**IN THE SUPREME COURT OF OHIO**

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

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REPLY BRIEF OF APPELLANT, CHARLES MAXWELL

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## OVERVIEW

The appellant maintains the facts and legal arguments as presented in his Merit brief. However, he takes the opportunity in this Reply Brief to point out specific arguments in response to the State's brief. He does not waive any arguments not specifically presented herein and reserves the right to address all the State's arguments at the oral argument.

Notably, counsel addresses the State's argument the defense counsel in a capital trial may reasonably withhold the presentation of mitigation evidence as a proper strategy. Proposition I. This argument has been soundly rejected by the Supreme Court of the United States, the Sixth Circuit Court of Appeals, and the ABA Guidelines for capital representation. Defense counsel must investigate and *present* all available evidence suggestion that a sentence of less than death would be the appropriate sentence. Thus, a decision not to present evidence establishing an intelligence level of less than 70 cannot be deemed to be a reasonable defense strategy.

## ARGUMENT

**Proposition of Law One:**

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

The state argues in it brief that "defense counsel may reasonably refrain from 'rais[ing] additional arguments in order to help focus attention on stronger argument undiluted by weaker arguments.'" State brief p. 32, citing State v. Tenace, 109 Ohio St.3d 451, 2006 Ohio 2987, at 10. If the the state if interpreting this case correctly, then the above statement is contrary to the ABA guidelines and the established Sixth Circuit and United States Supreme Court precedent. The bottom line is that defense counsel must investigate and prepare all available mitigation.

ABA Guideline 10.7 requires a full and completed investigation. "Because the sentences in a capital case must consider in mitigation, anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history. In the case of the client, this begins with the moment of conception, i.e., undertaking representation of the capital defendant." Dickerson v. Bagley, 453 F.3d 690, 694 (2006).

The Sixth Circuit Court of Appeals has made it clear that this effective assistance of counsel requires that counsel for defendants in capital cases must fully comply with ABA professional norms, Hamblin v. Mitchell, 354 F.3d 482, 485-88 (6th Cir. 2003) (briefly outlining the historical development of the requirement of effective assistance of counsel in capital cases). In Hamblin, the court said that in order to satisfy the requirements of the effective assistance of

counsel requirement of the Sixth Amendment, ABA Guidelines establish the relevant criteria:

> New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 Guidelines the obligations of counsel to investigate mitigating evidence. The 2003 ABA Guidelines do not depart in principle or concept from *Strickland*, *Wiggins* or our court's previous cases concerning counsel's obligation to investigate mitigation circumstances . . . .

Id. at 487. Hamblin then quoted the ABA Guidelines that create the required standards of performance for counsel in capital cases regarding the investigation of mitigating circumstances, norms that Maxwell's counsel fell far short of meeting:

> Counsel's duty to investigate *and present mitigating evidence* is now well established. The duty to investigate exists regardless of the expressed desires of a client. Nor may counsel sit idly by, thinking that investigation would be futile.

(Emphasis added)

The requirement in Hamlin that defense counsel investigate "and *present* mitigating evidence" (emphasis added) specifically rejects the argument set forth by the State. It is constitutionally impermissible for defense counsel to withhold viable mitigation to emphasis other available mitigation evidence.

In Dickerson v. Bagley, supra, the Sixth Circuit granted the writ where trial counsel relied on the mitigation of mental health while not investigating or presenting other evidence of mitigation. Among other evidence, counsel failed to present evidence of low intelligence to the jury during the penalty phase. Dickerson's IQ of 77 was very close to the retarded level; *see also* United States v. Roane, 378 F.3d 382, 408 (4th Cir. 2004) ("Johnson exhibited an IQ of 77, which indicated a 'generally impaired intelligence,' placing him 'just above the level of mental retardation.' ") (on remand, Dickerson was given life by the same three-judge panel upon full consideration of all mitigation, No. 85 CR 5931, Lucas County Common Pleas Court, 8/14/08).

The point is, defense counsel cannot rely upon one piece of mitigation. As Ohio is a weighing state, all mitigation must be provided to mitigate the appropriateness of death for the defendant. It is not a reasonable strategy to provide only the mitigation counsel likes or believes the jury will consider heavily. As life is required if only one juror is not convinced that death is appropriate beyond a reasonable doubt, withholding of mitigation evidence is never reasonable. Rompilla v. Beard, 545 U.S. 374 (2005).

**Proposition of Law Two:**

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

The State responds by arguing that "The second sentence in Crim. R. 7(A) does not apply to defendant..." (page 47 of State's brief) This argument is found at pages 27-30 of the Merit brief. The State additionally argues that the amendment of the death specification from "Rape" to "Felonious Assault" is "irrelevant" because either one of the death specifications made the appellant death eligible. (Page 47 of State's brief)

The State, at best, gives a tortured reading to Crim Rule 7. Further, it simply ignores the Constitutional requirement under Ohio and federal law that the defendant has the right to have a Grand Jury hear and consider the essential facts for each and every element of the capital crime charged. State v. Headley (1983), 6 Ohio St.3d 475.

This Court has recently addressed the importance of the Grand Jury in State v. Colon, 118

Ohio St.3d 26, 2008 Ohio 1624. See also State v. Colon, 2008 Ohio 3749 (Colon II). The second Colon decision did not alter the importance of the right to a grand jury properly indicting a capital case. Rather, the second Colon decision simply makes it clear that this Court makes it rule from Colon I apply prospectively and to cases, such as this one, pending on direct appeal.

Here, the trial court never addressed the appellant individually and never obtained an oral or a written waiver to the material and substantial change to the death specification. In spite of the State's argument, there is a significant difference between "Rape" and "Felonious Assault."

The State further argues that the error in this case is akin to the error this Court found harmless in State v. Joseph (1995), 73 Ohio St. 3d 450. Evidently, the State has not realized that the U.S. Court of Appeals for the Sixth Circuit reversed this Court's decision on this issue in Joseph and vacated his death sentence on the issue herein. See Joseph v. Coyle, 469 F.3d 441 (6th Cir. 2006), *cert denied* 127 S.Ct. 1827 (2007).

The amendment to the indictment was improper under Crim R 7, under the Ohio and federal Constitutions, under Colon I and II, and under Joseph v. Coyle, supra.

**Proposition of Law III:**

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

This Court has been quite specific in establishing what a proponent must show to demonstrate that a child understands the significance of her testimony under oath. In

determining whether a child under ten is competent to testify, the trial court must take into consideration (1) the child's ability to receive accurate impressions of fact or to observe acts about which he or she will testify, (2) the child's ability to recollect those impressions or observations, (3) the child's ability to communicate what was observed, (4) the child's understanding of truth and falsity and (5) the child's appreciation of his or her responsibility to be truthful." State v. Frazier, (1991) 61 Ohio St. 3d 247, syllabus.

Although the state did not address the particulars of the child witnesses' testimony, there is another passage not addressed in the principle brief which needs to be addressed. The following discourse occurred in the competency hearing.

Q. Did you and your daddy ever play games sometimes?

A. No.

Q. Did you ever go horseback riding with daddy?

A. Yes.

Q. And where did you go horseback riding at?

A. In the house.

Q. In the house? . . .

(T. 868)

Maxwell did teach others to ride horses. These are actual horses and not pretend game horses. The child's obvious confusion and possible fantasy is indicative of her inability to perceive or relate accurately her observations or to accurately recollect her observations. This is just one more reason the trial court erred in finding her competent to testify against Maxwell.

**Proposition of Law IX**

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

Here, the appellant argues that testimony before a Grand Jury is not testimony in a "criminal proceeding" as defined by R.C. 2929.04(A)(8) until the indictment is returned and filed in the Clerk's office pursuant to Ohio law.

The State responded in its Brief that the issue as already been decided in State v. Conway, 2006 Ohio 791, para. 53-55. The State's Brief has an extensive quote from Conway.

However, the Conway case does not stand for the principles cited by the State. Counsel could not find the material quoted by the State within that decision. In fact, the specification at issue in this case, the Retaliation specification, was not at issue in Conway. The paragraphs cited by the State, 53-55, involve the Administration of Oath to the Jury by the Bailiff. Moreover, R.C. 2929.04(A)(8) does not appear in the case at all.

Additionally, the State argues that "Like the defendant in *Conway*, Defendant killed McCorkle to *prevent her from testifying in a criminal proceeding.*" (emphasis added)(page 72 of State's brief)

The State, however, tried the appellant on the theory that the appellant retaliated against the victim for her testimony before the Grand Jury and not to prevent her from testifying at a future criminal proceeding. This point is beyond dispute from the testimony of the case and the trial judge's sentencing opinion. See Appendix of Merit brief, page A-7.

The appellant maintains his arguments advanced in his merit brief.

**Proposition of Law XIII:**

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

The State maintains that there was no "interrogation" of the appellant when the police asked the appellant, without any Miranda v. Arizona, 384 U.S. 436 (1966) warnings, whether he was armed. The appellant had already been handcuffed and the private home had already been fully secured by numerous police officers. The appellant responded to the police officer's question by stating he did not have a gun anymore. (T. 204)

For the first time on appeal, the State argues that there was not any "interrogation." In the trial court, the State argued that the "Public Safety" exception to the Miranda requirement found in New York v. Quarles 467 U.S. 649 (1984) must apply.

The custody aspect of Maxwell was addressed in the original briefing. Maxwell will here address the interrogation issue.

In Rhode Island v. Innis, 446 U.S. 291 (1980), the Supreme Court of the United States defined interrogation as "express questioning or its functional equivalent." Id. 301. In Innis, the police did not even directly question the defendant. Police officers conducted a conversation between themselves about the possibility that a handicapped child could find the gun in question in front of the defendant. Because no question directly was posed to the defendant, the court found no interrogation on the part of the officers.

Here there was direct questioning of the appellant. Although not all custodial questioning

violates Miranda, questioning designed to elicit an incriminating response are in violation. In Pennsylvania v. Muniz, 496 U.S. 582 (1990) the court held that routine booking questions were reasonably related to police record keeping needs and therefore not relevant to Miranda concerns. Id. 600-602. This is not the case in the present case. The request for a weapon was designed to elicit an incriminating response. The question would not have been asked were not Maxwell a suspect.

Where an incriminating response from a defendant would not be expected from the question, Miranda is not violated. Rosa v. McCray, 396 F.3d 210 (2d Cir. 2005) (booking officers question regarding defendant's natural hair color when the defendant volunteered he had recently dyed his hair within routine booking exception because officer could not have expected incriminating response); U. S. v. Broadus, 7 F.3d 460 (6th Cir. 1993) (police inquiry of defendant at booking regarding phone number that produced incriminating evidence within exception because the question was not intended to elicit incrimination response)

In this case, the question posed by the police to the appellant Maxwell was intended to elicit the possible murder weapon. The sought admission that he had possessed the gun used in a homicide cannot fall within the booking exception. The question unequivocally was intended to procure an incriminating response from Maxwell.

The public safety exception found in New York v. Quarles, supra, stands for the proposition that there is an exception to the Miranda rule when a weapon may be located where a member of the public may access it. Given the danger an abandoned firearm may pose to the public or the police officers in a public space, one may dispense with the Miranda warnings in this limited situation.

Here, the entire house was secure; the appellant was handcuffed; only police officers were in the secured private home. Nobody else was present. This is not a public space and it was secured. There was no danger of an abandoned firearm as there was in the supermarket where Quarles was arrested.

The admission of the appellant's statement was not harmless beyond a reasonable doubt. The statement is an admission that the appellant had a gun and then got rid of it. It implies a guilty conscious. The appellant was charged with shooting the victim. The statement was incriminating and contributed significantly to the state's theory of the case. The appellant's statement should have been suppressed and a new trial is in order.

**Proposition of Law XIV:**

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

The appellant maintains that the victim's alleged out of court statement via a three-way telephone conversation involving the appellant and state's witness John Gregg. Mr. Gregg testified, over objection, that the victim allegedly said in a three way telephone conversation that she "told the truth" when she testified before the Grand Jury. (T. 1675)

The appellant maintains he was denied the opportunity to cross examine the victim about this statement and his Sixth and Fourteenth Amendment rights were violated.

The State counters that the statement is not "testimonial" and not "hearsay." The United States Supreme Court in the seminal case of Crawford v. Washington, 531 U.S. 36 (2004) has

declined to define "testimonial." However, the Sixth Circuit has determined that the proper inquiry is whether the declarant intends to bear testimony against the accused. That intent may be determined by querying whether a reasonable person in the declarant's position would anticipate the statement being used against the accused in *investigating or prosecuting* the crime. United States v. Johnson, 440 F.3d 832 (6th Cir. 2006)(emphasis added)

If the statement is non-testimonial, then the decision in Ohio v. Roberts 448 U.S. 56 (1980) remains controlling. Johnson, supra. Maxwell address Roberts in his original brief.

The appellant maintains that the statement at issue is testimonial because the declarant would anticipate that her admission, that she testified truthfully before the Grand Jury, would be used against the appellant. She made this statement via a three-way phone call and she knew John Gregg was listening as well as the appellant. She knew that John Gregg could disclose it to the police for investigation, as he claims he did.

Even if not the statement were not found to be testimonial, under Roberts, there is no indicia of reliability that declarant ever made the statement as alleged by John Gregg. Mr. Gregg was not a reliable person or a credible witness. The trial judge called Mr. Gregg "mentally ill," a "tax fraud," and stated on the record he had very little credibility. (T. 1022)

The alleged statement as testified to by John Gregg was the absolute foundation for the Retaliation death specification that resulted in the appellant's death sentence. But for this testimony, there is no evidence to support the Retaliation death specification.

For the State to argue that the statement was not offered for the truth of the matter asserted is laughable. Her testifying to the "truth" of the alleged domestic violence or felonious assault incident before the Grand Jury forms the factual basis for the State seeking the death

penalty.

In addition, the State once again asserts one theory at trial, Retaliation, and another on appeal. For example, the State argues that "The statement was offered as evidence that the Defendant believed McCorkle told the truth *and he needed to kill her so she would not testify.* State's Brief pages 83-84. (emphasis added)

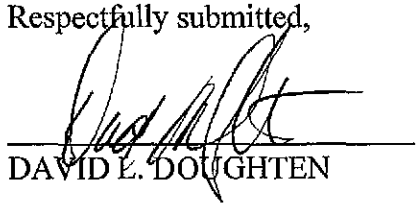
The State cannot have it both ways. The alleged hearsay statement of the victim about her testimony before the Grand Jury should have been excluded. A new trial is in order or the Retaliation specification must be vacated.

It must be noted that "forfeiture by wrongdoing" is not an exception to the right to Confrontation under the Sixth Amendment. See Giles v. California, No. 07-6053, ____ U.S. ___, 128 S. Ct. 2678, decided June 25, 2008.

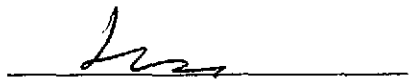
## CONCLUSION

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

Respectfully submitted,



DAVID L. DOUGHTEN



JOHN P. PARKER
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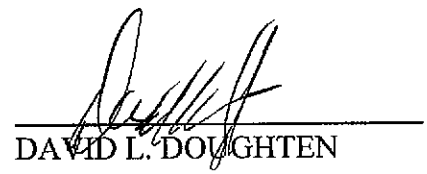
## CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Reply Brief was served upon William D. Mason, Esq., Cuyahoga County Prosecutor, or a member of his staff, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 9 day of September, 2008.



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