating OHIO CONST. art. I, §§ 1, 2, 5, 9, 10, 16, and 20, and U.S. CONST. amend. V, VI, VIII and XIV, and every common standard of decency under international law.

Proposition of Law No. Twenty-one:

A criminal defendant and a criminal appellant in a death penalty case is denied due process of law guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution where the ability to conduct an independent analysis of the appropriateness of the death sentence is restricted by the Ohio Supreme Court's decision in *State v. McGuire*.

Pursuant to statute, this Court must conduct an independent review not only of the jury's recommendation of death, but also that of the trial court as well. One of the factors that the jury and the trial court were not entitled to consider was that of residual doubt, such as whether Mr. Powell was guilty of the offense or whether he was a principle offender. Mr. Powell, pre trial, filed, on February 1, 2007, a motion recognizing residual doubt as a mitigating factor. The State, on March 15, 2007, filed a memorandum opposing the motion. The trial court, on July 5, 2007, denied the motion.

It is the position of Mr. Powell that this Court, as part of its independent weighing of the appropriateness of the death sentence, should have the ability to consider whether any residual doubts exist in this case and whether they mitigate the degree of punishment so that a sentence of less than death may be imposed. Since this involves a matter of legal interpretation, this Court's standard of review is *de novo*, *State v. Sufronko*, 105 Ohio App.3d 504, 506, 664 N.E.2d 596, 597 (1995).

In *State v. McGuire*, 80 Ohio St.3d 390, 403-04, 686 N.E. 2d 1112, 1123, (1997), this Court held that residual doubts of guilt are irrelevant to the issue of whether a person convicted of a capital crime should be sentenced to death or a lesser punishment. That decision flatly precludes the capital sentencer in

Ohio from entertaining residual doubts of guilt with regard to the capital defendant's moral culpability; notwithstanding proof beyond a reasonable doubt of his or her legal culpability.

In *Oregon v. Guzek*, 546 U.S. 517 (2006), the United States Supreme Court addressed the issue of residual doubt. The Court did not resolve the issue of whether a defendant has an Eighth Amendment right to present residual doubt. However, it appears to suggest the answer is that the defendant does not have such a right, but does not do so conclusively.

Mr. Powell is mindful of this Court's decision in *McGuire* and the United States Supreme Court's decision in *Guzek*. This proposition of law is offered to preserve this issue for review by other courts.

It is requested that this Court entertain residual doubt when it conducts its independent review of the sentence of death, in order to protect Mr. Powell's due process rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding portions of Ohio Constitution.

Judicial Interference in Attorney Client Relationship

Proposition of Law No. Twenty-two:

The trial court engaged in improper contact with Mr. Powell during the trial, specifically asking questions about his satisfaction with his counsel. This is improper.

The trial court interfered with the attorney-client relationship, creating the impression that Mr. Powell had to make things part of the record about his at-

torneys. In essence, the trial judge was requiring that Mr. Powell operate without his own counsel to protect his own interests.

In determining that there was no requirement for a trial court to inquire into the reasons for a client not to testify, this Court has said that it is inappropriate for the trial judge to come between the attorney and a criminal defendant:

Reasons vary for rejecting the requirement. Such an inquiry is thought to be simply unnecessary. Alternatively, it may be thought harmful. As Chief Justice Erickson of the Colorado Supreme Court noted, an inquiry “unduly interfere[s] with the attorney-client relationship.” *People v. Curtis* (Colo.1984), 681 P.2d 504, 519 (concurring opinion). An inquiry “places the judge between the lawyer and his client and can produce confusion as well as delay.” *Underwood v. Clark* (C.A.7, 1991), 939 F.2d 473, 476. For example, questioning can lead into the judge's evaluation of the wisdom of the defendant's decision, the substance of the testimony, or simply evoke a dramatic change in a previously carefully considered trial strategy. See, e.g., *United States v. Goodwin* (C.A.7, 1985), 770 F.2d 631, 636. “Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right.” *Brooks v. Tennessee* (1972), 406 U.S. 605, 612, 92 S. Ct. 1891, 1895, 32 L.Ed.2d 358, 364.¹⁹⁹

As the case progressed toward trial, the trial court stood between Mr. Powell and his counsel. The trial court did this by asking Mr. Powell if he had any issues that he needed to address with his counsel. In doing so, the trial court confused the defendant about both the court's role and the defendant's obligations. The defendant expressed this confusion and the Court reinforced it:

THE DEFENDANT: So just in case something happens where I have to even go down the road and appeals have to be done that I can have—I can have – basically get all bases covered or something. That's what I'm thinking about.

THE COURT: Well, that is a very similar way of handling the case that the court has to handle it. In other words, I don't know any of the facts really, the facts that will come out at trial, as far as proof of whether or not you did this crime. Obviously I know the alleged factual

¹⁹⁹ *State v. Bey*, 85 Ohio St.3d 487, 499, 709 N.E.2d 484, 497 (1999).

scenario, but I don't know the details. That's part of the court's function is we don't necessarily know the details as it goes forward. Your attorneys know details. The prosecutor knows the details. The court hears it for the first time at hearings either before trial or at trial where we get more details.

So I also have to look down the road to make sure that everything is protected in case there is a conviction and in case there is a sentencing and in case there is a course of appeals, such as we're building a record right now. And I'll order this record sealed so that it's not made known to anyone until after the trial so that your concerns can then be shown that they were placed on the record.

But we're doing all of this to protect the record so that just in case someone is looking at the case, you know, five years down the road, six, ten, eight, twelve years down the road as far as some sort of an appeal that we have made a record or everything we did so they can understand what's happening.

And that's basically what you're doing also is you're looking down the road, trying to make sure that just in case this case ever ends up in somebody's hands in, you know, federal Court of Appeals of some sort, you want to know, make sure that they understand that these are the thoughts and concerns you were having as the trial was being prepared and as the trial was going on.

Is that fair to say?

THE DEFENDANT: Yeah, yeah, yeah, yeah. Is like a lot like I got—like in there I got like newspaper clippings and like.

The trial court first invited Mr. Powell to bring the issues in late June:

And, Mr. Powell, with your attorneys in the meantime, you have an issue that you want to address with the court before July 23rd, just tell your attorneys, have them contact the court, and we'll have you brought over as soon as possible. And we'll just make sure we handle all your issues as they come along. Is there anything you need to address with your attorneys that you need to address at this time?

MS. BARONAS: Say nothing.

THE DEFENDANT: Nothing²⁰⁰

This first invitation resulted in a conference with the defendant and one of his trial counsel on June 28, 2007. The conference was prompted by a letter that has not been preserved as part of the record. The prosecutors were aware of the conference but were excluded.²⁰¹ During that conference Mr. Powell expressed concerns about the system, particularly about the racial discrimina-

²⁰⁰ Hearing, June 21, 2007, p. 23.

²⁰¹ Hearing, June 28, 2007, p. 3.

tion, his communication with his mother, and his medication. There was a vague reference to Mr. Thebes being white and the defendant being black.²⁰² The Court recognized the incongruity of the inquiry:

THE COURT: Well—

THE DEFENDANT: It's—I don't know how—I don't know how to break it down.

THE COURT: I don't want too many questions because I don't want to pry into your representation by Mr. Thebes. But at the same time, I don't want to neglect any responsibility that I may have to answer your questions at this time. And now you're expressing some concerns.

The invitations continued into the trial:

THE COURT: That was my inclination as the way things have been going but I want to give Mr. Powell the opportunity if in the meantime over the next day or so there is something that comes up, Mr. Powell I do have to leave it to you to bring that to your Attorney's attention so they can bring it to the Court's attention so we can address it.

Basically if you have an issue and you don't raise it with your attorneys or if you have a concern about something and you don't raise it with your attorneys there is no way for me to know about that and I can't address it. So I have to leave some responsibility with you as far as getting your thoughts to us. You can do that privately with your attorneys and we can deal with it from there. Do you understand that?

THE DEFENDANT: Okay.²⁰³

These continued inquiries placed the Court between Mr. Powell and his attorneys. This violated Mr. Powell's rights under OHIO CONST. art. I, §§ 9, 10, and 16, and U.S. CONST. amend. VI and XIV.

²⁰² Hearing, June 28, 2007, p. 12.

²⁰³ Hearing, August 6, 2007, p. 50.

Proposition of Law No. Twenty-three:

Cumulative errors may deprive a criminal defendant and criminal appellant of a fair trial in violation of His Rights Under The Fifth, Sixth, Eighth, Ninth, And Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

In *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), this Court recognized the existence of cumulative error by holding at paragraph two of the syllabus that a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial. This Court cited *DeMarco* in *State v. Garner* (1995), 74 Ohio St.3d 49, 64, recognizing that the aggregate effect of multiple errors, which may individually be harmless, may be prejudicial.

In this case, and should this Court conclude that the errors complained of in the various assignments of error were not individually prejudicial, it should recognize that their combined effect was prejudicial.

Proposition of Law No. Twenty-four:

The jury wrongly concluded that the Aggravating Circumstances outweighed the Mitigating Factors beyond a Reasonable Doubt.

Proposition of Law No. Twenty-five:

The judge wrongly determined that the Aggravating Circumstances outweighed the Mitigating Factors beyond a Reasonable Doubt.

Proposition of Law No. Twenty-six:

In conducting its own independent weighing of the Aggravating Circumstances against the Mitigating Factors, this court should conclude that the Mitigating Factors are not outweighed beyond a reasonable doubt.

Because these three propositions of law all deal with closely related issues, they will be argued together.

A. Introduction.

The ultimate question at the mitigation phase of the trial, and then separately for this Court, is whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. The decision is to be made separately for the aggravating circumstances associated with each victim.

First, the jury concluded that, as to each victim, the aggravating circumstances outweighed the mitigating factors. Accordingly, the jury recommended death sentences as to each victim. The trial court judge, after conducting his weighing of the aggravating circumstances and mitigating factors, OHIO REV. CODE § 2929.03(D)(3), agreed. As Mr. Powell explains in his argument supporting these assignments of error, each of those decisions separately requires that the death sentences be reversed.

In addition, and should this Court determine that the errors of the judge and jury below do not require reversal, this Court has the separate duty to conduct its own independent weighing of the aggravating circumstances against the mitigating factors. OHIO REV. CODE § 2929.05(A). On that independent weighing, this Court should conclude that the aggravating circumstances do not outweigh the mitigating factors beyond a reasonable doubt.

B. Aggravating Circumstances

The aggravating circumstances for each victim must be considered and weighed separately. *State v. Cooney* (1989), 46 Ohio St.3d 20, paragraph three of the syllabus. And the aggravated murder charges, and attendant specifications, for each victim merge at sentencing. *State v. Huertas* (1990), 51 Ohio St.3d 22, 28. In this case, the aggravating circumstances found by the jury, separately determined as to each victim, and which the jury was instructed to weigh in reaching its mitigation phase verdicts, see Tr. Vol. XII at 2638-41, are as follows:

1. Count Two, Mary McCollum. The aggravated murder was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons. OHIO REV. CODE § 2929.04(A)(5); that the defendant was committing aggravated arson, and that the defendant was the principal-offender in the commission of the aggravated murder, OHIO REV. CODE § 2929.04(A)(7).

2. Count Seven, Rose McCollom. The aggravated murder was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons. OHIO REV. CODE § 2929.04 (A)(5); that the defendant was

committing aggravated arson, and that the defendant was the principal offender in the commission of the aggravated murder, OHIO REV. CODE § 2929.04(A)(7).

3. Count Nine,²⁰⁴ Sanaa Thomas. The aggravated murder was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons. OHIO REV. CODE § 2929.04 (A)(5); that the defendant was committing aggravated arson, and that the defendant was the principal offender in the commission of the aggravated murder, OHIO REV. CODE § 2929.04 (A)(7); and the offense was committed while purposely causing the death of another who was under 13 years of age at the time of the commission of the offense.

4. Count Ten, Jamal McCollum-Meyers. The aggravated murder was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons. OHIO REV. CODE § 2929.04(A)(5); that the defendant was committing aggravated arson, and that the defendant was the principal offender in the commission of the aggravated murder, OHIO REV. CODE § 2929.04(A)(7); and the offense was committed while purposely causing the death of another who was under 13 years of age at the time of the commission of the offense.

C. Mitigating Factors

The evidence in mitigation is extensive. For convenience, it will be discussed in categories, rather than in the order it was presented to the jury.

²⁰⁴ Identified in the transcript as Count Seven, but identified on the jury verdict forms as Count Nine

1. *Family history.* The history of Wayne Powell's family is horrific.

His father, Isaac, was a regular user of illegal substances. He often provided Wayne and his siblings with drugs and alcohol at an early age, prior to age ten. He had a history of violence and criminal behavior, culminating in the shooting murder of a relative. For this crime he served a period of incarceration of twenty years. During this time he presented nothing but a negative role model for Wayne. Wayne's father also reported to the jury that his own parents were chronic substance abusers, as were other family members.

Beatrice, Wayne's mother, harbored a great deal of resentment toward her husband, which she transferred to Wayne. She appears to have had significant mental health issues that prevented her from parenting in an effective manner. There was at least one suicide attempt. She never had the financial or family support to effectively parent her children.

Wayne's siblings also appear to have engaged in a lifetime of sporadic work and no real accomplishments, with criminal court contacts from time to time.

2. *Family Life.* Growing up in Wayne's family was a nightmare.

Wayne's father beat the children. Most of the time he was with other women and drank a lot. He would hit them with a belt, during his infrequent periods at home. While at prison he was of absolutely no help to the family at all. There is no question that he cared little for the children.

Wayne's mother had to work to support her family and was forced to leave the children at home alone, unsupervised. It appears that she was overwhelmed with the responsibilities of work, raising a family, and protecting her sons from the streets.

3. *Other Relationship.* Wayne's relationship with Mary McCollum was often turbulent. It was an on again, off again relationship. Wayne apparently could not control his feelings and often acted impulsively.

D. Weighing

1. *The Jury.* The jury's weighing of these factors was skewed for at least three reasons.

First, in determining how much weight to give the aggravating circumstances, and in trying to keep each victim separate, and not aggregate the deaths, they had the urging of the prosecutor that it was of particularly great weight, essentially insurmountable weight because there were four victims. As has been argued in Proposition of Law No. 18, that is simply wrong. While that is hardly mitigating, it reduces very substantially the weight to be given to that specification.

The result of all this, where mitigation is great and aggravation considerably less than the jury believed, is that the jury's sentencing recommendations are unreliable. And that means that the jury has failed in its role as gatekeeper to the death penalty. As a consequence, the death sentences imposed on Mr. Powell violate his rights under the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and also under the corresponding provisions of the Ohio Constitution.

2. *The Court.* The trial court's opinion is infected with some of the problems which infected the jury's sentencing verdict and some additional problems.

The trial court's opinion pursuant to OHIO REV. CODE § 2929.03(F) does not offer any detail about precisely how it determined the weight to be afforded to the aggravating circumstances.

The result of all this, where mitigation is both great and greater than the trial court believed and where aggravation is both considerably less than and different than the trial court believed, is that the trial court's sentencing determinations are unreliable. And that means that the trial court failed in its role as the gatekeeper to the death penalty. As a consequence, the death sentences imposed on Mr. Powell violate his rights under the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and also under the corresponding provisions of the Ohio Constitution.

3. *Independent Weighing.* This Court's own independent weighing should result in life sentences.

The crimes were horrible. But the crimes are not weighed in this Court's independent assessment of whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. What is weighed are the aggravating factors as to each victim.

There is no doubt that those are serious matters. But, and with all respect to the families and friends of the victims, there are graver ones.

This is not a case of the OHIO REV. CODE § 2929.04(A)(8) specification. Mr. Powell was not convicted of killing a witness to prevent prosecution. That specification strikes at the very heart of our legal system, indeed, of any legal system. This is not an OHIO REV. CODE § 2929.04(A)(4) specification of a killing by a lifer in prison, where, it could be argued, there can be no other meaningful pu-

nishment than death. This is not a case of a contract killing, OHIO REV. CODE § 2929.04(A)(2), or of the assassination of the President, OHIO REV. CODE § 2929.04(A)(1), or of killing a law enforcement officer while on duty or because the victim was a law enforcement officer. OHIO REV. CODE § 2929.04(A)(6). Those specifications, Mr. Powell suggests, are worse than the ones in this case.

So while the aggravation is great, it could be much greater.

At the same time, this is a case where there is very great mitigation. There is Mr. Powell's family history; his personal history of abuse and neglect; the sexual assault while at TICO, his mental problems which are not only worthy of weight in themselves, under OHIO REV. CODE § 2929.04(B)(7), but also of weight within the ambit of OHIO REV. CODE § 2929.04(B)(3). All of these mitigate.

In addition, it is clear that Dr. Graves was of the opinion that Mr. Powell had, in the past, adjusted well to an institutional environment, or in other words, prison. This assertion by the defense was not the subject of rebuttal testimony by the State.

Finally, there is some mitigating circumstances in the nature and circumstances of the offense. Wayne and Mary McCollum had a long standing relationship. It was often marked by conflict and periods of separation. It also appears that they would have arguments, only to reconcile. It must be remembered that this relationship lasted over ten years. It appears that this is a crime of passion. This provides some mitigation for this Court to consider.

On fair balance, the mitigation outweighs the aggravation.

Conclusion

For all of the reasons set forth above, Mr. Powell's rights under the Constitution of the United States and the Ohio Constitution were violated and he was denied a fair trial and sentencing proceeding. Accordingly, this Court should adopt his Propositions of Law, vacate his death sentence, and either impose a life sentence, remand the case to the trial court for a new sentencing proceeding or a new trial.

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Certificate of Service

I, counsel for Wayne S. Powell, certify that on June 27, 2008, I served a copy of this Merit Brief and Appendix on the government by depositing it in the United States mail, first class postage prepaid, addressed to:

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Appendix

FILED
LUCAS COUNTY SUPREME COURT OF OHIO

07-2027

STATE OF OHIO,

NOV -8 P 1:10

Supreme Court Case No.:

Appellee,

COMMON PLEAS

On Appeal from the
Lucas County Court of
Common Pleas

vs.

WAYNE S. POWELL,

Appellant.

Common Pleas
Case No. CR07-3581



DEATH PENALTY CASE

NOTICE OF APPEAL OF APPELLANT, WAYNE S. POWELL

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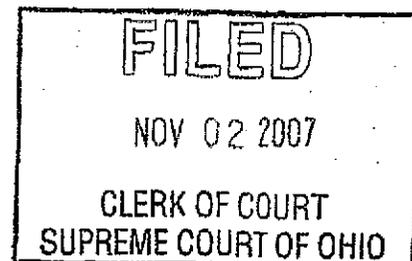
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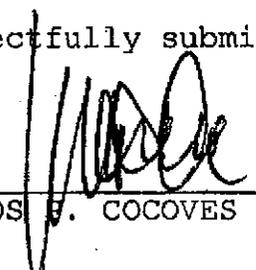
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Notice of Appeal of Appellant, WAYNE S. POWELL

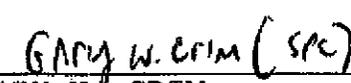
Appellant, WAYNE S. POWELL, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lucas County Court of Common Pleas pronounced, file-stamped, and journalized September 27, 2007. The R.C. 2929.03(F) Opinion was filed and journalized on September 27, 2007.

This is a capital case in which the offense occurred after January 1, 1995.

Respectfully submitted,



SPIROS P. COCOVES

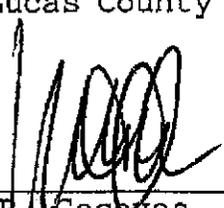


GARY W. CRIM

COUNSEL FOR APPELLANT,
WAYNE S. POWELL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing notice of appeal was delivered by hand to the office of the Lucas County Prosecuting Attorney the 13 day of November 2007.



Spiros P. Cocoves
COUNSEL FOR APPELLANT,
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FILED
LUCAS COUNTY

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COMMON PLEAS COURT
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IN THE COMMON PLEAS COURT, LUCAS COUNTY, OHIO

STATE OF OHIO	*	G-4801-CR-0200603581-000
Plaintiff	*	
	*	
v.	*	
	*	JUDGMENT ENTRY
WAYNE POWELL	*	
Defendant	*	JUDGE GARY G. COOK

On September 13, 2007, defendant Wayne Powell's sentencing hearing was held pursuant to 2929.19. Court reporter Kelly Wingate and the State's attorneys Christopher Anderson, Tim Braun and Jevne Meader were present. Defendant and his counsel, John Thebes and Ann Baronas were present and afforded all rights pursuant to Criminal Rule 32. The Court has considered the record, oral statements, victim impact statement (in a limited degree), a pre-sentence report was not prepared (at the request of the defendant), as to count one the Court also considered the principles and purposes of sentencing under R.C. Section 2929.11, and has balanced the seriousness and recidivism factors under R.C. Section 2929.12.

This cause was tried by a jury of twelve upon the charges against the defendant for the offenses of:

- count 1 aggravated arson, 2909.02(A)(1), F-1;
- count 2 aggravated murder, 2903.01(A)(F), an unclassified Felony, and specifications 2929.04(A)(5), & 2929.04(A)(7);
- count 3 aggravated murder, 2903.01(A)(F), an unclassified Felony, and specifications 2929.04(A)(5), & 2929.04(A)(7);
- count 4 aggravated murder, 2903.01(A)(F), an unclassified Felony, and specifications 2929.04(A)(5), 2929.04(A)(7), & 2929.04(A)(9);
- count 5 aggravated murder, 2903.01(A)(F), an unclassified Felony, and specifications 2929.04(A)(5), 2929.04(A)(7), & 2929.04(A)(9);

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count 6 aggravated murder, 2903.01(B)(F), an unclassified Felony, and specifications 2929.04(A)(5), & 2929.04(A)(7);
 count 7 aggravated murder, 2903.01(B)(F), an unclassified Felony, and specifications 2929.04(A)(5), & 2929.04(A)(7);
 count 8 aggravated murder, 2903.01(B)(F), an unclassified Felony, and specifications 2929.04(A)(5), 2929.04(A)(7), & 2929.04(A)(9);
 count 9 aggravated murder, 2903.01(B)(F), an unclassified Felony, and specifications 2929.04(A)(5), 2929.04(A)(7), & 2929.04(A)(9);
 count 10 aggravated murder, 2903.01(C)(F), an unclassified Felony, and specifications 2929.04(A)(5), 2929.04(A)(7), & 2929.04(A)(9); and
 count 11 aggravated murder, 2903.01(C)(F), an unclassified Felony, and specifications 2929.04(A)(5), 2929.04(A)(7), & 2929.04(A)(9).

At the conclusion of the trial, the jury, being duly instructed as to the applicable law, deliberated and, on August 21, 2007, returned verdicts of guilty against the defendant on all eleven counts contained in the indictment and the specifications attendant to counts two, three, four, five, six, seven, eight, nine, ten and eleven charging aggravated murder.

At Defendant's request, the sentencing phase of the trial was held on August 22 & 23, 2007 consistent with R.C. Section 2929.03(D)(1). Duplicative counts of aggravated murder, were merged and the State elected to proceed to sentencing on four counts of aggravated murder, along with each of the attached specifications of which Powell had been found guilty. As there were four separate victims the State proceeded in the sentencing phase on one count of aggravated murder for each victim; for Mary McCollum, count two in violation of R.C. Section 2903.01(A)&(F) an unclassified felony and the attached specifications; for Rose McCollum, count seven in violation of R.C. Section 2903.01(B)&(F) an unclassified felony and the attached specifications; for Sanaa Thomas, count nine in violation of R.C. Section 2903.01(B)&(F) an unclassified felony and the attached specifications; and for Jamal McCollum-Myers, count ten in violation of R.C. Section 2903.01(C)&(F) an unclassified felony and the attached specifications. The Court made the specific finding that none of the remaining specifications were duplicative and therefore would not be merged.

Following the sentencing phase of the trial, the jury, again being duly instructed as to the applicable law, returned its unanimous verdict finding that the aggravating circumstances of which defendant was found guilty outweighed, beyond a reasonable doubt, the mitigating factors shown, and recommended to the Court the imposition of the death penalty for each of the separate aggravated murder counts and specifications proven beyond a reasonable doubt consistent with R.C. Section 2929.03(D)(2).

The Court, as required by R.C. Section 2929.03(D)(3) of the Ohio Revised Code, independently considered the relevant evidence raised at trial, the testimony, and arguments of counsel. No presentence investigation or mental examination was requested by the defendant. The Court, upon due consideration of the recommendation of the jury, all evidence, arguments of counsel and other matters to be considered, finds, by proof beyond a reasonable doubt, the

aggravating circumstances outweigh any mitigating factors shown in this case.

Upon the offenses of aggravated murder charged in the second and sixth counts of the indictment, which were merged for sentencing purposes, and upon the specifications that the offense was committed during a course of conduct which involved the killing of two or more people, the offense was committed while the defendant was committing aggravated arson, and the defendant was the principal offender in the aggravated murder, it is the sentence of the Court that the defendant, Wayne Powell, be put to death by lethal injection in the manner and place directed by the provisions of Section 2949.22 of the Ohio Revised Code.

Upon the offenses of aggravated murder charged in the third and seventh counts of the indictment, which were merged for sentencing purposes, and upon the specifications that the offense was committed during a course of conduct which involved the killing of two or more people, the offense was committed while the defendant was committing aggravated arson, and the defendant was the principal offender in the aggravated murder, it is the sentence of the Court that the defendant, Wayne Powell, be put to death by lethal injection in the manner and place directed by the provisions of Section 2949.22 of the Ohio Revised Code.

Upon the offense of aggravated murder charged in the fifth, ninth and eleventh counts of the indictment, which were merged for sentencing purposes, and upon the specifications that the offense was committed during a course of conduct which involved the killing of two or more people, the offense was committed while the defendant was committing aggravated arson, the defendant purposely caused the death of another who was under thirteen years of age at the time of the commission of the offense, and the defendant was the principal offender in the aggravated murder, it is the sentence of the Court that the defendant, Wayne Powell, be put to death by lethal injection in the manner and place directed by the provisions of Section 2949.22 of the Ohio Revised Code.

Upon the offense of aggravated murder charged in the fourth, eighth and tenth counts of the indictment, merged for sentencing purposes, and upon the specifications that the offense was committed during a course of conduct which involved the killing of two or more people, the offense was committed while the defendant was committing aggravated arson, the defendant purposely caused the death of another who was under thirteen years of age at the time of the commission of the offense, and the defendant was the principal offender in the aggravated murder, it is the sentence of the Court that the defendant, Wayne Powell, be put to death by lethal injection in the manner and place directed by the provisions of Section 2949.22 of the Ohio Revised Code.

It is ORDERED that the defendant, Wayne Powell, be conveyed to the Ohio Department of Rehabilitations and Corrections, and specifically to the Reception Center at Orient, by the Sheriff of Lucas County, Ohio within thirty days of this ORDER.

It is further ORDERED that after the procedures performed at the reception facility are completed, the defendant be assigned to an appropriate correctional institution, conveyed to the

institution, and kept within the institution until the execution of his sentences on March 13, 2008, at midnight, and in accordance with R.C. Section 2949.22 of the Ohio Revised Code, the sentence of death shall be carried out by lethal injection. The defendant has been found guilty beyond a reasonable doubt by a jury of aggravated arson which occurred on the 11th day of November, 2006, as set forth in the first count of the indictment. Accordingly, it is the sentence of the Court that the defendant serve a term of ten years in prison on the aggravated arson charge in the first count of the indictment.

All the sentences are ORDERED to be served consecutively to one another.

Defendant given notice of appellate rights under R.C. Section 2953.08 and post release control notice under R.C. Section 2929.19(B)(3) and R.C. Section 2967.28. Defendant notified of application fee for appointment of counsel. Defendant found indigent and appointed the following appellate counsel of record: Spiros Cocoves and Gary Crim.

It is further ORDERED that defendant be given credit for 305 days of confinement awaiting disposition of this case. In accordance with R.C. Section 2929.03(F) of the Ohio Revised Code, this Court will file a separate written opinion within fifteen days hereof setting forth the Court's specific findings of the aggravating circumstances proven beyond a reasonable doubt and the existence or non-existence of mitigating factors, and the Court's reasons why the aggravating factors outweighs the mitigating factors beyond a reasonable doubt.

Dated: 9-26-07



JUDGE GARY G. COOK

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LUCAS COUNTY

Case Number: G-4801-CR-0200603581-000
STATE OF OHIO V. Wayne Powell

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TO THE CLERK:

LUCAS COUNTY
JUVENILE COURT
CLERK OF COURTS

Within three days of journalization, please serve upon all parties notice of the judgment in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket (see below).

Dated: 9-26-07



JUDGE GARY G. COOK

Wayne Powell
c/o Corrections Reception Center
P. O. Box 300
Orient, OH 43146

Mickey Rigsby
1050 Freeway Drive North
Columbus, Ohio 43229

Corrections Reception Center
Attn: Records
P.O. Box 300
Orient, OH 43146

Lucas County Corrections Center
Attn: Records
1622 Spielbush
Toledo, Ohio 43604

John Thebes
413 N. Michigan Street
Toledo, Ohio 43604

Ann Baronas
413 N. Michigan Street
Toledo, Ohio 43604

Jevne Meader
Lucas County Prosecutors Office
700 Adams Street
Toledo, Ohio 43604

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COMMON PLEAS COURT

IN THE COMMON PLEAS COURT, LUCAS COUNTY, OHIO

STATE OF OHIO	*	G-4801-CR-0200603581-000
Plaintiff	*	
	*	
v.	*	SENTENCING OPINION
	*	
WAYNE POWELL	*	
Defendant	*	JUDGE GARY G. COOK

This opinion is rendered pursuant to Ohio Revised Code Section 2929.03(F).

On November 22, 2006 the Lucas County Grand Jury returned an indictment charging the defendant, Wayne Powell, with one count of Aggravated Arson and ten counts of Aggravated Murder each with multiple specific capital specifications (twenty-six total specifications). These charges arose out of an arson fire and the death of Mary McCollum (age 33), Rose McCollum (age 52), Jamal McCollum-Myers (age 4), and Sanaa Thomas (age 2) on November 11, 2006 in Toledo, Lucas County, Ohio.

After having been appointed Rule 20 certified counsel, John Thebes and Ann Baronas-Jonke, Powell entered pleas of not guilty at his arraignment hearing held on December 4, 2006. After multiple pre-trial conferences, motion hearings and suppression hearings, the case proceeded to trial, with jury selection beginning on August 8, 2007.

On August 21, 2007, the jury returned verdicts finding the defendant, Wayne Powell, guilty of one count of aggravated arson, guilty of ten counts of aggravated murder and guilty of twenty-six separate capital specifications involving the killing of Mary McCollum, Rose McCollum, Jamal McCollum-Myers, and Sanaa Thomas.

Applying the law regarding merger the State elected to proceed to sentencing on four counts of aggravated murder, along with each of the attached specifications of which Powell had been found guilty. As there were four separate victims the State proceeded in the sentencing

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phase on one count of aggravated murder for each victim; for Mary McCollum, count two in violation of 2903.01(A)&(F) an unclassified felony and the attached specifications; for Rose McCollum, count seven in violation of 2903.01(B)&(F) an unclassified felony and the attached specifications; for Sanaa Thomas, count nine in violation of 2903.01(B)&(F) an unclassified felony and the attached specifications; and for Jamal McCollum-Myers, count ten in violation of 2903.01(C)&(F) an unclassified felony and the attached specifications.

The jury found Powell guilty of multiple specifications, to be considered as aggravating circumstances during the sentencing phase of the trial. Prior to the sentencing phase the court specifically considered the requirement of merger of specifications/circumstances [see: *State v. Jenkins* (1984), 15 Ohio St.3d 164 where two or more aggravating circumstances arise from the same act or indivisible course of conduct and are thus duplicative, the duplicative aggravating circumstances will be merged for purposes of sentencing. *State v. Robb* (2000), 88 Ohio St.3d 59 Merger is not required when the aggravating circumstances arise from a divisible course of conduct.]

The Court found that the course of conduct specification (multiple murder), R.C. 2929.04(A)(5) and the felony murder specification (while committing aggravated arson), R.C. 2929.04(A)(7) are not duplicative and need not be merged. [See, e.g., *State v. Smith*, (1997) 80 Ohio St.3d 116; *State v. Williams*, (1996) 74 Ohio St.3d 579; *State v. Adams*, (2004) 103 Ohio St.3d 508; *State v. Braden*, (2003) 98 Ohio St.3d 354; *State v. Keith*, (1997) 79 Ohio St.3d 514; *State v. McKnight*, (2005) 107 Ohio St.3d 101; *State v. Franklin*, (2002) 97 Ohio St.3d 1.] The Court also found, regarding the "child under 13" specification/circumstance under R.C. 2929.04(A)(9), that the murder of a person specifically protected because of status, such as a child (under 13) is not duplicative of other death specifications [see: *State v. Bryan*, (2004) 101 Ohio St.3d 272; *State v. Lynch*, (2003) 99 Ohio St.3d 514].

In the end, none of the specifications/circumstances as to counts 2, 7, 9, or 10 were merged. The jury was instructed that the penalty for each separate count must be determined separately and that only the aggravating circumstances, separately, relating to a given count may be considered and weighed against any and all of the mitigating factors. The jury was further instructed that the sentence for each count 2, 7, 9, and 10 must be decided separately, and independently of all of the other counts and circumstances and to only consider the aggravating circumstances which the Court outlined during the sentencing instructions.

The jury was instructed that the aggravated murder itself is not an aggravated circumstance and that the nature and circumstance of the offense could only be considered as mitigating factors.

Prior to the beginning of the sentencing phase Powell was advised of his right to the appointment of appellate counsel, his right to a pre-sentence investigation and report prepared by the court, his right to a mental/psychological examination conducted by the court, and his right to make a statement either sworn or unsworn. Powell declined his opportunity to make a statement and declined the opportunity for the court to prepare any reports.

The Court reviewed with Powell and Defense Counsel that they had met with Powell regarding these issues and reviewed the fact that they had been working with their own team of investigators, psychologist and mitigation experts and had prepared their own pre-sentence investigation findings and mental health examination findings.

Powell was informed, by the Court, that he would be given great leeway in the presentation of any and all mitigating factors that he wished to present. The Court also confirmed with Powell that he had sufficient time to prepare for the second phase of the trial.

Upon the request of Powell's counsel the sentencing phase of the trial began on August 22, 2007 and concluded on August 23, 2007. The State, first moved for the admission of certain exhibits from the trial phase and the testimony related to those exhibits, which was granted without objection. Next the State reserved its right to present rebuttal evidence and rested.

The defense presented the testimony of several witnesses in mitigation. Those witnesses included: Antonio Garrett, Powell's juvenile probation officer; Isaac Powell IV, Powell's father; Pricilla Fletcher, Powell's sister-in-law; Beatrice Lucas, Powell's mother; Charles Powell, Powell's younger brother, Isaac Powell V, Powell's youngest brother; Darrell Fletcher, Powell's brother; and Dr. Wayne Graves, Powell's forensic psychologist hired for this case. The defense also submitted thirteen exhibits (A-M) during mitigation which were submitted to the jury for consideration.

On August 23, 2007, after deliberations the jury returned to open court with their unanimous findings that the penalty of death was the appropriate sentence for each separate aggravated murder conviction contained in counts 2, 7, 9 and 10. The matter was then set for a sentencing hearing on September 13, 2007.

At the sentencing hearing, Powell was afforded all of his rights pursuant to criminal rule 32, and Powell's attorneys were allowed to speak in mitigation prior to the court rendering its sentence. Powell himself was allowed to exercise his right of allocution. On behalf of the victims one family member spoke in open court and the State requested that the Court impose the findings of the jury.

Pursuant to R.C. section 2929.04(A), imposition of the death penalty for a conviction of aggravated murder is precluded unless one or more of the listed specifications 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. The following aggravating circumstances were listed in the counts of the indictment as specifications, were proved beyond a reasonable doubt, and Powell was found guilty of committing, as to:

- count two; 2929.04(A)(5) that the offense at bar was part of a course of conduct involving the purposeful killing of two or more persons and 2929.04(A)(7) the offense was committed while the offender was committing aggravated arson and was the principal offender in the commission of the aggravated murder;

- count seven; 2929.04(A)(5) that the offense at bar was part of a course of conduct involving the purposeful killing of two or more persons and 2929.04(A)(7) the offense was committed while the offender was committing aggravated arson and was the principal offender in the commission of the aggravated murder;

- count nine; 2929.04(A)(5) that the offense at bar was part of a course of conduct involving the purposeful killing of two or more persons, 2929.04(A)(7) the offense was committed while the offender was committing aggravated arson and was the principal offender in the commission of the aggravated murder, and 2929.04(A)(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 was the principal offender in the commission of the offense;

- count ten; 2929.04(A)(5) that the offense at bar was part of a course of conduct involving the purposeful killing of two or more persons, 2929.04(A)(7) the offense was committed while the offender was committing aggravated arson and was the principal offender in the commission of the aggravated murder, and 2929.04(A)(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 was the principal offender in the commission of the offense.

The Court considered separately and only the aggravating circumstances as to each individual and specific charge of aggravated murder of which Powell was convicted

The Court is required to make specific findings as to the existence of any of the mitigating factors set forth in division (B) of 2929.04 of the Revised Code. If one or more of the aggravating circumstances listed in R.C. section 2929.04(A) is specified and proved beyond a reasonable doubt the trial jury, and later the court, 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 the offense;

The court finds that the victims did not induce or facilitate the offense;

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;

as this Court views the evidence, the Court finds that Powell was not under duress, Powell was not coerced, and Powell was not provoked into committing the offense, this finding is made with consideration of the argument that Powell was engaged in at the front door of the residence hours before he set the fire, the Court specifically finds that this argument was too remote in time and did not rise to the level of duress or 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 requirement of law;
based upon the evidence presented in mitigation by the defense and Dr. Graves this court specifically finds that Powell was not suffering a mental disease or defect, he did not lack the capacity to appreciate the criminality of his conduct, and he was capable to conforming his conduct to the requirement of the law;
- 4) the youth of the offender;
the court has considered that Powell was 41 years of age at the time of the commission of the offense;
- 5) the offender's lack of a significant history of prior criminal convictions and delinquency adjudications;
the court has considered Powell's prior criminal convictions and delinquency adjudications and specifically finds that they are not lacking. Powell was incarcerated both as a juvenile and an adult;
- 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;
the court specifically finds that Powell was the principal offender;

And finally

- 7) any other factors that are relevant to the issue of whether the offender should be sentenced to death.
In this area the court gave extensive consideration to any and all mitigating evidence presented.

For purposes of sentencing the Court reviewed the mitigating evidence for any and all relevant factors as to why Powell should not be put to death as the jury has recommended. The court has spent a significant amount of time reviewing the Courts notes, a transcript of the sentencing phase, defendant's post mitigation hearing brief, and all mitigating factors known at the time of this opinion.

The Court has considered on Powell's behalf: he is 42 years old, he is the father of three children, he is a grandfather of two children, he has four brothers, both his mother and father testified on his behalf, he had been married and his wife gave birth to another man's child during that marriage, that he is of low to average intelligence and functions at a grade school to high school level with mildly defective social judgement, he has been diagnosed with and treated for depression, anxiety, alcohol dependance and other substance abuse. He has numerous chronic health issues and is on several medications. He was raised in a dysfunctional family environment consisting of severe substance abuse

by several generations of his family, his father was incarcerated for twenty years for murdering a family member. Powell's father beat his children as discipline. Powell was picked on and teased as a child, was held back a grade in school, and eventually was sent to DYS or TICO where he was assaulted. Powell was incarcerated in the Ohio Department of Rehabilitations and Corrections and was amenable to his supervision. The Court considered his employment history and his productivity as well as his ability to be a productive member of society even while incarcerated. The Court further considered his statement of remorse made at the final sentencing hearing. As requested by Powell's counsel, the Court considered The United States Constitution as well as all of the applicable Amendments including the Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments. The court has not limited its consideration to only these listed issues for mitigation.

The Court has exercised exhaustive efforts to consider the existence of any other mitigating factors.

As to the aggravated Murder convictions, the Court has separately and specifically considered each of the four sentencing options allowable in this case: a) life imprisonment with parole eligibility after serving twenty-five full years, b) life imprisonment with parole eligibility after serving thirty full years, c) life imprisonment without the possibility of parole, and d) death. The Court considered the fact that, if given a life sentence, Powell would not be eligible for parole or release until the stated time had been served day-for-day.

The Court did not in any way consider any cumulative effect of Powell having been convicted of multiple counts of aggravated murder or having been convicted of multiple capital specifications. Each count was considered separately and each aggravating circumstance connected to that count, and that count only, was considered separately and independently of all other counts and circumstances.

For the purposes of the Court's consideration of mitigation and sentencing, victim impact Statements were not considered in any way against Powell.

The Court considered all of the mitigating factors presented which included, but was not limited to the nature and circumstances of the offense, the history, character and background of Wayne Powell and any other factors that weighed in favor of a sentence other than death. The Court further considered that any one mitigating factor standing alone would be sufficient to support a sentence of life imprisonment and that the cumulative effect of the mitigating factors could also support a sentence of life imprisonment. The court did not limit its consideration to the specific mitigating factors that were describe and considered any other mitigating factors that weighed in favor of a sentence other than death.

The Court is required to state the reasons why the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors. Quite simply put, all of the mitigating factors know to this Court cannot possibly outweigh any single one of

the aggravating circumstances in this case. Powell's acts were committed late at night while people were asleep, he purposely set a fire knowing that he would kill or attempt to kill whoever was inside of the home, he knew that there were two or more people inside the home at the time he set the fire because he had been to the home earlier in the night, and he knew that there were children under the age of thirteen inside of the home at the time he set the fire.

In consideration of all that is articulated in this opinion, the court can not see any reason to set aside the recommendation by the Jury for the sentence of death, by way of mitigating evidence, legal authority, or otherwise. Therefore the Court concurs with the jury's sentence and:

- as to Count two - hereby sentences Wayne Powell to death for the aggravated murder of Mary McCollum in violation of 2903.01(A)&(F), 2929.04(A)(5), & 2929.04(A)(7) an unclassified felony;
- as to Count seven - hereby sentences Wayne Powell to death for the aggravated murder of Rose McCollum in violation of 2903.01(B)&(F), 2929.04(A)(5), & 2929.04(A)(7) an unclassified felony;
- as to Count nine - hereby sentences Wayne Powell to death for the aggravated murder of Sanaa Thomas in violation of 2903.01(B)&(F), 2929.04(A)(5), 2929.04(A)(7), & 2929.04(A)(9) an unclassified felony;
- as to Count ten - hereby sentences Wayne Powell to death for the aggravated murder of Jamal McCollum-Myers in violation of 2903.01(C)&(F), 2929.04(A)(5), 2929.04(A)(7), & 2929.04(A)(9) an unclassified felony.

The sentences in counts two, seven, nine and ten are ordered to be served consecutively as there were four separate victims in this series of crimes. Additionally, Counts two, seven, nine and ten are ordered to be served consecutively to the ten year sentence ordered in count one for the aggravated arson.

Notification of appellate rights were given and Attorney Spiros Cocoves was appointed as lead appellate counsel and he was requested to inform the Court of his request for the naming of co-appellate counsel.

The sentence is ordered enforced and Wayne Powell is remanded to the Ohio Department of Rehabilitations and Corrections.

Dated: 9.26.07


JUDGE GARY G. COOK

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Applying the law regarding merger the State elected to proceed to sentencing on four counts of aggravated murder, along with each of the attached specifications of which Powell had been found guilty. As there were four separate victims the State proceeded in the sentencing

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In the end, none of the specifications/circumstances as to counts 2, 7, 9, or 10 were merged. The jury was instructed that the penalty for each separate count must be determined separately and that only the aggravating circumstances, separately, relating to a given count may be considered and weighed against any and all of the mitigating factors. The jury was further instructed that the sentence for each count 2, 7, 9, and 10 must be decided separately, and independently of all of the other counts and circumstances and to only consider the aggravating circumstances which the Court outlined during the sentencing instructions.

The jury was instructed that the aggravated murder itself is not an aggravated circumstance and that the nature and circumstance of the offense could only be considered as mitigating factors.

Prior to the beginning of the sentencing phase Powell was advised of his right to the appointment of appellate counsel, his right to a pre-sentence investigation and report prepared by the court, his right to a mental/psychological examination conducted by the court, and his right to make a statement either sworn or unsworn. Powell declined his opportunity to make a statement and declined the opportunity for the court to prepare any reports.

The Court reviewed with Powell and Defense Counsel that they had met with Powell regarding these issues and reviewed the fact that they had been working with their own team of investigators, psychologist and mitigation experts and had prepared their own pre-sentence investigation findings and mental health examination findings.

Powell was informed, by the Court, that he would be given great leeway in the presentation of any and all mitigating factors that he wished to present. The Court also confirmed with Powell that he had sufficient time to prepare for the second phase of the trial.

Upon the request of Powell's counsel the sentencing phase of the trial began on August 22, 2007 and concluded on August 23, 2007. The State, first moved for the admission of certain exhibits form the trial phase and the testimony related to those exhibits, which was granted without objection. Next the State reserved its right to present rebuttal evidence and rested.

The defense presented the testimony of several witnesses in mitigation. Those witnesses included: Antonio Garrett, Powell's juvenile probation officer; Isaac Powell IV, Powell's father; Pricilla Fletcher, Powell's sister-in-law; Beatrice Lucas, Powell's mother; Charles Powell, Powell's younger brother, Isaac Powell V, Powell's youngest brother; Darrell Fletcher, Powell's brother; and Dr. Wayne Graves, Powell's forensic psychologist hired for this case. The defense also submitted thirteen exhibits (A-M) during mitigation which were submitted to the jury for consideration.

On August 23, 2007, after deliberations the jury returned to open court with their unanimous findings that the penalty of death was the appropriate sentence for each separate aggravated murder conviction contained in counts 2, 7, 9 and 10. The matter was then set for a sentencing hearing on September 13, 2007.

At the sentencing hearing, Powell was afforded all of his rights pursuant to criminal rule 32, and Powell's attorneys were allowed to speak in mitigation prior to the court rendering its sentence. Powell himself was allowed to exercise his right of allocution. On behalf of the victims one family member spoke in open court and the State requested that the Court impose the findings of the jury.

Pursuant to R.C. section 2929.04(A), imposition of the death penalty for a conviction of aggravated murder is precluded unless one or more of the listed specifications 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. The following aggravating circumstances were listed in the counts of the indictment as specifications, were proved beyond a reasonable doubt, and Powell was found guilty of committing, as to:

- count two; 2929.04(A)(5) that the offense at bar was part of a course of conduct involving the purposeful killing of two or more persons and 2929.04(A)(7) the offense was committed while the offender was committing aggravated arson and was the principal offender in the commission of the aggravated murder;

- count seven; 2929.04(A)(5) that the offense at bar was part of a course of conduct involving the purposeful killing of two or more persons and 2929.04(A)(7) the offense was committed while the offender was committing aggravated arson and was the principal offender in the commission of the aggravated murder;

- count nine; 2929.04(A)(5) that the offense at bar was part of a course of conduct involving the purposeful killing of two or more persons, 2929.04(A)(7) the offense was committed while the offender was committing aggravated arson and was the principal offender in the commission of the aggravated murder, and 2929.04(A)(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 was the principal offender in the commission of the offense;

- count ten; 2929.04(A)(5) that the offense at bar was part of a course of conduct involving the purposeful killing of two or more persons, 2929.04(A)(7) the offense was committed while the offender was committing aggravated arson and was the principal offender in the commission of the aggravated murder, and 2929.04(A)(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 was the principal offender in the commission of the offense.

The Court considered separately and only the aggravating circumstances as to each individual and specific charge of aggravated murder of which Powell was convicted

The Court is required to make specific findings as to the existence of any of the mitigating factors set forth in division (B) of 2929.04 of the Revised Code. If one or more of the aggravating circumstances listed in R.C. section 2929.04(A) is specified and proved beyond a reasonable doubt the trial jury, and later the court, 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 the offense;
The court finds that the victims did not induce or facilitate the offense;
- 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;
as this Court views the evidence, the Court finds that Powell was not under duress, Powell was not coerced, and Powell was not provoked into committing the offense, this finding is made with consideration of the argument that Powell was engaged in at the front door of the residence hours before he set the fire, the Court specifically finds that this argument was to remote in time and did not rise to the level of duress or 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 requirement of law;
based upon the evidence presented in mitigation by the defense and Dr. Graves this court specifically finds that Powell was not suffering a mental disease or defect, he did not lack the capacity to appreciate the criminality of his conduct, and he was capable to conforming his conduct to the requirement of the law;
- 4) the youth of the offender;
the court has considered that Powell was 41 years of age at the time of the commission of the offense;
- 5) the offender's lack of a significant history of prior criminal convictions and delinquency adjudications;
the court has considered Powell's prior criminal convictions and delinquency adjudications and specifically finds that they are not lacking. Powell was incarcerated both as a juvenile and an adult;
- 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;
the court specifically finds that Powell was the principal offender;

And finally

- 7) any other factors that are relevant to the issue of whether the offender should be sentenced to death.
In this area the court gave extensive consideration to any and all mitigating evidence presented.

For purposes of sentencing the Court reviewed the mitigating evidence for any and all relevant factors as to why Powell should not be put to death as the jury has recommended. The court has spent a significant amount of time reviewing the Courts notes, a transcript of the sentencing phase, defendant's post mitigation hearing brief, and all mitigating factors known at the time of this opinion.

The Court has considered on Powell's behalf: he is 42 years old, he is the father of three children, he is a grandfather of two children, he has four brothers, both his mother and father testified on his behalf, he had been married and his wife gave birth to another man's child during that marriage, that he is of low to average intelligence and functions at a grade school to high school level with mildly defective social judgement, he has been diagnosed with and treated for depression, anxiety, alcohol dependence and other substance abuse. He has numerous chronic health issues and is on several medications. He was raised in a dysfunctional family environment consisting of severe substance abuse

by several generations of his family, his father was incarcerated for twenty years for murdering a family member. Powell's father beat his children as discipline. Powell was picked on and teased as a child, was held back a grade in school, and eventually was sent to DYS or TICO where he was assaulted. Powell was incarcerated in the Ohio Department of Rehabilitations and Corrections and was amenable to his supervision. The Court considered his employment history and his productivity as well as his ability to be a productive member of society even while incarcerated. The Court further considered his statement of remorse made at the final sentencing hearing. As requested by Powell's counsel, the Court considered The United States Constitution as well as all of the applicable Amendments including the Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments. The court has not limited its consideration to only these listed issues for mitigation.

The Court has exercised exhaustive efforts to consider the existence of any other mitigating factors.

As to the aggravated Murder convictions, the Court has separately and specifically considered each of the four sentencing options allowable in this case: a) life imprisonment with parole eligibility after serving twenty-five full years, b) life imprisonment with parole eligibility after serving thirty full years, c) life imprisonment without the possibility of parole, and d) death. The Court considered the fact that, if given a life sentence, Powell would not be eligible for parole or release until the stated time had been served day-for-day.

The Court did not in any way consider any cumulative effect of Powell having been convicted of multiple counts of aggravated murder or having been convicted of multiple capital specifications. Each count was considered separately and each aggravating circumstance connected to that count, and that count only, was considered separately and independently of all other counts and circumstances.

For the purposes of the Court's consideration of mitigation and sentencing, victim impact Statements were not considered in any way against Powell.

The Court considered all of the mitigating factors presented which included, but was not limited to the nature and circumstances of the offense, the history, character and background of Wayne Powell and any other factors that weighed in favor of a sentence other than death. The Court further considered that any one mitigating factor standing alone would be sufficient to support a sentence of life imprisonment and that the cumulative effect of the mitigating factors could also support a sentence of life imprisonment. The court did not limit its consideration to the specific mitigating factors that were describe and considered any other mitigating factors that weighed in favor of a sentence other than death.

The Court is required to state the reasons why the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors. Quite simply put, all of the mitigating factors know to this Court cannot possibly outweigh any single one of

the aggravating circumstances in this case. Powell's acts were committed late at night while people were asleep, he purposely set a fire knowing that he would kill or attempt to kill whoever was inside of the home, he knew that there were two or more people inside the home at the time he set the fire because he had been to the home earlier in the night, and he knew that there were children under the age of thirteen inside of the home at the time he set the fire.

In consideration of all that is articulated in this opinion, the court can not see any reason to set aside the recommendation by the Jury for the sentence of death, by way of mitigating evidence, legal authority, or otherwise. Therefore the Court concurs with the jury's sentence and:

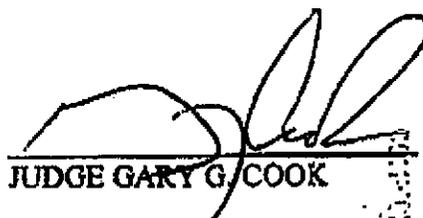
- as to Count two - hereby sentences Wayne Powell to death for the aggravated murder of Mary McCollum in violation of 2903.01(A)&(F), 2929.04(A)(5), & 2929.04(A)(7) an unclassified felony;
- as to Count seven - hereby sentences Wayne Powell to death for the aggravated murder of Rose McCollum in violation of 2903.01(B)&(F), 2929.04(A)(5), & 2929.04(A)(7) an unclassified felony;
- as to Count nine - hereby sentences Wayne Powell to death for the aggravated murder of Sanaa Thomas in violation of 2903.01(B)&(F), 2929.04(A)(5), 2929.04(A)(7), & 2929.04(A)(9) an unclassified felony;
- as to Count ten - hereby sentences Wayne Powell to death for the aggravated murder of Jamal McCollum-Myers in violation of 2903.01(C)&(F), 2929.04(A)(5), 2929.04(A)(7), & 2929.04(A)(9) an unclassified felony.

The sentences in counts two, seven, nine and ten are ordered to be served consecutively as there were four separate victims in this series of crimes. Additionally, Counts two, seven, nine and ten are ordered to be served consecutively to the ten year sentence ordered in count one for the aggravated arson.

Notification of appellate rights were given and Attorney Spiros Cocoves was appointed as lead appellate counsel and he was requested to inform the Court of his request for the naming of co-appellate counsel.

The sentence is ordered enforced and Wayne Powell is remanded to the Ohio Department of Rehabilitations and Corrections.

Dated: 9.26.07


JUDGE GARY G. COOK

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LUCAS COUNTY
2007 SEP 27 A 11:49
CLERK OF COURT

FILED
LUCAS COUNTY

2007 SEP 26 P 3:39

COMMON PLEAS COURT
DEBIE GUNTER
CLERK OF COURTS

IN THE COMMON PLEAS COURT, LUCAS COUNTY, OHIO

STATE OF OHIO

Plaintiff

v.

WAYNE POWELL

Defendant

* G-4801-CR-0200603581-000

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JUDGMENT ENTRY

JUDGE GARY G. COOK

On September 13, 2007, defendant Wayne Powell's sentencing hearing was held pursuant to 2929.19. Court reporter Kelly Wingate and the State's attorneys Christopher Anderson, Tim Braun and Jevne Meader were present. Defendant and his counsel, John Thebes and Ann Baronas were present and afforded all rights pursuant to Criminal Rule 32. The Court has considered the record, oral statements, victim impact statement (in a limited degree), a pre-sentence report was not prepared (at the request of the defendant), as to count one the Court also considered the principles and purposes of sentencing under R.C. Section 2929.11, and has balanced the seriousness and recidivism factors under R.C. Section 2929.12.

This cause was tried by a jury of twelve upon the charges against the defendant for the offenses of:

- count 1 aggravated arson, 2909.02(A)(1), F-1;
- count 2 aggravated murder, 2903.01(A)(F), an unclassified Felony, and specifications 2929.04(A)(5), & 2929.04(A)(7);
- count 3 aggravated murder, 2903.01(A)(F), an unclassified Felony, and specifications 2929.04(A)(5), & 2929.04(A)(7);
- count 4 aggravated murder, 2903.01(A)(F), an unclassified Felony, and specifications 2929.04(A)(5), 2929.04(A)(7), & 2929.04(A)(9);
- count 5 aggravated murder, 2903.01(A)(F), an unclassified Felony, and specifications 2929.04(A)(5), 2929.04(A)(7), & 2929.04(A)(9);

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count 6 aggravated murder, 2903.01(B)(F), an unclassified Felony, and specifications 2929.04(A)(5), & 2929.04(A)(7);
 count 7 aggravated murder, 2903.01(B)(F), an unclassified Felony, and specifications 2929.04(A)(5), & 2929.04(A)(7);
 count 8 aggravated murder, 2903.01(B)(F), an unclassified Felony, and specifications 2929.04(A)(5), 2929.04(A)(7), & 2929.04(A)(9);
 count 9 aggravated murder, 2903.01(B)(F), an unclassified Felony, and specifications 2929.04(A)(5), 2929.04(A)(7), & 2929.04(A)(9);
 count 10 aggravated murder, 2903.01(C)(F), an unclassified Felony, and specifications 2929.04(A)(5), 2929.04(A)(7), & 2929.04(A)(9); and
 count 11 aggravated murder, 2903.01(C)(F), an unclassified Felony, and specifications 2929.04(A)(5), 2929.04(A)(7), & 2929.04(A)(9).

At the conclusion of the trial, the jury, being duly instructed as to the applicable law, deliberated and, on August 21, 2007, returned verdicts of guilty against the defendant on all eleven counts contained in the indictment and the specifications attendant to counts two, three, four, five, six, seven, eight, nine, ten and eleven charging aggravated murder.

At Defendant's request, the sentencing phase of the trial was held on August 22 & 23, 2007 consistent with R.C. Section 2929.03(D)(1). Duplicative counts of aggravated murder, were merged and the State elected to proceed to sentencing on four counts of aggravated murder, along with each of the attached specifications of which Powell had been found guilty. As there were four separate victims the State proceeded in the sentencing phase on one count of aggravated murder for each victim; for Mary McCollum, count two in violation of R.C. Section 2903.01(A)&(F) an unclassified felony and the attached specifications; for Rose McCollum, count seven in violation of R.C. Section 2903.01(B)&(F) an unclassified felony and the attached specifications; for Sanaa Thomas, count nine in violation of R.C. Section 2903.01(B)&(F) an unclassified felony and the attached specifications; and for Jamal McCollum-Myers, count ten in violation of R.C. Section 2903.01(C)&(F) an unclassified felony and the attached specifications. The Court made the specific finding that none of the remaining specifications were duplicative and therefore would not be merged.

Following the sentencing phase of the trial, the jury, again being duly instructed as to the applicable law, returned its unanimous verdict finding that the aggravating circumstances of which defendant was found guilty outweighed, beyond a reasonable doubt, the mitigating factors shown, and recommended to the Court the imposition of the death penalty for each of the separate aggravated murder counts and specifications proven beyond a reasonable doubt consistent with R.C. Section 2929.03(D)(2).

The Court, as required by R.C. Section 2929.03(D)(3) of the Ohio Revised Code, independently considered the relevant evidence raised at trial, the testimony, and arguments of counsel. No presentence investigation or mental examination was requested by the defendant. The Court, upon due consideration of the recommendation of the jury, all evidence, arguments of counsel and other matters to be considered, finds, by proof beyond a reasonable doubt, the

aggravating circumstances outweigh any mitigating factors shown in this case.

Upon the offenses of aggravated murder charged in the second and sixth counts of the indictment, which were merged for sentencing purposes, and upon the specifications that the offense was committed during a course of conduct which involved the killing of two or more people, the offense was committed while the defendant was committing aggravated arson, and the defendant was the principal offender in the aggravated murder, it is the sentence of the Court that the defendant, Wayne Powell, be put to death by lethal injection in the manner and place directed by the provisions of Section 2949.22 of the Ohio Revised Code.

Upon the offenses of aggravated murder charged in the third and seventh counts of the indictment, which were merged for sentencing purposes, and upon the specifications that the offense was committed during a course of conduct which involved the killing of two or more people, the offense was committed while the defendant was committing aggravated arson, and the defendant was the principal offender in the aggravated murder, it is the sentence of the Court that the defendant, Wayne Powell, be put to death by lethal injection in the manner and place directed by the provisions of Section 2949.22 of the Ohio Revised Code.

Upon the offense of aggravated murder charged in the fifth, ninth and eleventh counts of the indictment, which were merged for sentencing purposes, and upon the specifications that the offense was committed during a course of conduct which involved the killing of two or more people, the offense was committed while the defendant was committing aggravated arson, the defendant purposely caused the death of another who was under thirteen years of age at the time of the commission of the offense, and the defendant was the principal offender in the aggravated murder, it is the sentence of the Court that the defendant, Wayne Powell, be put to death by lethal injection in the manner and place directed by the provisions of Section 2949.22 of the Ohio Revised Code.

Upon the offense of aggravated murder charged in the fourth, eighth and tenth counts of the indictment, merged for sentencing purposes, and upon the specifications that the offense was committed during a course of conduct which involved the killing of two or more people, the offense was committed while the defendant was committing aggravated arson, the defendant purposely caused the death of another who was under thirteen years of age at the time of the commission of the offense, and the defendant was the principal offender in the aggravated murder, it is the sentence of the Court that the defendant, Wayne Powell, be put to death by lethal injection in the manner and place directed by the provisions of Section 2949.22 of the Ohio Revised Code.

It is ORDERED that the defendant, Wayne Powell, be conveyed to the Ohio Department of Rehabilitations and Corrections, and specifically to the Reception Center at Orient, by the Sheriff of Lucas County, Ohio within thirty days of this ORDER.

It is further ORDERED that after the procedures performed at the reception facility are completed, the defendant be assigned to an appropriate correctional institution, conveyed to the

institution, and kept within the institution until the execution of his sentences on March 13, 2008, at midnight, and in accordance with R.C. Section 2949.22 of the Ohio Revised Code, the sentence of death shall be carried out by lethal injection. The defendant has been found guilty beyond a reasonable doubt by a jury of aggravated arson which occurred on the 11th day of November, 2006, as set forth in the first count of the indictment. Accordingly, it is the sentence of the Court that the defendant serve a term of ten years in prison on the aggravated arson charge in the first count of the indictment.

All the sentences are ORDERED to be served consecutively to one another.

Defendant given notice of appellate rights under R.C. Section 2953.08 and post release control notice under R.C. Section 2929.19(B)(3) and R.C. Section 2967.28. Defendant notified of application fee for appointment of counsel. Defendant found indigent and appointed the following appellate counsel of record: Spiros Cocoves and Gary Crim.

It is further ORDERED that defendant be given credit for 305 days of confinement awaiting disposition of this case. In accordance with R.C. Section 2929.03(F) of the Ohio Revised Code, this Court will file a separate written opinion within fifteen days hereof setting forth the Court's specific findings of the aggravating circumstances proven beyond a reasonable doubt and the existence or non-existence of mitigating factors, and the Court's reasons why the aggravating factors outweighs the mitigating factors beyond a reasonable doubt.

Dated: 9-26-07



JUDGE GARY G. COOK

Clerk of the Court
BEVERLY S. COULTER
CLERK OF COURTS

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LUCAS COUNTY

U.S. Const. amend 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.

U.S. Const. amend 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.

U.S. Const. amend VIII

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

U.S. Const. amend 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.

Ohio Const. art. I, § 1

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

Ohio Const. art. I, § 2

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.

Ohio Const. art. I, § 5

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.

Ohio Const. art. I, § 9

All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

The general assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(B) of the Constitution of the state of Ohio.

Ohio Const. art. I, § 10

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.

Ohio Const. art. I, § 16

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.

Ohio Const. art. I, § 20

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

Ohio Rev. Code § 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 or arson, aggravated robbery or robbery, aggravated burglary or burglary, 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.

(2002 S 184, eff. 5-15-02; 1998 S 193, eff. 12-29-98; 1998 H 5, eff. 6-30-98; 1997 S 32, eff. 8-6-97; 1996 S 239, eff. 9-6-96; 1981 S 1, eff. 10-19-81; 1972 H 511)

Ohio Rev. Code § 2909.02 Aggravated arson

(A) No person, by means of fire or explosion, shall knowingly do any of the following:

(1) Create a substantial risk of serious physical harm to any person other than the offender;

(2) Cause physical harm to any occupied structure;

(3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of physical harm to any occupied structure.

(B) (1) Whoever violates this section is guilty of aggravated arson.

(2) A violation of division (A)(1) or (3) of this section is a felony of the first degree.

(3) A violation of division (A)(2) of this section is a felony of the second degree.

(1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1982 H 269, § 4, eff. 7-1-83; 1982 S 199; 1976 S 282; 1972 H 511)

Ohio Rev. Code § 2929.02 Penalties for 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, 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

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

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

(1998 S 107, eff. 7-29-98; 1996 H 180, eff. 1-1-97; 1981 S 1, eff. 10-19-81; 1972 H 511)

Ohio Rev. Code § 2929.03 Imposing sentence for a capital offense; procedures; proof of relevant factors; alternative sentences

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation. The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

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

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

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole. If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is a sentence of life imprisonment without parole imposed under division (D)(2)(b) of this section, the sentence shall be served pursuant to section 2971.03 of the Revised Code. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of

death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

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

- (i) Life imprisonment without parole;
- (ii) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;
- (iii) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

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

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

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

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

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

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh

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

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

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

(1996 H 180, eff. 1-1-97; 1996 S 269, eff. 7-1-96; 1995 S 2, eff. 7-1-96; 1995 S 4, eff. 9-21-95; 1981 S 1, eff. 10-19-81; 1972 H 511)

Ohio Rev. Code § 2929.04 Criteria for imposing death or imprisonment for a capital offense

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

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

person campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

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

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section 2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

(a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.

(b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

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

(6) The victim of the offense was a law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

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

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

(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of

the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

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

- (1) Whether the victim of the offense induced or facilitated it;
- (2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
- (3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of 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.

(2002 S 184, eff. 5-15-02; 1998 S 193, eff. 12-29-98; 1997 H 151, eff. 9-16-97; 1997 S 32, eff. 8-6-97; 1981 S 1, eff. 10-19-81; 1972 H 511)

Ohio Rev. Code § 2929.05 Appeals; procedures

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall 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 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.

(1998 S 107, eff. 7-29-98; 1995 S 4, eff. 9-21-95; 1981 S 1, eff. 10-19-81)

2949.22 Execution of death sentence

(A) Except as provided in division (C) of this section, a death sentence shall be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death. The application of the drug or combination of drugs shall be continued until the person is dead. The warden of the correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed.

(B) A death sentence shall be executed within the walls of the state correctional institution designated by the director of rehabilitation and correction as the location for executions, within an enclosure to be prepared for that purpose, under the direction of the warden of the institution or, in the warden's absence, a deputy warden, and on the day designated by the judge passing sentence or otherwise designated by a court in the course of any appellate or postconviction proceedings. The enclosure shall exclude public view.

(C) If a person is sentenced to death, and if the execution of a death sentence by lethal injection has been determined to be unconstitutional, the death sentence shall be executed by using any different manner of execution prescribed by law subsequent to the effective date of this amendment instead of by causing the application to the person of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death, provided that the subsequently prescribed different manner of execution has not been determined to be unconstitutional. The use of the subsequently prescribed different manner of execution shall be continued until the person is dead. The

warden of the state correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the sentence of death is executed.

(D) No change in the law made by the amendment to this section that took effect on October 1, 1993, or by this amendment constitutes a declaration by or belief of the general assembly that execution of a death sentence by electrocution is a cruel and unusual punishment proscribed by the Ohio Constitution or the United States Constitution.

(2001 H 362, eff. 11-21-01; 1994 H 571, eff. 10-6-94; 1993 H 11, eff. 10-1-93; 1992 S 359; 1953 H 1; GC 13456-2)

Sup R 20 Appointment of counsel for indigent defendants in capital cases-courts of common pleas

I. APPLICABILITY

(A) This rule shall apply in cases where an indigent defendant has been charged with aggravated murder and the indictment includes one or more specifications of aggravating circumstances listed in R.C.

2929.04(A). This rule shall apply in cases where a juvenile defendant is indicted for a capital offense, but because of his or her age, cannot be sentenced to death.

(B) The provisions for the appointment of counsel set forth in this rule apply only in cases where the defendant is indigent and counsel is not privately retained by or for the defendant.

(C) If the defendant is entitled to the appointment of counsel, the court shall appoint two attorneys certified pursuant to this rule. If the defendant engages one privately retained attorney, the court shall not appoint a second attorney pursuant to this rule.

(D) The provisions of this rule apply in addition to the reporting requirements created by section 2929.021 of the Revised Code.

II. QUALIFICATIONS FOR CERTIFICATION AS COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES

(A) Trial Counsel

(1) At least two attorneys shall be appointed by the court to represent an indigent defendant charged with aggravated murder and the indictment includes one or more specifications of aggravating circumstances listed in R.C. 2929.04(A). At least one of the appointed counsel must maintain a law office in Ohio and have experience in Ohio criminal trial practice. The counsel appointed shall be designated "lead counsel" and "co-counsel."

(2) Lead counsel shall satisfy all of the following:

(a) Be admitted to the practice of law in Ohio or admitted to practice pro hac vice;

- (b) Have at least five years of civil or criminal litigation or appellate experience;
- (c) Have specialized training, as approved by the committee, on subjects that will assist counsel in the defense of persons accused of capital crimes in the two-year period prior to making application;
- (d) Have at least one of the following qualifications:
 - (i) Experience as "lead counsel" in the jury trial of at least one capital case;
 - (ii) Experience as "co-counsel" in the trial of at least two capital cases;
- (e) Have at least one of the following qualifications:
 - (i) Experience as "lead counsel" in the jury trial of at least one murder or aggravated murder case;
 - (ii) Experience as "lead counsel" in ten or more criminal or civil jury trials, at least three of which were felony jury trials;
 - (iii) Experience as "lead counsel" in either: three murder or aggravated murder jury trials; one murder or aggravated murder jury trial and three felony jury trials; or three aggravated or first- or second-degree felony jury trials in a court of common pleas in the three years prior to making application.

(3) Co-counsel shall satisfy all of the following:

- (a) Be admitted to the practice of law in Ohio or admitted to practice pro hac vice;
- (b) Have at least three years of civil or criminal litigation or appellate experience;
- (c) Have specialized training, as approved by the committee, on subjects that will assist counsel in the defense of persons accused of capital crimes in the two years prior to making application;
- (d) Have at least one of the following qualifications:
 - (i) Experience as "co-counsel" in one murder or aggravated murder trial;
 - (ii) Experience as "lead counsel" in one first-degree felony jury trial;
 - (iii) Experience as "lead" or "co-counsel" in at least two felony jury or civil jury trials in a court of common pleas in the three years prior to making application.

(4) As used in this rule, "trial" means a case concluded with a judgment of acquittal under Criminal Rule 29 or submission to the trial court or jury for decision and verdict.

(B) Appellate Counsel.

(1) At least two attorneys shall be appointed by the court to appeal cases where the trial court has imposed the death penalty on an indigent defendant. At least one of the appointed counsel shall maintain a law office in Ohio.

(2) Appellate counsel shall satisfy all of the following:

- (a) Be admitted to the practice of law in Ohio or admitted to practice pro hac vice;
- (b) Have at least three years of civil or criminal litigation or appellate experience;

- (c) Have specialized training, as approved by the Committee, on subjects that will assist counsel in the defense of persons accused of capital crimes in the two years prior to making application;
 - (d) Have specialized training, as approved by the Committee, on subjects that will assist counsel in the appeal of cases in which the death penalty was imposed in the two years prior to making application;
 - (e) Have experience as counsel in the appeal of at least three felony convictions in the three years prior to making application.
- (C) Exceptional Circumstances. If an attorney does not satisfy the requirements of divisions (A)(2), (A)(3), or (B)(2) of this section, the attorney may be certified as lead counsel, co-counsel, or appellate counsel if it can be demonstrated to the satisfaction of the Committee that competent representation will be provided to the defendant. In so determining, the Committee may consider the following:
- (a) Specialized training on subjects that will assist counsel in the trial or appeal of cases in which the death penalty may be or was imposed;
 - (b) Experience in the trial or appeal of criminal or civil cases;
 - (c) Experience in the investigation, preparation, and litigation of capital cases that were resolved prior to trial;
 - (d) Any other relevant considerations.
- (D) Savings Clause. Attorneys certified by the Committee prior to January 1, 1991 may maintain their certification by complying with the requirements of Section VII of this rule, notwithstanding the requirements of Sections II(A)(2)(d), II(A)(3)(b) and (d), and II(B)(2)(d) as amended effective January 1, 1991.

III. COMMITTEE ON THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS IN CAPITAL CASES

- (A) There shall be a Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases.
- (B) Appointment of Committee Members. The Committee shall be composed of five attorneys. Three members shall be appointed by a majority vote of all members of the Supreme Court of Ohio; one shall be appointed by the Ohio State Bar Association; and one shall be appointed by the Ohio Public Defender Commission.
- (C) Eligibility for Appointment to the Committee. Each member of the Committee shall satisfy all of the following qualifications:
- (1) Be admitted to the practice of law in Ohio;
 - (2) Have represented criminal defendants for not less than five years;
 - (3) Demonstrate a knowledge of the law and practice of capital cases;
 - (4) Currently not serving as a prosecuting attorney, city director of law, village solicitor, or similar officer or their assistant or employee, or an employee of any court.
- (D) Overall Composition. The overall composition of the Committee shall meet both of the following criteria:
- (1) No more than two members shall reside in the same county;

(2) No more than one shall be a judge.

(E) Terms; Vacancies. The term of office for each member shall be five years, each term beginning on the first day of January. Members shall be eligible for reappointment. Vacancies shall be filled in the same manner as original appointments. Any member appointed to fill a vacancy occurring prior to the expiration of a term shall hold office for the remainder of the term.

(F) Election of Chair. The Committee shall elect a chair and such other officers as are necessary. The officers shall serve for two years and may be reelected to additional terms.

(G) Powers and Duties of the Committee. The Committee shall do all of the following:

- (1) Prepare and notify attorneys of procedures for applying for certification to be appointed counsel for indigent defendants in capital cases;
- (2) Periodically provide all common pleas and appellate court judges and the Ohio Public Defender with a list of all attorneys who are certified to be appointed counsel for indigent capital defendants;
- (3) Periodically review the list of certified counsel, all court appointments given to attorneys in capital cases, and the result and status of those cases;
- (4) Develop criteria and procedures for retention of certification including, but not limited to, mandatory continuing legal education on the defense and appeal of capital cases;
- (5) Expand, reduce, or otherwise modify the list of certified attorneys as appropriate and necessary in accord with division (G)(4) of this section;
- (6) Review and approve specialized training programs on subjects that will assist counsel in the defense and appeal of capital cases;
- (7) Recommend to the Supreme Court of Ohio amendments to this rule or any other rule or statute relative to the defense or appeal of capital cases.

(H) Meetings. The Committee shall meet at the call of the chair, at the request of a majority of the members, or at the request of the Supreme Court of Ohio. A quorum consists of three members. A majority of the Committee is necessary for the Committee to elect a chair and take any other action.

(I) Compensation. All members of the Committee shall receive equal compensation in an amount to be established by the Supreme Court of Ohio.

IV. PROCEDURES FOR COURT APPOINTMENTS OF COUNSEL

(A) Appointing counsel. Only counsel who have been certified by the Committee shall be appointed to represent indigent defendants charged with aggravated murder and the indictment includes one or more specifications of aggravating circumstances listed in R.C. 2929.04(A). Each court may adopt local rules establishing qualifications in addition

to and not in conflict with those established by this rule. Appointments of counsel for these cases should be distributed as widely as possible among the certified attorneys in the jurisdiction of the appointing court.

(B) Workload of Appointed Counsel.

(1) In appointing counsel, the court shall consider the nature and volume of the workload of the prospective counsel to ensure that counsel, if appointed, could direct sufficient attention to the defense of the case and provide competent representation to the defendant.

(2) Attorneys accepting appointments shall provide each client with competent representation in accordance with constitutional and professional standards. Appointed counsel shall not accept workloads that, by reason of their excessive size, interfere with the rendering of competent representation or lead to the breach of professional obligations.

(C) Notice to the Committee.

(1) Within two weeks of appointment, the appointing court shall notify the Committee secretary of the appointment on a form prescribed by the committee. The notice shall include all of the following:

- (a) The court and the judge assigned to the case;
- (b) The case name and number;
- (c) A copy of the indictment;
- (d) The names, business addresses, telephone numbers, and Sup.R. 20 certification of all attorneys appointed;
- (e) Any other information considered relevant by the Committee or appointing court.

(2) Within two weeks of disposition, the trial court shall notify the Committee secretary of the disposition of the case on a form prescribed by the Committee. The notice shall include all of the following:

- (a) The outcome of the case;
- (b) The title and section of the Revised Code of any crimes to which the defendant pleaded or was found guilty;
- (c) The date of dismissal, acquittal, or that sentence was imposed;
- (d) The sentence, if any;
- (e) A copy of the judgment entry reflecting the above;
- (f) If the death penalty was imposed, the name of counsel appointed to represent the defendant on appeal.
- (g) Any other information considered relevant by the Committee or trial court.

(D) Support Services. The appointing court shall provide appointed counsel, as required by Ohio law or the federal Constitution, federal statutes, and professional standards, with the investigator, mitigation specialists, mental health professional, and other forensic experts and other support services reasonably necessary or appropriate for counsel to prepare for and present an adequate defense at every stage of the proceedings including, but not limited to, determinations relevant to competency to stand trial, a not guilty by reason of insanity plea, cross-

examination of expert witnesses called by the prosecution, disposition following conviction, and preparation for and presentation of mitigating evidence in the sentencing phase of the trial.

V. MONITORING; REMOVAL

(A) The appointing court should monitor the performance of assigned counsel to ensure that the defendant is receiving competent representation. If there is compelling evidence before any court, trial or appellate, that an attorney has ignored basic responsibilities of providing competent counsel, which results in prejudice to the defendant's case, the court, in addition to any other action it may take, shall report this evidence to the Committee, which shall accord the attorney an opportunity to be heard.

(B) Complaints concerning the performance of attorneys assigned in the trials or appeals of indigent defendants in capital cases shall be reviewed by the Committee pursuant to the provisions of Section III(G)(3), (4), and (5) of this rule.

VI. PROGRAMS FOR SPECIALIZED TRAINING

(A) Programs for Specialized Training in the Defense of Persons Charged With a Capital Offense.

(1) To be approved by the Committee, a death penalty trial seminar shall include instruction devoted to the investigation, preparation, and presentation of a death penalty trial.

(2) The curriculum for an approved death penalty trial seminar should include, but is not limited to, specialized training in the following areas:

- (a) An overview of current developments in death penalty litigation;
- (b) Death penalty voir dire;
- (c) Trial phase presentation;
- (d) Use of experts in the trial and penalty phase;
- (e) Investigation, preparation, and presentation of mitigation;
- (f) Preservation of the record;
- (g) Counsel's relationship with the accused and the accused's family;
- (h) Death penalty appellate and post-conviction litigation in state and federal courts.

(B) Programs for Specialized Training in the Appeal of Cases in Which the Death Penalty has been Imposed.

(1) To be approved by the Committee, a death penalty appeals seminar shall include instruction devoted to the appeal of a case in which the death penalty has been imposed.

(2) The curriculum for an approved death penalty appeal seminar should include, but is not limited to, specialized training in the following areas:

- (a) An overview of current developments in death penalty law;
- (b) Completion, correction, and supplementation of the record on appeal;
- (c) Reviewing the record for unique death penalty issues;
- (d) Motion practice for death penalty appeals;

- (e) Preservation and presentation of constitutional issues;
 - (f) Preparing and presenting oral argument;
 - (g) Unique aspects of death penalty practice in the courts of appeals, the Supreme Court of Ohio, and the United States Supreme Court;
 - (h) The relationship of counsel with the appellant and the appellant's family during the course of the appeals.
 - (i) Procedure and practice in collateral litigation, extraordinary remedies, state post-conviction litigation, and federal habeas corpus litigation.
- (C) The sponsor of a death penalty seminar shall apply for approval from the Committee at least sixty days before the date of the proposed seminar. An application for approval shall include the curriculum for the seminar and include biographical information of each member of the seminar faculty.
- (D) The Committee shall obtain a list of attendees from the Supreme Court Commission on Continuing Legal Education that shall be used to verify attendance at and grant Sup.R. 20 credit for each Committee-approved seminar. Credit for purposes of this rule shall be granted to instructors using the same ratio provided in Rule X of the Supreme Court Rules for the Government of the Bar of Ohio.
- (E) The Committee may accredit programs other than those approved pursuant to divisions (A) and (B) of this section. To receive accreditation, the program shall include instructions in all areas set forth in divisions (A) and (B) of this section. Application for accreditation of an in-state program may be made by the program sponsor or a program attendee and shall be made prior to the program. Application for accreditation of an out-of-state program may be submitted by the program sponsor or a program attendee and may be made prior to or after completion of the program. The request for credit from a program sponsor shall include the program curriculum and individual faculty biographical information. The request for credit from a program attendee shall include all of the following:
- (1) Program curriculum;
 - (2) Individual faculty biographical information;
 - (3) A written breakdown of sessions attended and credit hours received if the seminar held concurrent sessions;
 - (4) Proof of attendance.

VII. STANDARDS FOR RETENTION OF SUP.R. 20 CERTIFICATION

(A)(1) To retain certification, an attorney who has previously been certified by the Committee shall complete at least twelve hours of Committee-approved specialized training every two years. To maintain certification as lead counsel or co-counsel, at least six of the twelve hours shall be devoted to instruction in the trial of capital cases. To maintain certification as appellate counsel, at least six of the twelve hours shall be devoted to instruction in the appeal of capital cases.

(2) On the first day of July of each year, the Committee shall review the list of certified counsel and revoke the certification of any attorney who has not complied with the specialized training requirements of this rule. An attorney whose certification has been revoked shall not be eligible to accept future appointment as counsel for an indigent defendant charged with or convicted of an offense for which the death penalty can be or has been imposed.

(B) The Committee may accredit an out-of-state program that provides specialized instruction devoted to the investigation, preparation, and presentation of a death penalty trial or specialized instruction devoted to the appeal of a case in which the defendant received the death penalty, or both. Requests for credit for an out-of-state program may be submitted by the seminar sponsor or a seminar attendee. The request for credit from a program sponsor shall include the program curriculum and individual faculty biographical information. The request for credit from a program attendee shall include all of the following:

- (1) Program curriculum;
- (2) Individual faculty biographical information;
- (3) A written breakdown of sessions attended and credit hours received if the seminar held concurrent sessions;
- (4) Proof of attendance.

(C) An attorney who has previously been certified but whose certification has been revoked for failure to comply with the specialized training requirements of this rule must, in order to regain certification, submit a new application that demonstrates that the attorney has completed twelve hours of Committee approved specialized training in the two year period prior to making application for recertification.

VIII. RESERVED

IX. EFFECTIVE DATE

(A) The effective date of this rule shall be October 1, 1987.

(B) The amendments to Section II(A)(5)(b), Section III(B)(2), and to the Subcommittee Comments following Section II of this Rule adopted by the Supreme Court of Ohio on June 28, 1989, shall be effective on July 1, 1989.

(C) The amendments to Sections I(A)(2), I(A)(3), I(B), and II, and the addition of Sections I(C) and IV, adopted by the Supreme Court of Ohio on December 11, 1990, shall be effective on January 1, 1991.

(D) The amendments to this rule adopted by the Supreme Court of Ohio on April 19, 1995, shall take effect on July 1, 1995.

(E) The amendment to Sup. R. 20 adopted by the Supreme Court on December 4, 2002, shall take effect on January 6, 2003.

(F) The amendment to Sup. R. 20 adopted by the Supreme Court on February 1, 2005, shall take effect on March 7, 2005.

(Adopted eff. 10-1-87; amended eff. 7-1-89; 1-1-91; 7-1-95; 1-6-03; 3-7-05)

Crim R 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.

(Adopted eff. 7-1-73)

Evid R 105 Limited admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request of a party, shall restrict the evidence to its proper scope and instruct the jury accordingly.

(Adopted eff. 7-1-80)

Evid R 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.

(Adopted eff. 7-1-80; amended eff. 7-1-07)

Evid R 607 Impeachment

(A) Who may impeach

The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage. This exception does not apply to statements admitted pursuant to Evid. R. 801(D)(1)(a), 801(D)(2), or 803.

(B) Impeachment: reasonable basis

A questioner must have a reasonable basis for asking any question pertaining to impeachment that implies the existence of an impeaching fact.

(Adopted eff. 7-1-80; amended eff. 7-1-98)

Evid R 611 Mode and order of interrogation and presentation

(A) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(B) Scope of cross-examination. Cross-examination shall be permitted on all relevant matters and matters affecting credibility.

(C) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

(Adopted eff. 7-1-80; amended eff. 7-1-07)

Evid R 612 Writing used to refresh memory

Except as otherwise provided in criminal proceedings by Rules 16(B)(1)(g) and 16(C)(1)(d) of Ohio Rules of Criminal Procedure, if a witness uses a writing to refresh memory for the purpose of testifying, either: (1) while testifying; or (2) before testifying, if the court in its discretion determines

it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing. The adverse party is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

(Adopted eff. 7-1-80; amended eff. 7-1-07)

Evid R 613 Impeachment by self-contradiction

(A) Examining witness concerning prior statement

In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(B) Extrinsic evidence of prior inconsistent statement of witness

Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:

(1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;

(2) The subject matter of the statement is one of the following:

(a) A fact that is of consequence to the determination of the action other than the credibility of a witness;

(b) A fact that may be shown by extrinsic evidence under Evid. R. 608(A), 609, 616(B) or 706;

(c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence.

(C) Prior inconsistent conduct

During examination of a witness, conduct of the witness inconsistent with the witness's testimony may be shown to impeach. If offered for the sole purpose of impeaching the witness's testimony, extrinsic evidence of that prior inconsistent conduct is admissible under the same

circumstances as provided for prior inconsistent statements in Evid. R. 613(B)(2).
(Adopted eff. 7-1-80; amended eff. 7-1-98)

Evid R 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.

(Adopted eff. 7-1-80; amended eff. 7-1-94)

Evid R 803 Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing, mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

- (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
- (5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
- (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
- (7) Absence of entry in record kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.
- (8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.
- (9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirement of law
- (10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report,

statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 901(B)(10) or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of the declarant's family by blood, adoption, or marriage or among the declarant's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of the declarant's personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among the person's associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(Adopted eff. 7-1-80; amended eff. 7-1-06, 7-1-07)