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CASE OVERVIEW

This is the second time this Court has reviewed this case. This Court remanded the case for new sentencing procedure in State v. Roberts, 110 Ohio St. 3d 71, 2006-Ohio-3665. The reversal was based upon the failure of the trial court to allow allocution, coupled with the failure of the trial court to independently prepare its sentencing opinion as required by R.C. 2929.03(F).

The issues herein are relatively limited for a direct capital appeal. The reasons are two-fold. First, the remand was for sentencing purposes only. The first-phase or culpability-phase issues were fully addressed in Roberts I, supra. Second, the trial judge narrowly reviewed this Court's order on remand. The trial court refused to consider any information relevant to sentencing that had not been presented at the first sentencing hearing. The defense proffered considerable information for the court's consideration, but the court refused to consider the evidence. The evidence, including a Social Security Administration grant of disability funding due to mental health issues, and prison records reflecting severe mental health problems including hallucinations, were proffered into the record and will be addressed fully below.

The appellant Donna Roberts was convicted of complicity in the murder of her ex-husband/housemate Robert Fingerhut. It was alleged that she maintained a relationship with the co-defendant Nathaniel Jackson while Mr. Jackson was imprisoned on an unrelated charge. The two hatched the plot through letters and phone calls to kill Mr. Fingerhut for the purpose of obtaining the proceeds of his life insurance policies, of which Ms. Roberts was the beneficiary. Mr. Jackson was convicted and sentenced to death in a trial prior to that of the appellant.

It was argued at the remand sentencing below that the mitigation evidence, including Roberts' lack of a criminal history and mental health issues, required that a life sentence be found

to be the appropriate sentence in this instance. The trial court again found death, refusing to consider any information not adduced at the required allocution hearing.

Because of the wealth of mitigation available but not presented to the jury at the penalty phase hearing, the issue of the effectiveness of trial counsel is ripe to be addressed here. The records that predated the offense were proffered into the record. The issue was not raised in Roberts's first direct appeal as the record did not support the issue at that time.

STATEMENT OF THE CASE

A Trumbull County grand jury indicted the defendant-appellant Donna Roberts (hereinafter appellant) on a four count indictment for various charges, including two alternative theory counts of capital murder surrounding the death of her husband, Robert Fingerhut. The indictment charged the appellant with one count of the purposeful killing of Mr. Fingerhut with prior calculation and design in violation of R.C. 2903.01(A) and one count of the so-called felony murder in violation of R.C. 2903.01(B). Each of these capital murder counts included two capital specifications addressing violations of R.C. 2929.04(A)(7). The first specification alleged that the murder occurred during the commission of an Aggravated Burglary, R.C. 2911.11. The second specification alleged that the murder occurred during the commission of an Aggravated Robbery, R.C. 2911.01.

The third and fourth counts charged the felonies underlying the aforementioned capital specifications, Aggravated Burglary, R.C. 2911.11 and Aggravated Robbery, R.C. 2911.01. Each count of the indictment included a firearm specification pursuant to R.C. 2929.141.

The charges indicated that the appellant was not the principal offender, but rather she acted in complicity with the principal, and co-defendant, Nathaniel Jackson. Mr. Jackson was tried separately as he also was capitally indicted. The appellant pleaded not guilty to all counts of the indictment at her arraignment on December 31, 2001.

On February 26, 2002, the trial court conducted a hearing on the appellant's motion to suppress items taken from her home the night of the homicide. The trial court denied the motion.

A jury trial began on March 26, 2003, with the death-qualification process. The jury found the appellant guilty of all counts including the capital and firearm specifications on May

28, 2003.

On June 3, 2003, the appellant indicated to the court that she wanted to waive the presentation of mitigation at the penalty phase hearing, except she did desire to make an unsworn statement. The trial court conducted a hearing to determine her competency to do so. A psychologist, Thomas Eberle, who had previously examined her, believed the appellant to be competent. The court also directly questioned the appellant. The court determined her to be competent under State v. Ashworth (1999), 85 Ohio St. 3d 56, 1999-Ohio-204.

Prior to the commencement of the penalty phase hearing, the prosecutor elected to dismiss Count Two, R.C. 2903.01(B)(felony-murder) and proceeded with Count One, R.C. 2903.01.(A) (prior calculation and design). The hearing began on June 4, 2004. The defense waived opening and closing argument. The appellant did provide an unsworn statement. That same day, the jury recommended a sentence of death.

On June 20, 2003, the trial court accepted the recommendation and sentenced the appellant to death. The court also sentenced the appellant to serve ten years for both the convictions of Aggravated Robbery and Aggravated Burglary. These sentences are being served consecutively to each other and the sentence of death. The trial court also applied a three-year firearm specification, which is also being served consecutively to the principle sentences.

The appellant appealed her convictions and sentence to this Court. In State v. Roberts, 110 Ohio St. 3d 71, 2006-Ohio-3665, this Court affirmed the convictions but reversed the sentence of death. The matter was remanded to the trial court to allow Roberts to allocute and to have the trial court independently prepare the R.C. 2929.03(F) sentencing opinion.

Re-Sentencing Procedure in Trumbull County Common Pleas Court

Judge John M. Stuard, the original trial judge, conducted the proceedings on the re-sentencing mandate. On May 1, 2007, Ms. Roberts moved to expand the sentencing hearing to include all relevant mitigation evidence. The trial court denied the motion and restricted the hearing to only the allocution of Roberts on September 14, 2007. A defense request for an independent psychologist was also denied by the court.

The defense moved for a competency evaluation. The court granted the motion. On October 22, 2007, the court conducted a competency hearing. Dr. Thomas Gazley of the Trumbull County Forensic Diagnostic Center testified that in his opinion Ms. Roberts was competent. The court agreed with the opinion and found her to be competent.

That same day, the court conducted a hearing for the purpose of hearing the allocution of Ms. Roberts as required by the Ohio Supreme Court decision.

On October 29, 2007, the court announced its decision, again finding death to be the appropriate penalty.

The appellant filed a timely Notice of Appeal on December 11, 2007. This Brief on the Merits follows.

STATEMENT OF THE FACTS

The state charged the appellant Donna Roberts with planning the killing of her husband with a prison inmate, Nathaniel Johnson. According to the state, the appellant and Mr. Jackson were pen-pals while he was serving time in a state penal institution. It is alleged that at some point during the letter writing and phone conversations, the two planned the homicide of the appellant's husband/roommate, Robert Fingerhut. Shortly after Mr. Jackson was released from prison, the two allegedly orchestrated the homicide during a time which the appellant established an alibi for herself while shopping and eating away from her home, where the offense transpired.

The defense did not contest that Mr. Jackson was the killer. The defense did argue that the appellant did not act in complicity with him. While their correspondence was admittedly sexually graphic and did allude to actions suggestive of a plot, the defense argued that there was insufficient evidence that the appellant acted in complicity with Mr. Jackson.

The facts will be further discussed in the following Propositions of Law.

ARGUMENT

Proposition of Law I:

Where a capital sentence is remanded for a new sentencing, the trial court must consider and give effect to all relevant evidence in mitigation available for consideration. A remand to allow allocution does not prevent the sentencing court from considering evidence which would support and provide weight to the allocution.

In State v. Roberts, 110 Ohio St. 3d 71, 2006-Ohio-3665, this Court reversed appellant's death sentence. The matter was remanded for a new sentencing hearing. The issue here is whether the presentation of evidence in mitigation may be limited by the trial court at the new sentencing hearing. Here, the trial court interpreted this Court's decision to preclude it from considering any evidence that was not presented at the first sentencing presentation. Thus, Roberts was not permitted to present strong evidence in mitigation of a finding that death was the appropriate penalty.

The mitigation Roberts desired to present can be classified into two forms. First, there was considerable evidence that was available for presentation at the first sentencing hearing, but was not presented. This includes evidence of considerable and severe mental health issues, perhaps caused by a number of head injuries. The second class of evidence consisted of post-sentencing evidence garnered from her stay on death row. This also included considerable mental health evidence requiring the taking of drugs and treatment to combat the symptoms. It also included evidence of her ability to adapt favorably to her prison environment, when not hallucinating or suffering from adverse mental health effects. It should be noted that the prison records reflect some chronic mental health issues, meaning that the issues pre-dated the

underlying offense.

The problem with the trial court's refusal to consider the additional evidence of mitigation is also two-fold. First, the sentencer is constitutionally required to hear and consider all available mitigation evidence. The second is that the allocution cannot carry much weight if the sentencer refuses to hear the background that supports and provides credibility and weight to the allocution. As the trial court here did not reference any of appellant Robert's allocution in its R.C. 2929.03(F) opinion, it is clear that he did not give any effect to her presentation. See Proposition of Law III.

Even if the the trial court was correct in its reading of the decision of this Court, such a limitation is contrary to clearly established precedent of the United States Supreme Court.

Specifically, this Court in Roberts I held as follows at p. 95:

[**P167] Having found no prejudicial error in regard to Roberts's conviction, we affirm the conviction and the judgment of the trial court pertaining to them. Because of the prejudicial error in sentencing Roberts to death, the sentence of death is vacated, and the cause is hereby remanded to the trial court. ***On remand, the trial judge will afford Roberts her right to allocute, and the trial court shall personally review and evaluate the evidence, weigh the aggravating circumstances against any relevant mitigating evidence, and determine anew the appropriateness of the death penalty as required by R.C. 2929.03.*** The trial court will then personally prepare an entirely new penalty opinion as required by R.C. 2929.03(F) and conduct whatever other proceedings are required by law and consistent with this opinion.

This decision does not give any prohibition against providing new evidence at a second or remand sentencing hearing. To do so would violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Mitigation Case Law

The United States Supreme Court has long held that a death conviction may not stand if the sentencing body has been precluded from considering relevant evidence suggesting that the death sentence would not be appropriate. The Eighth Amendment mandates an individualized assessment of the appropriateness of the death penalty. In Lockett v. Ohio (1978), 438 U.S. 586, the Supreme Court held that the Eighth and Fourteenth Amendments require that the sentencer "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id., at 604 (emphasis in original). Thus, the Court held unconstitutional the Ohio death penalty statute which mandated capital punishment upon a finding of one aggravating circumstance unless one of three statutory mitigating factors were present.

Lockett and Its Progeny Mandate Consideration of All Relevant Mitigation

This holding has been consistently applied throughout the Court's opinions addressing Lockett and its progeny. See Eddings v. Oklahoma (1982), 455 U.S. 104, Skipper v. South Carolina (1986), 476 U.S. 1, Hitchcock v. Dugger (1987), 107 S.Ct. 1821. In Eddings, a majority of the Court reaffirmed that a sentencer may not be precluded from considering, *and may not refuse to consider*, any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death.

In Eddings, the Oklahoma death penalty statute permitted the defendant to introduce evidence of any mitigating circumstance, but the sentencing judge concluded, as a matter of law, that he was unable to consider mitigating evidence of the youthful defendant's troubled family

history, beatings by a harsh father, and emotional disturbance. Applying Lockett, the Court held that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." 455 U.S., at 113-114 (emphasis in original). In that case, "it was as if the trial judge had instructed a jury to disregard the mitigating evidence [the defendant] proffered on his behalf." Id., at 114.

"[T]he Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence." McCleskey v. Kemp (1987), 481 U.S. 279, 304 (1987) (emphasis in original). "Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." Penry v. Lynaugh (1989), 492 U.S. 302, 327-328.

If the sentencer has been precluded from considering and giving effect to the mitigation, the sentence of death must be reversed. This is because the sentence imposed at the penalty phase failed to reflect a reasoned *moral* response to the defendant's background, character and crime. California v. Brown (1987), 479 U. S. 538, 545.

Sentencing Remand

The above precedent applies even where the original death sentence is reversed and the matter is on remand for a new sentencing hearing. The Sixth Circuit has clearly stated that the scope of the mitigation in a re-sentencing hearing could not be limited. In Davis v. Clark (C.A.6, 2007), 475 F.3d 761, the trial court at a second sentencing hearing refused to consider the

behavior of the defendant while in prison after his death sentence. This mitigation evidence was admissible under Skipper v. South Carolina (1986), 476 U.S. 1. The refusal of the three-judge panel to consider this additional relevant mitigation evidence required a reversal of the death sentence.

Mitigating factors under R.C. 2929.04(B) are not related to a defendant's culpability but, rather, are those factors that are relevant to the issue of whether a defendant convicted under R.C. 2903.01 should be sentenced to death. A sentencing authority may not refuse to consider, as a matter of law, any relevant mitigating evidence. State v. Goff (1998), 82 Ohio St.3d 123.

Precluded Evidence

The Social Security Administration Records (SSA) and the prison records reveal the following factors which should have been considered by the judge in his sentencing consideration. These records were proffered as Defense Exhibit A on October 22, 2007. The SSA records were part of the third proffer by Roberts as the remand sentencing hearing on October 22, 2007.

1. Sexual abuse as a child.

At her allocution, Ms. Roberts noted to the judge that she had been sexually abused as a child by her cousin. The judge did not consider this to be mitigation and did not address it. But the judge's failure to consider evidence to provided her statement with weight may have been the reason for the overlooking of the issue. The judge did not mention sexual abuse as a mitigating factor in his opinion.

Dr. Gazley, who testified in Roberts competency hearing, acknowledged that post-traumatic stress syndrome is sometimes an effect of sexual abuse. (T. 28) It was not part of his

diagnosis. He did not recall seeing references to PTSD in the prison records. He did remember something about the abuse, but could not remember if he had read it or heard directly from Roberts. (T. 28) Dr. James Eisenberg proffered an affidavit testifying that he believed there to be a strong indication of the diagnosis, albeit his diagnosis was not beyond a psychological certainty due to his limited access to Roberts and the record, as the trial judge refused appointment of an independent psychologist. The prison records do in fact reflect this diagnosis.

2. Low Intelligence

In 1999, Roberts applied for SSI disability due to her mental condition. The psychological evaluation was prepared by Dr. Donald Delgli. (Contained in Social Security Administration Records proffered on October 22, 2007) The reports were filed with the administration on November 3, 1999, some two years prior to the murder, for the purpose of a Disability Determination. The report disclosed that Ms. Roberts tested to a full scale IQ of 65, under the State v. Lott, 97 Ohio St. 3d 303, 2002-Ohio-6625. The verbal I.Q. was 79 and her performance I.Q. was 55.

Even if a subsequent hearing would result in Ms. Roberts not meeting Atkins criteria, the report should have been admitted as evidence in mitigation. Low intelligence is a recognized mitigator, regardless of whether it meets Lott standards. State v. Evans (1992), 63 Ohio St. 3d 231; State v. Hill (1992), 64 Ohio St. 3d 313; State v. Green (1993), 66 Ohio St. 3d 141; State v. Murphy (1992), 65 Ohio St. 3d 554; State v. Webb (1994), 638 N.E.2d 1023.

3. Depression

The records both pre-offense and post offense are replete with references of Ms. Roberts suffering from mental health issues. Dr. Delgli concluded that, in 1999, Ms. Roberts was a fifty-

five- year old woman “who presents a rather odd diagnostic picture. Unfortunately, no formal history accompanied the referral to this office for this claimant who suffered multiple injuries including head trauma in a reported automobile accident which occurred in April of 1999.” (Dr. Donald Degli 11/3/1999 Psychological Evaluation) The report noted that Roberts, when asked if she was a happy person, responded “ Well, I used to be. Now- - there is no reason to be happy. I am waiting to die now . . .any second. Don’t you think so?” (Degli report, page two) She also reported that her husband, the decedent, was tired of her at the time. She also mentioned that she thought of suicide constantly but just could not pull the trigger, even though she had guns. Id.

The Delgli report concluded by noting that dementia could not be ruled out. The doctor also could not rule out malingering, but noted that the head injuries required further testing. He noted that:

Psychologically, Donna does present herself as genuinely impaired to some degree, probably not able to follow directions or do routine tasks in a competitive work environment at the present time. She has the ability and judgment to manage basic money matters appropriately. Interpersonal functioning was particularly impaired, if today is an example. She will have difficulty in simple social interactions and at best, presents marginal capacity to interact appropriately in a competitive workplace. Provisionally, Donna is moderately impaired in her ability to meet the demands of competitive adult employment. These observations are made without regard to whatever physical limitations she may have.

Delgli Report, p. 3.

In addition, the Delgi Report contained important psychological testing results and opinion that would have been instrumental to the jury’s determination of the appropriate sentence. The report concluded as follows:

This is the evaluation of a fifty-five year old woman who presents a rather odd diagnostic picture. Unfortunately, no formal history accompanied the referral to this office for this claimant who suffered multiple injuries including head trauma

in a reported automobile accident which occurred in April of 1999. Thus, today's evaluation leads to rule out differential diagnostics. At times, she seemed to be genuinely confused as she well complained of memory problems. At other times, her responses seemed to be an exaggeration, dramatization, confabulation or malingering. She reports medications for dizziness. She also takes antidepressant medication. Yet, she reports no formal mental health care. The intellectual assessment yielded questionable functioning and an intelligence quotient in the mild mental retardation range. Memory functioning, as measured by the Wechsler Memory Scales was also impaired, although her responses were suggestive of confabulation and malingering. Reading skills proved to be functional at the high school level. Personality and emotional assessment reveals an individual who is rather blunted, expressionless, preoccupied, worrisome and evidencing some rather strange ideation if she is being genuine in her presentation. Diagnostically, there is a need for rule out consideration of dementia. There is certainly a need for thorough review of whatever medical/neurological records are available.

Psychologically, Donna does present herself as genuinely impaired to some degree, probably not able to follow directions or do routine tasks in a competitive work environment at the present time. She has the ability and judgment to manage basic money matters appropriately. Interpersonal functioning was particularly impaired, if today is an example. She will have difficulty in simple social interactions and at best, presents marginal capacity to interact appropriately in a competitive workplace. Provisionally, Donna is moderately impaired in her ability to meet the demands of competitive adult employment. These observations are made without regard to whatever physical limitations she may have.

It is important to note, again, that the report was prepared approximately two years prior to the homicide. It notes, consistently, the "Interpersonal functioning was particularly impaired," which may explain her difficulty with her attorneys. She had a "marginal capacity to interact appropriately in a competitive workplace."

In addition, the SSA records reveal, in addition to the severe car accident, that:

- A. Ms. Roberts was receiving SSI benefits for mental disability;
- B. The decedent himself, Robert Fingerhut, had called the Social Security Administration to urge that she receive the benefits. He informed that agency that Donna had not been herself since the accident. Fingerhut was afraid someone would grab her after one of her memory problems. She was a changed person.

She did not have the emotional stability to work anymore. She had lost some of her memory. (Proffer A, pp. 1, 3 of records) Robert Fingerhut gave examples. Donna had previously know all members of the Cleveland Indians but could no longer recall them.

- C. The examiners noted the change in mental condition since the accident. This all occurred two to three weeks after the accident. She became more moody with more irrational thinking. She takes medication for her depression. Fingerhut had not seen anyone come from such a high point to such a low point. She was not the same person that she had been. She had lapses of time. A half an hour may pass and Donna would think that half the day had passed. She could not remember dates after repeated prompting. She went into rages, forcing him to leave. (Proffer A, p. 6, 9)
- D. Fingerhut noted that she was getting worse. She was not thinking clearly. She forgot where she was in familiar places and would forget where she placed items in the home. She could not even remember the dogs' names. She was seeing a psychiatrist. (Proffer A, p. 7) The psychiatric records have not been obtained currently as Roberts is unable to remember the name of her psychiatrist.
- E. Fingerhut reported that she had violent mood swings, including one in the doctors office. This necessitated her being admitted to the "mental ward" at St. Joseph's Hospital. (Proffer A, p. 8, 9)
- F. There appears to be a diagnosis of psychotic disorder, personality disorder in the records. Petitioners Exhibit A, p. 11. The admitting diagnosis was depression, suicidal, major depression, recurrent bi-polar disorder. Medications were numerous. (Proffer A, p. 16)
- G. The records included the discharge summary for St. Joseph's Health Center in Warren, Ohio. This report noted that:

The immediate reason for this hospitalization was because of severe anxiety, agitation, depression, **auditory and visual hallucinations and suicidal ideations** and intention by CO2 poisoning. Roberts stated that she has been getting quite tense, restless and depressed lately, having frequent mood swings, losing interest in doing things, having difficulties concentrating and started hearing voices talking to her. She has been seeing shadows around the room when no one is home and has the feeling that someone is after her. Medications: Remeron (15 mg), Zyprexa (5 mg), Vistaril (50 mg), Premarin, Provera, Paxil (20 mg), Depakote (500 mg), Risperdal (1 mg)

(Emphasis added) (Proffer A, p. 17)

The final diagnosis was bi-polar disorder, circular type. (Proffer A, p. 18).

- H. The emergency room documentation of February 10, 2000 indicates the doctors found her depressed and suicidal. Proffer A, p. 19, 20. She was admitted to the general psychiatric unit in stable condition. Feelings of paranoia were noted, in addition to psychiatric problems with her father. That she had past bouts with diabetes was also noted. (Id. 21, 50).
- I. Donna revealed to doctors that she has had some psychiatric problems and has taken some medicines from a psychiatrist in the past. She admitted to having frequent mood swings, going from elation to depression all throughout her life. Id., p. 22. She believed that she would be better off dead than alive and thought of killing herself with CO2. She admitted hearing voices and seeing shadows in her rooms and believed that someone was after her and trying to hurt her. Id. 23. She was again diagnosed with major depression with possible bi-polar disorder. She thought of killing herself “everyday.” (Proffer A. 37).
- J. The records revealed that she had been an “abuse victim.” Id. 38. She has “probable post-concussion syndrome with memory loss and confusion.” Id. p. 43, 48, 50. An MRI of the brain was recommended. Depression again was noted. She was taking Paxil and Remeron. (Id. 48).
- K. An EEG was performed on June 25, 1999. The result was suggestive of psychological dysfunction and thought less likely to be structural damage. (Id. 96)
- L. Roberts displayed bizarre behavior in a January 14, 2000 interview where she pulled gum from her bosom and repeatedly licked the filters of her cigarettes. She heard noises that others could not hear, felt rage and saw a light to the side of her head that others could not see, but denied that they were hallucinations. Id. 118 She was obsessed with sex and death. She had obsessive thoughts of bad things happening to her if she did not complete her rituals. She was experiencing auditory and visual hallucinations. (Id.)

Prison Records

The records below were obtained from the Ohio Department of Rehabilitation and Correction. A summary of areas of mitigation that could have been introduced from the information contained in the record follows. The evidence from these records, the

postconviction records and the trial record includes the following factors in mitigation. These records were proffered to the trial court on September 20, 2007. The records consistently confirm her bi-polar and depression diagnosis. They reveal that she was victim of child abuse, possibly resulting in a diagnosis of post-traumatic stress suffering. Her mental health condition at the time deteriorated into hallucinations (report of March 12, 2006, seeing ants in cell, in addition of scope of March 2006, reports), and the ability to communicate with others through her mere thoughts (December 24, 2003 report). The prison records reveal that she had watched her father abuse her mother when she was a child, among other items relevant to sentencing.

The records contain evidence of the following which were relevant to the appropriateness of the death penalty. The summaries of the reports are listed in the order of the packet received from the institution. They are not chronological. The prison records are listed below in order of proffer submitted:

- A. *Physical Problems* (These reports reflect the time period from 2003 -2007)**
1. Has a problem with her lower spine and pelvis, often causing her great amounts of pain;
 2. Has suffered from sciatica;
 3. Had a fall in prison and hit her head/face on a metal desk;
 4. Has borderline diabetes;
 5. Had at least 3 head injuries (first at 19 years of age);
 6. Had cysts removed from her ovaries and an abortion;
 7. Has suffered hypertension, and shows a few punctuate white matter signal

abnormalities which are non-specific in nature, found via an MRI (likely to be age related).

B. Mental Health Problems

1. Has suffered from on/off depression from the age of 6, possibly as a result of the sexual abuse she suffered by her cousins or her father's mental and physical abuse towards her mother. Has now been diagnosed as a type of Bipolar Disorder (BPAD Type II). This leaves her feeling very depressed or euphoric and can lead to risk-taking behavior;
2. Was an inpatient in 2000 for 2 weeks after expressing suicidal thoughts, saw a psychiatrist on/off but failed to keep appointments (prior to conviction);
3. She occasionally suffers from hallucinations and appears confused and disorganized. She also believes others can see and hear her thoughts. She has a negative body image;
4. Has had several head injuries with the most serious being in 1999. She had concussion and reported a change in personality, including feeling 18 again and having no fear. It may also have been the reason she started smoking cannabis;
5. In prison, denied any suicidal thoughts or self-harm but there have been a few occasions where she has unexplained bruises on her arms and/or legs and her fall in prison *could* be regarded as suspect. Has said that she tried holding her breath once, this could be regarded as a possible suicide attempt. She has stated that she would like to die but it is against her religion for her to do it to herself;
6. Is in remission of Post Traumatic Stress Disorder (PTSD);
7. Is too trusting of her fellow inmates and fails to set appropriate boundaries, occasionally takes on child-like characteristics;
8. Takes medication to help with her symptoms of depression and hypomania (since 2000), she is extremely reliant on these;

C. Evidence from Prison Records

The evidence of the above was gleaned from the following dates from the prison records.

Report dated 1/12/2005 from Corrections Medical Center (247058)

Degeneration in the lower spine and pelvis.
Mild sclerosis of the acetabular surfaces (right acetabulum)
Joint spaces causing narrowing
Mild osteophytes from both femoral heads
Overall; mild bilateral DJD in both hips.

Report dated 7/07/03 from Corrections Medical Center (323866)

Prominent pseudoarticulation or prominent costochondral junction of the left 1st rib anteriorly.

Report dated 6/03/05. Addendum to Mental Health Evaluation (page 1).

On a selection of medication, was coping fine but now feels depressed as to her situation; her physical pain is also too much (it is now affecting her sleep). History includes on/off depression since the age of 6. Was an inpatient in 2000 for 2 weeks. Has seen a psychiatrist and has been on medication since 2000.

Report dated 6/03/05. Addendum to Mental Health Evaluation (page 2)

Used pot on/off on the street but did not do drugs while incarcerated. She was sexually abused by her 2 cousins.

Her mother suffers from depression and is terminally ill.

Her mood is sad.

Report dated 6/03/05. Addendum to Mental Health Evaluation (page 3)

Diagnostic impression; BPAD type II, currently depressed. Treatment included medication for depression and pain.

Report dated 6/13/06. Mental Health Caseload Classification (annual).

C1 Categorical (SMI); Bipolar D/O

Report dated 6/03/03(?). Mental Health Caseload Classification (update)

C1 Categorical (SMI); Bipolar D/O

Report dated 6/18/07. Addendum to Mental Health Evaluation

Inmate has suffered from depression since 6, was treated on/off with counseling but is now purely on medication; wonders if she would die without it. Experiences depression when thinks of her husband.

She has had 3 head injuries, the first being aged 19, second in 1983 and the third in 1999. Reports of a personality change after the 1999 injury-felt like she was 18 and not afraid of anything.

Report dated 6/18/07. Addendum to Mental Health Evaluation (page 2)

Similar to 6/03/05 report.

Report dated 12/17/03. Interdisciplinary Progress Notes.

Donna says she feels much better and that she isn't afraid to die. However, she also said that she thinks people can see and hear her thoughts when she is alone and that she has always felt this way (claims it does not affect her daily functions though). She also has negative feelings towards her body; she always wears make up and nobody has seen her naked.

Report dated 11/24/03. Interdisciplinary Progress Notes.

Donna has reported she is sleeping a lot due to her medication. Her aunt and cousin had died recently.

11/28/03; mood is very sad.

Report dated 11/13/03. Interdisciplinary Progress Notes.

Donna feels good at the moment but highlights the fact that she often feels bad and her mood can never stay even.

Report dated 10/24/03. Interdisciplinary Progress Notes

Donna is sensitive to bright light in her room, this is affecting her sleep.

Report dated 10/15/03. Interdisciplinary Progress Notes

Donna reports crying spells, loss of appetite, difficulty sleeping and is struggling to get out of bed in the mornings.

Report dated 9/18/03. Interdisciplinary Progress Notes

She is taunted by her inmates and the guards talk about her.

Report dated 9/03/03. Interdisciplinary Progress Notes

She experiences difficulty sleeping, loss of appetite and low energy levels. She feels she is being unfairly treated.

Report dated 9/26/03. Interdisciplinary Progress Notes

Donna reports she suffers from depression and anxiety but her medication offers her appropriate relief.

Report dated 05/14/07. Bipolar Group Pre test

Has 4 symptoms of a bipolar disorder; sadness, euphoria, agitation and intolerance. On a scale of 1(low)-10(high) Donna says her disorder interferes with her life at number 8. Her compliance for taking medication was only 95% but she claims to have taken all of them. Says her mood is affected by inconsideration from others, others being mean and fear. Her disorder is controlled by medication.

Report dated 6/28/05. Referral to Mental Health Services-Urgent

Call was received from a Ms. Weaver (unit manager at NC) stating Donna was

acting strangely. On arrival told that she was disorientated. When spoken to, found that she was orientated but she felt nervous and anxious, she also kept running her sheet through her hands saying she was trying to fix the bed.

Report dated 10/24/03. Bureau of Mental Health Services.

Feeling sad as it would have been her husband's birthday.

Report dated 4/19/06. Medication order form

4/14/06 Donna banged her head.

8/03/05 MRI scan of the head-memory deficit and head trauma. Optometry consult.

Report dated 6/26/03. Initial Medical/Mental Health/Substance Use Screening Crisis/Safe cell assignment requested and special housing assignment requested under mental health disposition.

Report dated 06/26/03. Health History

Gave personal history as positive for: bone, joint or other deformity, ear trouble, eye disorder, hemorrhoids, high blood pressure, mumps, stomach trouble and cysts. Current problems are depression and anxiety.

Report dated 6/26/03. Female Health History

Menopausal for the past 2 years, had ovarian cyst in 1962, has had two pregnancies, one of which was aborted. Has been on HRT for 4 years (?)

Report dated 7/02/03. Mental Health Evaluation

Page 2; has on/off depression all her life. Was admitted for inpatient treatment in 2002; she had suicidal thoughts. Occasionally feels euphoric which leads to high energy, low need for sleep and risk taking behavior. Admits to spending sprees and having unprotected sex with a young man.

Page 3, started using pot after her accident in 1999

Page 4, father was abusive to mother, she was sexually abused by cousins

Page 7; Axis I: BPAD Type II and psychotic feelings(?)

Report dated 7/02/03. Mental Health Caseload Classification

Confirms bipolar disorder.

Report dated 9/12/05. OSU Electronic File Report-Radiology

Suffered from memory loss, chronic dizziness and gait disturbance. MRI found a few punctuate white matter signal abnormalities which are non-specific in nature and are

most likely due to small vessel ischemic disease or age related changes. Also minimal punctuate mucosal thickening within the right mastoid air cells and a small left frontal sinus retention cyst, polyp, or localized mucosal thickening.

Report dated 6/13/06. Addendum to Mental Health Evaluation

Has difficulty falling and staying asleep. Has nerve pain and heart burn.

Page 2; sexually abused by 2 cousins.

Page 3; BPAD Type II in remission.

Report dated 6/13/07. Mental Health Caseload Classification

Confirms bipolar disorder.

Report dated 6/24/03. Initial Medical/Mental Health/Substance Use Screening

Suffered a concussion from 1999 head injury.

Report dated 6/12/07. Mental Health Treatment Plan Review

Confirms bipolar II disorder and is a borderline diabetic. Problem described as mania/hypomania. States she has depression more often than mania and she did not attend her Bipolar Group when passed.

Report dated 3/13/07. Mental Health Treatment Plan Review

See above. Currently in depressed phase, she has to learn to set appropriate boundaries and not to be so trusting of inmates who will take advantage of her.

Report dated 12/12/06. Mental Health Treatment Plan Review

Reiterates history of depressive mood

Report dated 12/14/05. Mental Health Treatment Plan Review

Increased depressive symptomology over the past several months.

Report dated 9/24/03. Treatment Plan

Experiencing symptoms of depressed mood that interfere with areas of daily functions such as, past suicide attempts, high feelings of anger and isolation, crying spells and low appetite.

Report dated 7/08/03. Treatment Plan

Experiencing adjustment issues and high feelings of isolation.

Report dated 3/12/06. Referral to Mental Health Services

Call received from CO stating behavior was "bizarre". Donna was seeing ants (none could be seen). She stated 'saw ants, put down coffee grounds to get rid of them and got rid of food in room (?)'. She appeared disheveled, wearing no make up, speech soft, mumbling and she is wearing sweats. Spontaneously started saying 'men always play

sports and balls-golf-little ball, little hole, little man; basketball, big ball, big hole, big man'. Abruptly ends by saying 'it's been nice talking to you'.

Response; Donna was confused and disorganized. Had not eaten last 3 meals and has severe cognitive impairment-placed on suicide watch.

Report dated 1/24/06. Referral to Mental Health Services

Donna appears very stressed, irrational and is sleeping more frequently.

Report dated 11/14/05. Referral to Mental Health Services

Experiencing flashbacks to finding husband's body so has requested medication. Therapy was recommended instead.

Report dated 8/14/05. Referral to Mental Health Services

States that Donna was not intending to harm herself but she had bruises on her arms and legs, she did admit to feeling down. She put her arm against the wall and said she feels like she isn't there. She is unsteady on her feet and says her hands and feet keep twitching.

Report dated 4/28/05. Referral to Mental Health Services

Donna is sad, has been crying frequently, will not engage in conversation, is not wearing make up and has poor eye contact. This is presumed to be a reaction to her mother's terminal illness.

Report dated 7/29/05. Brief Psychiatric Rating Scale

Scored 3 (mild) on depressive mood scale.

Report dated 6/18/07. Brief Psychiatric Rating Scale

Scored 4 (moderate) on depressive mood scale.

Report dated 7/02/03. Brief Psychiatric Rating Scale

Scored 5 (moderately severe) on depressive mood and hostility scales.

Report dated 7/11/07. Interdisciplinary Progress Notes

BPAD type II and PTSD are in remission.

Report dated 2/20/07. Interdisciplinary Progress Notes (2nd page)

Donna states she wishes she knew a way to die without killing herself, she says she has tried holding her breath. Still experiencing problems setting boundaries and is giving away her commissary items.

Report dated 11/22/06. Interdisciplinary Progress Notes (2nd page)

Recently lost brother-in-law to suicide. Donna states her despair and how she could relate to what he was feeling, said if she was given a life sentence she 'would not

.....

Report dated 5/17/06. Interdisciplinary Progress Notes (2nd page)

Reports she has not sleep properly for two nights and claims to have dozed off whilst showering/shaving-wonders if this is a problem.

Report dated 3/27/06. Interdisciplinary Progress Notes (2nd page)

Has bruises around left eye from a fall last week.

Report dated 3/22/06. Interdisciplinary Progress Notes (2nd page)

(CONT.) Was dumping food outside her window. Determined medical attention was needed-was placed in infirmary for testing and observation. Donna was staring into space, was unsteady on her feet and withdrawn. She has poor recent memory and her thought process is slurred, she is confused and is suffering from cognitive impairment.

Report dated 3/21/06. Interdisciplinary Progress Notes (2nd page)

Donna has expressed confusion, agitation and disorganized behavior during the night. She also fell and hit her face on a metal desk but is adamant that she slipped accidentally. She has had previous gait disturbances and a MRI showed multiple lesions. She denies self-harm etc and is strongly opposed to being placed on suicide watch. Suspect she may be experiencing delusions.

Report dated 3/13/06. Interdisciplinary Progress Notes (2nd page)

Spoke with a child like voice.

Report dated 3/13/06. Interdisciplinary Progress Notes (2nd page)

Donna tried to force her way out of the cell, she was laughing and smiling saying that she felt very happy and her appeal is 'working'. Again *she used a child like voice*.

Report dated 1/27/06. Interdisciplinary Progress Notes

Donna failed a room inspection and shut down for 2 hours, she did however have it cleaned for re-inspection. She gets confused if her meds are not given at consistent times and thinks she has already taken them.

Report dated 12/14/05. Interdisciplinary Progress Notes

Reports her new meds are making her feel shaky.

Report dated 11/25/05. Interdisciplinary Progress Notes

Has two bruises on her left arm and can not recall how they got there.

Report dated 10/31/05. Interdisciplinary Progress Notes

Bruising (?) on both arms, does not know how it got there.

Report dated 11/07/05; experiencing stress after being told that her cell door will soon have to be closed at all times; she says she becomes sweaty when closed up.

Report dated 9/19/05. Interdisciplinary Progress Notes
Had a family visit, coped well, spoke of how her father was physically and mentally abusive towards her mother (though was less so as they got older).

Report dated 8/14/05. Interdisciplinary Progress Notes
Donna was disorganized and stated that whilst she had no intention of hurting herself, she had fallen down several times. Had bruises on her arms and legs and was a little unstable on her feet.

Report dated 6/29/05. Interdisciplinary Progress Notes
Reluctant to come outside.

Report dated 6/28/05. Interdisciplinary Progress Notes
M.H Donna was sitting on her bed staring at TV static and would not come out of her room. When psychiatrist (?) arrived, her blanket and sheets.....

Report dated 6/8/05. Interdisciplinary Progress Notes
Mood is tearful and depressed but her thoughts are organized though they may be inaccurate due to wishful thinking. This is exasperated by her back pain.

Report dated 5/06/05. Interdisciplinary Progress Notes (2nd page)
Donna is in a lot of pain due to a general medical condition. She also states she is having a hard time dealing with the lack of control in her life, she feels guilty that people have to do things for her; she feels that no one really cares about her, they only visit because it is their job. She says she wrote to her lawyer telling him to stop fighting as there was no use.

Report dated 4/29/05. Interdisciplinary Progress Notes (2nd page)
Having more difficulty with her memory than normal and her mood is depressed.

Report dated 4/08/05. Interdisciplinary Progress Notes
Donna discussed fear of becoming incapacitated and says that she is not afraid of death itself.

Report dated 1/21/05. Interdisciplinary Progress Notes
Continues to exhibit semi-depressive symptoms but no mania present.

Report dated 1/11/05. Interdisciplinary Progress Notes
1/21/05; Donna states her depression is with her all the time.

Report dated 4/26/04. Interdisciplinary Progress Notes

Donna feels she has bought shame on her family by going to prison and that she misses her husband, she was very teary eyed.

Report dated 12/24/03. Interdisciplinary Progress Notes

Insists on the death penalty to 'show the racism, the injustice, the corrupt', also states she is not afraid of death. She believes she can communicate to others through her thoughts.

D. Medications Prescribed

While in prison, Ms. Roberts was receiving the following medication prescribed by medical experts.

1. Trazodone
2. Depakote -- mood stabilizer
3. Lithium
4. Bupropion
5. Valproic Acid
6. Wellbutrin
7. Cymbalta
8. Elavil
9. Depakene
10. Buspar

It is doubtful that the above would be prescribed throughout her term of incarceration if she were malingering.

In addition, the trial court refused to consider a statement of testimony from her son, a military veteran, of Robert's volunteering to help the poor, her dysfunctional family or her ability to be a good mother until the automobile accident caused her to start smoking pot and generally lose her way. An incomplete affidavit was proffered to the record by Roberts from Dr. James Eisenberg, Ph.D., a forensic psychologist. Dr. Eisenberg admittedly could not testify as he had not been able to fully evaluate her mental condition. However, his preliminary findings are

completely consistent with the above evidence and corroborate her mental health sufferings.

Proffer of September 20, 2007 (Second Motion to Proffer)

Summary

Ms. Roberts' Social Security and prison records reveal a great deal of mitigation evidence that was not considered by the trial court in his determination of the appropriate sentence in this case. The affidavits of Dr. Eisenberg and her son, Michael Raymond, also would have provided strong testimony or statements of mitigation had the trial court permitted as much and would have supported Roberts' ignored allocution. (See Proffers of September 20, 2007) Pursuant to the Sixth Circuits opinion in Davis, supra, the failure to consider this relevant evidence is error. Because the evidence in this case includes depression, bi-polar disorder, child abuse, hallucinations, post-traumatic stress disorder, dysfunctional family (father beating mother when Roberts was a child) head injuries (car accidents) and was not part of the record at her first sentencing, this matter must again be remanded for a new sentence (unless this Court finds death inappropriate in its independent evaluation).

Proposition of Law Two:

When considering the appropriate sentence in a capital trial, the sentencing judge must consider and give effect to all presented evidence in mitigation.

Although closely related to Proposition of Law One, this issue differs in the following manner. The previous proposition addressed the failure of the trial court to consider the proffered evidence of mitigation. This proposition addresses the failure of the trial court to

consider the mitigation that was presented at the remand sentencing hearing. Specifically, the court refused to consider the information provided at the hearing in the form of Roberts' allocution or mitigation evidence available from the original penalty phase hearing. In other words, this proposition addresses mitigation not considered even excluding the proffered materials addressed in Proposition of Law I.

Although required to do so by R.C. 2929.03(F), the judge failed to identify a single factor as worthy of consideration for mitigation derived from Roberts allocution. This Court remanded this matter with specific instructions to allow Roberts to allocute. Inherent in this order, and constitutionally required, is for the sentencing court to consider and give effect to her allocution. In his opinion, the judge does not only not consider her allocution, but does not even mention that it was provided. The judge painstakingly reviewed all penalty phase procedures, yet failed to mention that Roberts provided the statement which was part of the reason for the remand.

The evidence provided in her allocution alone was considerable. This included:

1. Sexually abused by cousins when she was a girl; (T. 46)
2. Depression, resulting in time spent in psychiatric ward. (T. 51, 52)
3. Severe head injuries from car accidents; (T. 49, 50, 53)
4. Ms. Robert was 58 at the time of the offense with no criminal record;
5. No danger to others in prison;
6. Volunteering to assist injured in Israel, possibly saving lives; (T. 54, 57-58)
7. Long work history; (T. 59-60)
8. Hallucinations; (T. 52)

9. Father was verbally abusive and he beat her mother and at times guns were involved; (T. 47)
10. Raised her younger sister and helped send her through college; (T. 62)
11. Received SSI for mental disability. (T. 53)

At the close of Robert's allocution, she told that judge that she was not a bad person. The judge answered, "I never thought for a moment that you are a bad person." (T. 64-65)

Nevertheless, the judge failed to acknowledge in his sentencing opinion that she had even made an allocution, let alone consider and give effect to anything that she had stated.

The United States Supreme Court has long held that a death conviction may not stand if the sentencing body has been precluded from considering relevant evidence suggesting that the death sentence would not be appropriate. The Eighth Amendment mandates an individualized assessment of the appropriateness of the death penalty. As stated earlier, in Lockett v. Ohio (1978), 438 U.S. 586, the Court held that the Eighth and Fourteenth Amendments require that the sentencer "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis in original). Thus, the Court held unconstitutional the Ohio death penalty statute which mandated capital punishment upon a finding of one aggravating circumstance unless one of three statutory mitigating factors were present.

Lockett and Its Progeny

As argued in Proposition of Law I, above, this holding has been consistently applied throughout the Court's opinions addressing *Lockett* and its progeny. Eddings v. Oklahoma

(1982), 455 U.S. 104, Skipper v. South Carolina (1986), 476 U.S. 1, Hitchcock v. Dugger (1987), 107 S.Ct. 1821. In Eddings, a majority of the Court reaffirmed that a sentencer may not be precluded from considering, *and may not refuse to consider*, any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death.

In Eddings, the Oklahoma death penalty statute permitted the defendant to introduce evidence of any mitigating circumstance, but the sentencing judge concluded, as a matter of law, that he was unable to consider mitigating evidence of the youthful defendant's troubled family history, beatings by a harsh father, and emotional disturbance. Applying Lockett, the Court held that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." 455 U.S., at 113-114 (emphasis in original). In that case, "it was as if the trial judge had instructed a jury to disregard the mitigating evidence [the defendant] proffered on his behalf." Id., at 114.

Thus, at the time Robert's conviction became final, it was clear from Lockett and Eddings that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty. Like Eddings, the Ohio statute here allowed the consideration of the disputed mental health testimony, but the consideration of the evidence was precluded by the trial judge.

As quoted above, "the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence." McCleskey v. Kemp (1987), 481 U.S. 279, 304 (emphasis in original). "Indeed, it is

precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense.” Penry v. Lynaugh (1989), 492 U.S. 302, 327-328.

The trial judge panel denied Robert’s due process of law by failing to follow state sentencing law requiring specific content in its sentencing opinion. R.C. 2929.03(F) is a direct codification of the United States Supreme Court’s dictates of Lockett. The statute simply requires the sentencing judge to place the analysis required in Lockett into writing and enter the opinion into the record. The statute provides, in relevant part:

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 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 trial court's sentencing opinion falls woefully short of the requirements of R.C. 2929.03(F) in the following specific manner.

First, the statute requires the trial court to determine initially whether any mitigating factors have been established. This is essential to preserve and isolate those mitigating factors, which are to be weighed collectively against the aggravating circumstances. Here, the trial court did not mention in opinion a single factor that he could even consider as mitigation, even if he were to provide little weight to that factor. His failure to even consider one of the above factors as mitigation, irrespective of his refusal to consider the proffered material, invalidates the sentence.

Proposition of Law Three:

In a capital case, the sentencing court may not consider non-statutory aggravating factors in the determination of the appropriate sentence.

In the sentencing opinion of the trial court, not only did the court refuse to consider and give effect to mitigation properly before the court, but the court further created error by consideration of non-statutory aggravating factors. In a weighing state such as Ohio, the consideration of aggravators not part of the statutory scheme is improper. Lockett v. Ohio (1978), 438 U.S. 586; State v. Johnson (1986), 24 Ohio St. 3d 87.

In the trial court's R.C. 2929.03(F) opinion, it is not clear that the trial court understood the purpose or import of the sentencing opinion required by the above statute.

The court believed that the statute required:

The judge is required to review the evidence independently and to determine if the jury was mistaken, or misinterpreted or failed to take into account facts or a fact that in light of the absolute seriousness of the recommendation that reasons exists [sic] wherein the imposition of the death penalty should not be sanctioned by the court.

(Opinion, p. 5)

The court did not understand that it was to independently weigh the statutory aggravators found by the jury and independently weigh available mitigation and determine if the aggravators outweighed the mitigation beyond a reasonable doubt. It is not akin to a Crim.R. 29(C) motion where he finds the jury's finding is not supported by the sufficiency of the evidence. In regards to this requirement, a jury's recommendation of death is irrelevant to the court's findings.

The trial judge then reviewed the facts of the case and determined that the jury's

finding of guilt of the charges and specifications was supported by the evidence. (Opinion, pp. 5-15)

The court then outlined the appellant's waiver of mitigation evidence. (Opinion, 15-16) The court gave some weight to Roberts not being the principal offender. (Opinion, p. 17) The court also gave "slight weight" to the fact that the victim may have been abusive to her. (Opinion, p. 18) This was because the abuse was unsubstantiated and because even if the actions were true, they "would not warrant the Defendant's actions in this case."

Puzzlingly, the court then referred to Robert's original unsworn statement, noting that she attacked the lead investigator in the case, accusing him of perjury, chastized the jury, and accused the prosecutor of anti-semitism and racism. (Opinion, p. 19) The court believed that the statements about remorse were in direct contravention of Roberts' phone calls and letters stating otherwise. (Opinion, pp.19- 20)

Finally, the court gave slight weight to Roberts' behavior at trial, as was "courteous, pleasant and properly addressed the Court at all times." (Opinion, pp. 20)

The court concluded the mitigation was almost "completely overshadowed" by the found aggravators. (Opinion, pp. 21) The court concluded that:

[T]his Court cannot see any other form of aggravated burglary where the weight of this particular aggravating circumstance could ever be greater. The evidence reveals that the aggravated burglary was committed for the sole purpose of killing Robert S. Fingerhut, pursuant to a planned and methodical execution scheme designed by the defendant and her codefendant and whereby the defendant would collect \$550,000 in insurance proceeds. This is a most heinous form of aggravated burglary and is entitled to great weight.

(Opinion, pp. 22)

The problem with the above is that the judge based his determination on the nature

and circumstances of the specification, and not on the specification alone. The judge found death appropriate because this was the most “heinous form” of the specification.

Heinousness is not a valid consideration due to the arbitrariness of the term.

The judge also found the second aggravator significant, relating to the robbery aggravator. The court determined because “the aggravated robbery was clearly committed to facilitate the escape from the Aggravated Murder, and is extremely close to being the worst form of aggravated robbery.” (Opinion, pp. 22-23) Here again, the judges believe that the robbery occurred to facilitate the escape by the co-defendant rendered it, in his opinion, close to the worst form of the offense. The personal valuation of the form of the offense in both instances rendered that decision arbitrary and capricious under the federal constitution.

Although the jury must consider the nature and circumstances of the crime, it is well settled that the nature and circumstances of the crime may not be weighed against the mitigating factors. See State v. Wogenstahl, 75 Ohio St.3d 344, 356, 1996-Ohio-219; State v. Williams, 99 Ohio St.3d 493, 2003-Ohio-493.

The Supreme Court of the United States has consistently condemned the consideration of factors not permitted under a state’s statutory scheme. Barclay v. Florida (1983), 463 U.S. 939, rehearing denied, 464 U.S. 874; Espinosa v. Florida (1992), 505 U.S. 1079, 1081(per curium). Misguiding a jury during the sentencing phase invites arbitrary and capricious sentencing Gregg v. Georgia (1976), 428 U.S. 153, 193-195; Stringer v. Black (1992), 503 U.S. 222, 231-235; Boyde v. California (1990), 494 U.S. 370, 380-381.

Proposition of Law Four

To avoid the appearance of impropriety or conflict, a judge whose conduct during a penalty phase hearing led to a reversal of that sentence must recuse himself or stay the proceedings while the disciplinary matters are pending against that judge.

Even where there was insufficient evidence to support for an allegation of actual bias, a reasonable possibility that there might be an appearance of impropriety or partiality may warrant the disqualification of a county's entire bench. See, e.g., In re Disqualification of Calabrese (1991), 74 Ohio St.3d 1233; In re Disqualification of McMonagle (1990), 74 Ohio St.3d 1226; In re Disqualification of Corrigan (1989), 47 Ohio St.3d 602; In re Disqualification of Nadel (1989), 47 Ohio St.3d 604; In re Disqualification of Nugent (1987), 47 Ohio St.3d 601.

The sentencing of this case was reversed by this Court. The reversal was based upon this Court's failure to consider allocution and to independently prepare the required opinion pursuant to R. C. 2929.03(F). Roberts filed a motion for the trial judge to recuse himself as counsel became aware that the judge was facing disciplinary charges from this court. The judge refused to recuse himself and sentenced Ms. Roberts to death.

A. The Roberts Decision Places The Court in a Position of Appearing to Compromise its Decision Making.

The "integrity of our judicial system requires that litigants who appear before a judge have the confidence that their cause will be heard in a fair and impartial manner." In Re Disqualification of Celebrezze (1992), 74 Ohio St. 3d 1242, 657 N.E.2d 1348. The issue before the Ohio Supreme Court in Celebrezze was whether or not the trial court held a "predisposition of thought and opinion." Id. at 1348. After reviewing the record before it,

the Ohio Supreme Court stated in Celebrezze that it could not “conceive of a rule that would allow a judge to proceed to adjudicate a case when the question of the judge’s bias or prejudice has not yet been resolved.” Celebrezze at 1349.

The problem here is that the trial court was placed in an untenable position by the Roberts decision. The trial court is facing possible disciplinary action by the Supreme Court for the R. C. 2929.03(F) missteps. The trial court was open and forthright about this litigation. Thus, counsel was aware the trial judge was fighting the action. The disciplinary matter has not yet been decided by this Court.

A major dispute in the re-sentencing procedure is whether Ms. Roberts’ is entitled to a full presentation of mitigation, including evidence not adduced at her original trial. The court indicated to all counsel that it believed that the mandate of the Roberts decision is narrow. The trial court believed that it cannot consider any new mitigation evidence except the allocution of Ms. Roberts herself. Considering the fact that evidence of considerable mitigation was uncovered during the pendency of the re-sentencing hearing, the restrictive reading was extremely prejudicial to the defense as evidenced by the re-sentence of death.

The reason the trial court should have recused itself is that there is an appearance of undue pressure on the court in the rendering of its decision. The trial judge may not have wanted to risk interpreting its reading of the Roberts Supreme Court mandate inconsistently with the Supreme Court while the disciplinary action is pending for fear of the decision adversely affecting his case. Had the court ruled in line with the defense request, there may have been the fear the Supreme Court may view the decision as an act of insolence, which may ultimately impact on the disciplinary decision.

The decision of a court, particularly in a death situation, should be free of all suspicion of undue influence from any source. In order to avoid any appearance of impropriety, the trial court should have recused itself from sentencing Ms. Roberts. The failure to consider any factors as mitigation is evidence of the pre-disposition of the trial court. The failure of the trial court to recuse itself from the case deprived Roberts a fair sentencing hearing in violation of the Fifth, Eighth and Fourteenth Amendments.

Proposition of Law Five:

The failure to fully investigate and present all possible evidence of mitigation in a capital trial constitutes ineffective assistance of penalty phase counsel where the investigation would have revealed substantial evidence calling for a sentence of less than death.

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

Here, the performance of Robert's counsel during the penalty phase fell below the professional norm in numerous instances. Although this issue is normally raised on postconviction, the standard for res judicata is somewhat confused in this state. As postconviction judges almost automatically find res judicata for this issue if any part of it could or should have been raised on direct appeal, capital litigators are raising it in both instances. As in every capital trial, some of the failures, such as failure to object, are on the record. Other aspects of defense counsel failures, such as the failure to investigate, are necessarily off the record. Then it is necessary to raise this aspect on postconviction pursuant

to R.C. 2953.21.

Roberts presents an unusual situation because she proffered evidence which should have been presented at the penalty phase hearing. As the proffer is part of the direct appeal record, it must be raised here for fear of procedural default should Roberts not be successful. Also, the proffered materials, the Social Security Records and statement of her son, Michael Raymond, were clearly available pre-trial. (Proffers of October 22, 2007 and September 20, 2007, respectfully) The materials themselves contain enough evidence in mitigation that the reliability of the sentence is called into question. The ineffectiveness of penalty phase counsel was not raised in Roberts I.

Death Penalty Standard for Performance of Counsel

In Wiggins v. Smith (2003), 539 U.S. 510, 123 S. Ct. 2527, the Supreme Court reaffirmed the principle that a reviewing court must consider the quality and extent of the investigation that underlies a ‘strategic decision’. The court stated:

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

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

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

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

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

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

Under Strickland, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690-91. This court has commented when evaluating facts similar to those here that "the inadequacy of the attorney's investigation . . . was manifest." Campbell v. Coyle, 260 F.3d 531, 553 (6th Cir. 2001) Our conclusion is bolstered by the Supreme Court's recent decision in the capital case of Wiggins v. Smith, 123 S. Ct. 2527 (2003).

* * *

In Wiggins, as in the present case, "any reasonably competent attorney would have realized that pursuing these leads"—in Wiggins's case, allusions to his horrible childhood; was necessary . . . In sum, no reason at all has been

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

Likewise, the record in Roberts' case reveals no strategic reason for not fully investigating or presenting the mitigation available. The SSA records reveal that the victim of the offense, Robert Fingerhut, advocated her receiving benefits because of how she changed after the latest automobile accident. She did not have the emotional stability to work anymore. She had lost some of her memory. The records reveal severe depression, bi-polar disorder, low intelligence poor mental health, including hallucinations. In fact, the records indicated that she had been an in-patient for mental deficiencies at a local hospital. (See Proposition of Law I)

Although Roberts did attempt to restrict the evidence presented in mitigation at that time, there is no evidence that she was even aware of the social security records. As this Court ruled in Roberts I that she did not waive mitigation, it cannot be fairly argued that Roberts would not have allowed counsel to present the evidence. In fact, in her remand sentencing hearing, she told the trial court many of the topics contained in the records. See Proposition of Law II, above. If there is a lesson to be learned from Williams, Wiggins and Frazier, it is, when it comes to mitigation, it is an unreasonable strategy for defense not

investigate all available mitigation and present it to the jury.

In fact, according to Guideline 10.7 of the revised ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, counsel has an absolute duty to conduct a thorough penalty phase investigation, even if the client objects or otherwise instructs counsel:

Guideline 10.7 Investigation

- A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilty and penalty.**

* * * *

- 2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.**

In the Commentary section following this Guideline, the ABA further explains the importance of counsel's efforts regarding mitigation investigation:

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." Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case. [footnotes omitted.]

The Supreme Court in Wiggins, supra, relies upon and arguably adopts these guidelines and mandates counsel follow these guidelines in order to render constitutionally-effective assistance of counsel. See, Sixth Amendment – Ineffective Assistance of Counsel:

Wiggins v. Smith. 117 Harv. L. Rev. 278 (Nov. 2003).

Proposition of Law Six:

The trial court may not conduct a sentencing hearing for a death-eligible defendant where the record does not establish by a preponderance of the evidence that the defendant is legally competent.

The trial court permitted the allocution and sentencing of Ms. Roberts without a sufficient indicia of her competency. Specifically, there was insufficient evidence of her ability to assist counsel in preparation for the hearing. The failure of the trial judge to appoint an independent psychologist as requested by Roberts exacerbated the problem.

Competency Standard

R.C. 2945.37(G) states:

“A defendant is presumed to be competent to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant’s present *mental condition*, the defendant is *incapable* of understanding the nature and objective of the proceedings against the defendant *or* of assisting in the defendant’s defense, the court *shall* find the defendant incompetent to stand trial and shall enter an order authorized by section 2945.38 of the Revised Code.” (Emphasis added).

The United States Supreme Court has characterized the test for competence to stand trial in the following manner: “...the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he

has a rational as well as factual understanding of the proceedings against him.” Dusky v. United States (1960), 362 U.S. 402. See also, State v. Williams (1997), 116 Ohio App.3d 237. The Dusky standard has been adopted in Ohio by the this Court. State v. Berry (1995), 72 Ohio St.3d 354. Consequently, the essential feature of a determination of a defendant’s competency to stand trial from the perspective of the statute and case law is the defendant’s ability to be rationally engaged in the trial process.

Fundamental principles of fairness and due process demand that a criminal defendant who is not legally competent may not be tried or convicted of a crime. Pate v. Robinson (1966), 383 U.S. 375; State v. Berry, supra. It is established law that, “...a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial....” Drope v. Missouri (1975), 420 U.S. 162. The conviction of an accused while he is not legally competent to stand trial violates due process of law. Bishop v. United States (1956), 350 U.S. 961.

Present Case

In the case at bar, the appellant, through counsel, submits that there was *not* reliable, credible evidence that Donna Roberts was capable of rationally assisting in her own defense, and, therefore, she should not have been tried or convicted of a crime or face the penalty phase of a capital trial. The issue is not whether she was mentally ill, or even to what extent she was mentally ill; rather, the issue was whether she could rationally participate in the trial

process. All of the experts agreed that the appellant suffered from some mental condition.

The trial court refused to grant an independent evaluation as requested by defense counsel. Defense counsel requested the independent psychologist on December 6, 2006. At the competency hearing of October 22, 2007, Dr. Thomas Gazley of the Trumbull County Forensic Diagnostic Center noted that he had interviewed Ms. Roberts for two and one-half hours. He reviewed the mental health file at the prison. He also reviewed the director of the psychology department at the prison. Finally, he had a conversation with defense counsel. It was the doctor's opinion that she could understand the alternatives available for sentencing and to provide counsel with any mitigating circumstances, should she desire to do so.

(Competency Hearing, T. 21, 22)

Dr. Gazley stated that "I don't know if there is such a thing as a competency to be sentenced criteria." He could not comment on whether the auto accident suffered in approximately 2000 would influence her competency. (Competency Hearing, T. 25) The doctor also admitted that he had no direct observation of her ability to interact with defense counsel. However, because she could provide him with a coherent account of her own perceptions, he came to the conclusion that she would be able to do so with defense counsel.

(Competency Hearing, T. 27)

Dr. Gazley did not interview family members about Donna's history. He remembered a discussion about childhood sex abuse but could not remember if it came from the records or Donna. He did not recall seeing any reference to Donna's suffering from post-traumatic

syndrome but acknowledged that the syndrome sometimes was caused by childhood sex abuse. (Competency Hearing, T. 28) He did not see in the records any reference to Donna going through hallucinations such as the referral in the prison for her on March 26, 2006. The report indicates that she was hallucinating about seeing ants. She put down coffee grounds to get rid of the ants. She appeared disheveled without makeup, mumbling imperceptibly. (See Proposition of Law I, proffered prison records of March, 2006)

The doctor did diagnose Donna with a bi-polar disorder, but not with schizophrenic features, which would suggest possible hallucinations. (Competency Hearing, T. 31) He did not see any references to schizophrenia in the records. He did acknowledge that she consistently possessed suicide ideation. (Competency Hearing, T. 31)

Dr. Gazley did not know Donna's psychiatric history. He did not review mental health evaluations prior to her conviction. (Competency Hearing, T. 33) He did not review the records from the Social Security Administration (Competency Hearing, T. 34) He did not think that Donna receiving mental disability benefits would have an affect on his opinion. (Competency Hearing, T. 34) The doctor did not believe that if neurological impairment existed that it would not have changed his opinion because Ms. Roberts was able to provide a coherent, relevant, reasonable, intelligent response to what the court needed to know. (Competency Hearing, T. 37)

What was missing from the hearing was any information on Robert's ability to work with and assist counsel in her case. There was simply no testimony relevant to that issue.

Competency is a two pronged test, not just an issue of mental illness.

As stated earlier, the United States Supreme Court has characterized the test for competence to stand trial in the following manner: “the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.” Dusky v. United States, (1960), 362 U.S. 402. Without evidence that Roberts could properly assist counsel, the hearing should not have been conducted. The conducting of the penalty phase while she was not competent was in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Proposition of Law Seven:

The trial court may not conduct a penalty phase hearing for a death-eligible defendant where the record does not establish by a preponderance of the evidence that the defendant is legally competent.

Ms. Roberts was not competent to make decisions at her penalty phase hearing of the original trial. As the result, the decisions made by her and statements made by her were illogical, disjointed and self-defeating. She was unable to assist counsel to represent her in a meaningful fashion. She was unable to address the jury or understand the procedures which resulted in her receiving the death penalty. The conducting of the penalty phase while she was not competent was in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The record reflects a history of depression with suicidal tendencies. This is consistent with Robert's refusal to cooperate with counsel at the penalty phase presentation to the jury.

R.C. 2945.37(G) states:

"A defendant is presumed to be competent to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant's present *mental condition*, the defendant is *incapable* of understanding the nature and objective of the proceedings against the defendant *or* of assisting in the defendant's defense, the court *shall* find the defendant incompetent to stand trial and shall enter an order authorized by section 2945.38 of the Revised Code." (Emphasis added).

Again, the Dusky case states with regard to competency that "the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, (1960), 362 U.S. 402. See also, State v. Williams (1997), 116 Ohio App.3d 237.

In the case at bar, the appellant, through counsel, submits that there was *not* reliable, credible evidence that she was capable of rationally assisting in her own defense, and, therefore, she should not have been tried or convicted of a crime. Much of the evidence of her incompetence was not available until the remand sentencing procedure as the records were not procured for her trial. See Proposition of Law I. Thus, the original examiner who determined her competency was unaware of her complete history of mental illness or the extent of her head trauma, let alone her low intelligence testing.

In retrospect, Roberts illogical behavior at her trial becomes more understandable. Because of her mental health problems, Roberts was completely unable to work with her counsel, resulting in her ordering her counsel to not participate in penalty phase activities and to provide the jury with a self-defeating unsworn statement in which she attacked everyone and asked for death.

Ms. Roberts used the trial as her stand to show to the world that racial inequality exists. Because her co-defendant Nathaniel Jackson received the death penalty, then she too should receive it. She so instructed the jury of this fact. (T.6256, 6263).

In her unsworn statement, Roberts explained to the jury that she was not providing any mitigation (T.6253-6254). She wanted to expose people that she believed were untruthful (T.6255).

At that time, the record did not indicate Roberts' head trauma, low intelligence level, history of depression, history of suicide attempts, possible post-traumatic stress syndrome from childhood abuse, bi-polar diagnosis and other mental health issues found in the social security records. Roberts asked for death, another attempt at suicide, "that is what I hope for" (T.6232) This is completely consistent with her suicide ideation.

At the time of her competency examination, the results from Dr. Donald Delgi, including her I.Q testing, were unknown. At the time of the competency examination, the fact that Roberts was receiving SSI benefits for mental disability was not known or discussed by counsel for either party or addressed by the psychologist.

At the time of the competency hearing, the 24-point disparity between verbal and performance IQ, which strongly suggests head trauma suffered from severe automobile accidents, was unknown to the parties.

The trial court failed to conduct a full evidentiary hearing, where some of this material may have been located and presented. It is admittedly speculative that the social security records might have been found as Ms. Roberts was not cooperative and defense counsel was not discussing much with the family of Ms. Roberts. This is again evidence of her inability to assist counsel in her defense of the death penalty, or case for that matter.

In United States v. Blohm (1984), 579 F. Supp. 495, the issue of competence to stand trial was addressed in a case that is factually similar to the case at bar. In Blohm, the defendant believed that his criminal prosecution was merely an opportunity to publicize and expose a conspiracy related to an unrelated and meritless lawsuit in which he had been the plaintiff. Blohm was charged in his criminal case with mailing a threatening letter to a federal judge.

Blohm was examined by professionals on the issue of competence. During the subsequent competency hearing, Blohm sought the removal of his attorney, in that the attorney wanted to defend with a particular strategy that excluded trial, while Blohm insisted upon proceeding to trial. The court complied with Blohm's request. There remained an issue of whether Blohm had the capacity to make decisions in his own best interest. The federal test for competence under Section 4244, Title 18, U.S.Code is remarkably similar to R.C.

2945.37(G) and is based upon the decision in Dusky v. United States, supra.

It was determined that Blohm did, in fact, have a factual understanding of the proceedings in the criminal case, including statutory law and court procedures. The essential issue before the court was Blohm's rationality which the court determined to be an objective assessment based upon the average person's perspective of rationality. Blohm believed that he would be acquitted when the jury heard evidence of the conspiracy that he felt was arrayed against him. The court stated: "The issue is not his ability to understand, in the sense of being able to recite the legal consequences of certain acts, but rather to evaluate the realities of his situation in order to assist his counsel in his defense." United States v. Blohm, supra, at 500, 501.

In the final analysis, the court's determination of incompetence, contrary to the professionals' findings, was based upon Blohm's own behavior. That behavior included an unshakable, obsessive fixation upon factual claims of a conspiracy that were irrational and false in nature and not based in objective reality. The potential dangers of a loss at trial were simply not important to Blohm, who viewed a trial as a forum in which he would be able to expose the conspiracy against him. Blohm's delusional thinking was beyond his control. He was incompetent to stand trial.

CONCLUSION

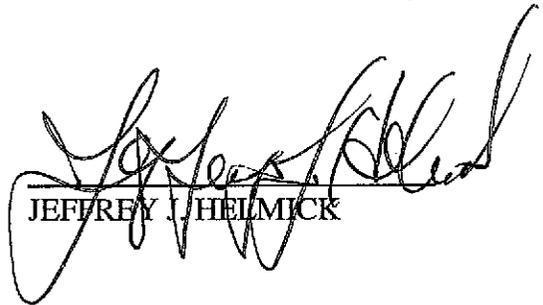
Defendant-appellant, Donna Roberts, respectfully requests that this Honorable Court reverse the sentence of death and find a life sentence to be appropriate. In the alternative, defendant-appellant respectfully requests that this Court reverse the sentence of death and remand her case for a new sentencing hearing with appointment of a different judge. As this new judge would not have heard the original hearing evidence, it is requested that a full penalty determination hearing be ordered before a newly selected jury.

Respectfully submitted,



DAVID L. DOUGHTEN

(by JFH)

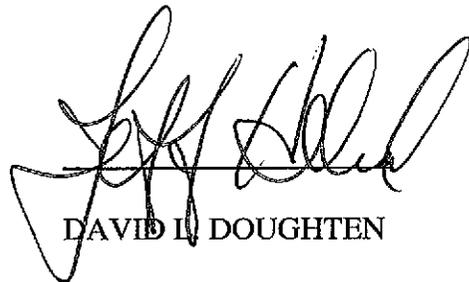


JEFFREY J. HELMICK

Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing appellant's Brief was served upon Dennis Watkins, Trumbull County Prosecutor and/or LuWayne Annos, Esq. Assistant Trumbull County Prosecutor, Administration Building, 160 High Street, Warren, Ohio 44481, by Regular U. S. mail on this 12th day of September, 2008.

A handwritten signature in black ink, appearing to read "Jeffrey J. Helmick", written over a horizontal line.

DAVID L. DOUGHTEN

JEFFREY J. HELMICK

Counsel for Appellant

APPENDIX

Notice of Appeal of Appellant Donna Roberts

Now comes the appellant, Donna Roberts, and hereby gives Notice of Appeal to the Supreme Court of Ohio from a judgment of the Court of Common Pleas of Trumbull County journalized on November 6, 2007. The appellant is appealing her sentence of death pursuant to S.Ct. Prac. R. II. Section I, (C)(1) and is filed as a matter of right.

Respectfully submitted,



David L. Doughten
Counsel for Appellant

Proof of Service

A copy of the foregoing Petitioner's Motion was served upon Dennis Watkins, Trumbull County Prosecutor and/ Christopher Becker, Esq. Assistant Trumbull County Prosecutor, Administration Building, 160 High Street, Warren, Ohio 44481, by Regular U. S. mail on this 10 day of December, 2007.



DAVID L. DOUGHTEN
Counsel for Appellant

IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

STATE OF OHIO,)	CASE NO. 01-CR-793
)	
Plaintiff)	JUDGE JOHN M. STUARD
)	
-vs-)	DEATH PENALTY
)	
DONNA MARIE ROBERTS,)	SENTENCED TO OHIO
INMATE #W055276)	REFORMATORY FOR WOMEN
)	
Defendant)	ENTRY ON RE-SENTENCE

On October 29, 2007, the Defendant having been brought into Court, and being fully advised in the premises and being represented by counsel, Attorney David L. Doughten and Attorney Robert A. Dixon, and the State of Ohio being represented by Assistant Prosecuting Attorney Christopher D. Becker and Assistant Prosecuting Attorney Kenneth N. Bailey, for purposes of re-sentencing, pursuant a remand from the Ohio Supreme Court.

On 8th day of April, 2003, the Defendant was brought into Court for a trial before a petit jury and after due deliberation was found guilty on May 28, 2003 of Count One: Complicity to Commit Aggravated Murder (O.R.C. §§2923.03(A)(2), 2903.01(A) and 2941.14(C)) of Robert S. Fingerhut, with two (2) separate Specifications of Aggravating Circumstances, to wit: Specification No. 1: Aggravated Burglary (O.R.C. §2929.04(A)(7)), and Specification No. 2: Aggravated Robbery (O.R.C. §2929.04(A)(7)); Count Two: Complicity to Commit Aggravated Murder (O.R.C. §§ 2923.03(A)(2), 2903.01(B) and 2941.14(C)) of Robert S. Fingerhut, with two (2) separate Specifications of Aggravating Circumstances, to wit: Specification No. 1: Aggravated Burglary (O.R.C. §2929.04(A)(7)),

and Specification No. 2: Aggravated Robbery (O.R.C. 2929.04(A)(7)); Count Three: Complicity to Commit Aggravated Burglary (F1) With Firearm Specification (O.R.C. §2923.03(A)(2), 2911.11.(A)(1)(2) and 2941.145); and Count Four: Complicity to Commit Aggravated Robbery (F1) With Firearm Specification (O.R.C. §2923.03(A)(2), 2911.01(A)(1)(3) and 2941.145). Thereafter, Count Two was removed from the Jury pursuant to a Motion to Dismiss by the State.

On June 4, 2003, the Defendant having been brought into Court to give evidence in mitigation on Count One of the indictment, and after arguments of counsel and instructions of law, and after due deliberation, it was the finding and recommendation of the Jury on June 4, 2003, that the sentence of death be imposed on the Defendant. The original sentencing hearing was held on June 20, 2003.

On October 29, 2007, pursuant to the Ohio Supreme Court's opinion in State v. Roberts (2006) 110 Oh. St 3d 71, the Defendant's re-sentencing hearing was held and she was sentenced to Death on October 28, 2008 on Count One; and imprisoned therein for the stated prison term of ten (10) years on Count Three; plus a mandatory term of three (3) years on the Firearm Specification to be served prior to and consecutive to the sentence imposed in Count Three; ten (10) years on Count Four, plus a mandatory term of three (3) years on the Firearm Specification to be served prior to and consecutive to the sentence imposed in Count Four, sentence in Count Four to be served consecutively to the sentence imposed on Count Three. Firearm Specifications in Count Three and Count Four shall merge as one sentence in Count Three as a matter of law.

The Court further advised the Defendant of her right to appeal pursuant to Criminal Rule 32(B).

The OHIO REFORMATORY FOR WOMEN shall take note that the Defendant has been incarcerated in the Trumbull County Jail pursuant to these charges from December 21, 2001 to June 26, 2003, and in the Ohio Reformatory for Women from June 26, 2003 to date.

11/6/07
DATED


HONORABLE JOHN M. STUARD
JUDGE, COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO

THE CLERK OF COURTS IS HEREBY ORDERED TO SERVE COPIES OF THIS ENTRY TO ALL COUNSEL OF RECORD AND THE BUREAU OF SENTENCE COMPUTATION, P. O. BOX 450, ORIENT, OHIO 43146.

You are hereby notified that you have been convicted of a felony of violence and pursuant to Section 2923.13 of the Ohio Revised Code, you are prohibited from acquiring, having, carrying or using any firearm or dangerous ordinance.

✓
11-6-07
Copies to:
Pros.
D. Daughen
Bureau of Sentence Computation

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CLERK OF COURTS
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IN THE COURT OF COMMON PLEAS
TRUMBULL COUNTY, OHIO
CASE NO. 01-CR-793

STATE OF OHIO,)
)
Plaintiff.)
)
vs.) JUDGMENT ENTRY
)
DONNA ROBERTS,)
)
Defendant)

This matter is before the Court on remand from the Supreme Court of Ohio pursuant to the Court's opinion and Order on Remand. See State v. Roberts (2006) 110 Oh.Std.3d 71. The remand is quite specific (paragraph 167) wherein having found no prejudicial error in regard to Defendant Roberts' conviction, the conviction and judgment of the Court was affirmed.

The reviewing court went on to state the opinion that the administrative act of typing this Court's opinion evaluating of the appropriateness of the death penalty as required by R.C. 2929.03(F) was defective. The Supreme Court apparently thought the Prosecution participated in the Court's conclusions as set forth in the final opinion.

The last issue on remand was to instruct this Court to

provide Roberts with her right of allocution before reimposing sentence.

This writer has presided over the trials of each of the co-Defendants, Roberts and Jackson. He has reviewed and decided the appropriateness of the death penalty option in both cases as required by R.C. 2929.03 and now does so again as ordered by the Ohio Supreme Court.

There is perhaps no case in the annals of Criminology where the perpetrators wrote personal letters to each other outlining in great detail their plan to kill another person, made numerous phone calls which they knew were being recorded, yet still talked of their plans, and one, the Defendant herein, refused to allow mitigating evidence to be offered on her behalf but insisted in her unsworn summation to the jury that it invoke the death penalty.

On May 28, 2003, a Trumbull County Petit Jury, after hearing the extensive evidence presented by the Prosecution, returned a unanimous verdict finding the Defendant, Donna Marie Roberts, guilty of two counts of complicity to Commit Aggravated Murder. The victim, Robert S. Fingerhut, was the ex-husband and domestic partner of the Defendant at the time of his death. Each count contained two specifications of aggravating circumstances, listed in Revised Code 2929.04(A).

Counts One and Two of the indictment merge for sentencing purposes. The State elected to dismiss Count Two of the Specification thereto prior to the commencement of the mitigation phase. This Court for purposes of this opinion, addresses the conviction of the Defendant on the first count of the indictment wherein she purposely and with prior calculation and design caused the death of Robert S. Fingerhut.

The mitigation or second phase of the trial began on June 4, 2003. The jury, after deliberation, unanimously found the State had proven beyond a reasonable doubt that the aggravating circumstances, to wit, Specification One to Count One, that the Defendant was a complicitor in committing or attempting to commit or in fleeing immediately after committing, or attempting to commit aggravated burglary, and that the Defendant committed the aggravated murder with prior calculation and design. The jury also found by evidence proven beyond a reasonable doubt as to Specification Two to Count One that the Defendant was a complicitor in committing or attempting to commit or in fleeing immediately after committing or attempting to commit aggravated robbery. The jury further found by proof beyond a reasonable doubt that the Defendant committed the Aggravated Murder with prior

calculation and design. The jury further found the aggravating factors outweighed the mitigating factors and returned two verdicts recommending the death sentence.

This Court is obligated to review the evidence presented in this case and to review that evidence independently without regard to the findings of the jury. The purpose of such independent review is for the Court to weigh the aggravating circumstances of each specification against any mitigating factors that may be present in favor of Defendant.

This Court has independently reviewed this case on a prior occasion, and has independently reviewed the present case once more, in keeping with the opinion of the Ohio Supreme Court.

There are many people who abhor the imposition of the death penalty and many others who are of the opinion that the death penalty is appropriate if done according to law as prescribed by our state legislature, Rules of Procedure, Evidence and by both our State and Federal Constitutions.

No matter what any particular judge's opinion may be on the matter, the law under review is quite clear that upon a jury returning its recommendation of the death penalty, the sitting judge must re-weigh the evidence presented to the jury upon which the judgment was determined. The judge is required

to review that evidence independently and to determine if the jury was mistaken, or misinterpreted or failed to take into account facts or a fact that in light of the absolute seriousness of the recommendation that reasons exists wherein the imposition of the death penalty should not be sanctioned by the court.

The evidence presented in this trial Court showed an ex-wife who had a reason, and put into play a plan, to have her ex-husband murdered so as to collect \$550,000 in life insurance proceeds. Defendant's plan to murder can reasonably be characterized as unimaginative and naive in concept and ill-fated and botched in its implementation.

The Defendant had become involved romantically and sexually with her co-defendant, Nathaniel Jackson, several months before the murder. Jackson was incarcerated in an Ohio State prison on an unrelated offenses but Defendant and he began written correspondence for at least the last three months before his release. The evidence presented nineteen collect telephone calls from Jackson's prison to Defendant. Throughout the written correspondence and the recorded phone calls, the Defendant and Jackson planned the murder.

As discussed in the phone conversations and letters written to each other and presented in evidence, the plan was

that Defendant would pick up co-defendant Jackson from prison on December 9, 2001, take him to the Wagon Wheel Motel in Boardman, Ohio, rent a room with a mirrored ceiling and Jacuzzi tub where they would have sexual relations. The Defendant would obtain handcuffs, a firearm, ski mask, leather gloves to conceal fingerprints and would provide a means of access to Defendant's residence so Jackson could abduct the victim, take him to another location and kill him. The conspirators discussed forcing the victim to watch the Defendant perform oral sex on Jackson before executing the victim.

In order to prove an alibi for herself, Roberts traveled by automobile to various retail outlets and entered the stores knowing she would be recorded on the various store video security cameras. This would also establish a time line for her whereabouts at the time of the pending murder.

Roberts also, during her shopping trip, took the time to call the Greyhound bus station, which her ex-husband owned and operated to be sure Fingerhut left work on time, i.e., 9:00 p.m.

Roberts provided Jackson with a cell phone in order to co-ordinate the execution of the plan according to schedule.

Jackson was able to enter the Fingerhut house by the key.

provided by Roberts, but found upon confronting Fingerhut that the victim was also armed. During the confrontation and struggle that ensued, Jackson was shot in his left index finger. Jackson then shot Fingerhut three times with one fatal shot to the head. Fingerhut's keys were taken by Jackson and he drove the deceased's Chrysler 300M to Youngstown, Ohio, where it was eventually found within three blocks of where Jackson was arrested on December 20, 2001.

Various phone calls continued between Defendant and Jackson during the hours of 9:30 p.m. to 12 midnight on December 11, 2001. Between 9:30 p.m. and 10:30 p.m., the Defendant drove Jackson to the Days Inn in Boardman, Ohio, rented a room for him and treated his wound. Later the hotel cleaning staff would find bloody bandages and medical supplies in this room which were retrieved by the police.

Roberts then returned to the residence in Howland Township, Trumbull County, Ohio, and found her ex-husband's body inside the main door leading from the garage. Roberts then called 911 to report the murder and when the police arrived, as she had done on the 911 call, she feigned her shock and grief according to the plan laid out in her letters to Jackson.

The Howland Township police as they arrived and started

their investigation found no sign of forced entry. Beside the corpse was found a revolver and the victim had two wallets containing large sums of cash with credit cards. The house contained other valuables but nothing could be identified as missing other than Fingerhut's Chrysler automobile.

Roberts upon request granted permission to the police to search the house and her vehicle. The search turned up approximately 140 letters from Jackson to Roberts in her dresser and approximately 140 letters from Roberts to Jackson in the trunk of Roberts car in a paper bag bearing Jackson's prison number.

Also during the following days of investigation, the police obtained nineteen recorded telephone conversations between the Defendant and Jackson. There were approximately three hours of phone conversation which are automatically recorded by the prison when inmates such as Jackson speak by phone to another person outside the prison. The tapes revealed a continuing and evolving plan to kill Fingerhut within days of Jackson's release from prison.

When Jackson was arrested in Youngstown, Ohio, a pair of black leather gloves with fleece lining were recovered from that home. The same type of gloves as mentioned in their letters. One of the gloves had gunshot residue and a hole in

the left index finger and what appeared to be possibly blood in the area of the hole. The damage to the glove matched the injury Jackson had sustained to his finger.

Fingerhut's automobile having been stolen by Jackson when checked by forensic personnel revealed a DNA analysis match of the DNA profile of both Jackson and Fingerhut. Also the blood samples from the Boardman Days Inn matched the DNA profile of Jackson.

The State also produced evidence showing Roberts had recently checked on Fingerhut's life insurance, upon which she was primary beneficiary, to be sure the policy was still in effect. Also that Roberts promised to purchase a new Cadillac for Jackson once the proceeds were collected. Roberts repeatedly told Jackson how much she hated her ex-husband with whom she continued to live.

Defendant told the police during their investigation of the crime scene on December 12, 2001, that she had been shopping prior to returning home and gave them the name and location of her activities. The police were able to confirm she was at Wal-Mart at approximately 9:30 p.m. that evening. She failed to mention she had taken Jackson to the Days Inn in Boardman, Ohio.

The police asked Roberts to provide a list of suspects

she felt may have wanted to kill Fingerhut. Again she failed to mention Nathaniel Jackson in the list she provided. When asked specifically about Jackson, she replied, "Oh, I almost forgot about him."

The investigation found that Defendant and Jackson had worked together throughout the afternoon and evening of December 11, 2001. The evidence presented was that Defendant had taken Jackson to get a hair cut that day, had eaten dinner at the Red Lobster, and he was with her for a portion of the day at the Warren Greyhound bus terminal in Warren, Ohio, which Roberts managed for Fingerhut. Roberts had told the police, however, that she had last seen Jackson on Monday, December 10, 2001, and had spoken with him on the morning of December 11, 2001.

Frank Reynold, an employee or hanger-on at the Youngstown bus terminal testified he was present a day or so before the murder and saw Roberts approach and ask Fingerhut for \$3,000. Fingerhut refused to give her the money. Roberts had mentioned in one of her letters to Jackson that she was tired of the "grinch" doling out money to her.

Roberts also accused an ex-convict with whom she had a sexual liaison within her home shortly before Jackson's release from prison of stealing a .38 caliber weapon from her.

She informed the police two .38 caliber weapons were missing from the house. The person accused of the theft, Santiago Mason, denied the allegation.

In this case, the Jury found the existence beyond a reasonable doubt, of two aggravating circumstances, pursuant to Section 2929.04(A)(7) of the Revised Code, to-wit, Specification One to Count One, that the Defendant was a complicitor in committing or attempting to commit or in fleeing immediately after committing or attempting to commit aggravated burglary, and that the Defendant committed the aggravated murder with prior calculation and design. And Specification Two to Count One, that the Defendant was a complicitor in committing or attempting to commit, or in fleeing immediately after committing or attempting to commit aggravated robbery, and that the Defendant committed the Aggravated Murder with prior calculation and design.

With respect to the aggravating circumstances relating to the aggravated burglary, the evidence presented at trial proved that the Defendant allowed Jackson to trespass in Fingerhut's residence, located at 254 Fonderlac Drive, Howland Township, Trumbull County, Ohio, with the specific purpose of killing Fingerhut with prior calculation and design.

Jackson was wearing leather gloves and armed with a firearm, which he used to shoot the victim three times causing his death. The gloves and the ski mask, firearm and access to the house were all provided by the Defendant with prior calculation and design, as evidenced by the telephone calls and letters introduced by the State. The Defendant assured the victim's arrival, by checking at his place of employment, and determining when he left work by calling him on the telephone while he was on his way home.

The Defendant also checked on the status of the life insurance policies and determined that the premiums paid were up to the end of 2001, and advised Jackson of the same. Pursuant to her plan to kill Fingerhut, the Defendant took Jackson to a motel room in Boardman, Ohio, and rented the room for one week which was consistent with the plans discussed in the letters and phone calls prior to the murder.

Upon discovering Fingerhut's body, the Defendant feigned grief exactly as discussed in her letters with Jackson. During the course of the investigation, the Defendant continually threw out red herrings to the Howland Policy by mentioning a number of possible suspects, including alleged homosexual lovers of the victim, her ex-boyfriends, crazy people from the bus terminal in Youngstown, and

Santiago Mason. The Defendant only mentioned Jackson, the convict she had corresponded with by letters for three months, spoken to on the telephone 19 times, picked up from prison and engaged in sexual relations with just two days prior, taken to get a haircut and ate dinner with just hours previously and the person whom she had driven to Boardman, Ohio on the night of the murder, and who had an injured index finger, only after the investigators confronted her with his name.

From the aforementioned evidence, the Court concludes that the Defendant committed the aggravated murder as a complicitor, while committing or attempting to commit or in fleeing immediately after committing or attempting to commit aggravated burglary. And that the Defendant committed the aggravated murder with prior calculation and design. With respect to the aggravating circumstance related to the aggravated robbery, after Jackson had murdered the victim, he took the victim's set of keys and the silver Chrysler 300M. Although the planned crime involved Jackson stealing Fingerhut's car in order to kidnap Fingerhut, it is clear that Jackson was to take the victim's car to flee the residence.

The fact that Fingerhut struggled with Jackson in the residence and was killed in the residence, in no way, negates the Defendant's plan that Jackson should steal the victim's

car to facilitate Jackson's own flight from the residence. Ample DNA evidence was presented indicating that Jackson was in the silver Chrysler 300M following the murder of Fingerhut. Additionally, phone records were introduced showing that Jackson and the Defendant called each other after the murder to check on the status of the plan.

Finally, the vehicle was recovered a few blocks from the location where Jackson was arrested. The Defendant, in accordance with the plan to kill Fingerhut, paid for a hotel room for Jackson following the murder. The fact that the silver Chrysler 300M was found abandoned with the victim's keys in the ignition, coupled with the fact that the victim's wallet, money, credit cards and other valuables were not stolen, clearly shows that the plan to steal the victim's car with a means of escape following the kidnapping and murder of the victim was carried out in accordance with the prior calculation and design, as set out by the Defendant and Jackson.

From the aforementioned evidence, this Court concludes that the Defendant committed the Aggravated Murder, as a complicitor, while committing or attempting to commit or in fleeing immediately after committing or attempting to commit aggravated robbery, and that the Defendant committed the

aggravated murder with prior calculation and design.

Now, to be weighed against the aggravating circumstances, the Court must weigh any mitigating factors. On Tuesday, June 3, 2003, the Defendant appeared in-chambers and on the record with her retained attorneys, J. Gerald Ingram and John B. Juhasz, and her retained psychologist, Thomas Eberle. The State was present and represented by Assistant Prosecutor Kenneth N. Bailey and Christopher D. Becker.

At that time, the Defense indicated to the Court that the Defendant had been evaluated by Dr. Eberle for her competency to waive mitigating evidence. And that in the doctor's opinion, she was competent to do same.

This Court personally addressed the Defendant and inquired of her as to the importance of presenting mitigating evidence, the use of such evidence to offset the aggravating circumstances, and the effect of failing to present such evidence. The Court was assured at that time by the Defendant, that she understood these concepts by both Defense counsel and Dr. Eberle. This Court personally inquired whether the Defendant desired to waive the right to present mitigating evidence. The Court having found no evidence to contradict Dr. Eberle's findings on the Defendant's

statements, and her express desire to waive the presentation of mitigating evidence, then found that the Defendant was competent to waive her presentation of mitigating evidence, and had done so knowingly, voluntarily and intelligently, and the Defendant indicated to the Court, that she only desired to make an unsworn statement to the Jury, which she was advised she was permitted to do and would be permitted to make on June 4, 2003, which was the date previously scheduled for the mitigation phase.

On Wednesday, June 4, 2003, the Defendant made an unsworn statement during which she stated to the Jury that there were no mitigating factors, and during which she requested the Jury to impose the death sentence. This statement was articulate, coherent and well organized. The statement lasted approximately one hour, during which the Defendant showed no difficulty or fear in addressing a large group of individuals, including the Jury, and a large number of courtroom observers. The Defendant spoke freely and although she had with her prepared notes, she often extemporized.

Despite the preceding that I have outlined, the Court is still bound to make an independent weighing of any and all mitigating factors that it feels may exist in this case

against the aggravating circumstances. The Defendant in this case was not the principal offender. Pursuant to Section 2929.04(B)(6), the Court considers this factor, but gives it very little weight.

The Defendant committed the Aggravated Murder during the course of the commission of both an aggravated burglary and aggravated robbery. The record is replete with instances where the Defendant actively planned this Aggravated Murder with prior calculation and design in order to collect \$550,000 in life insurance proceeds. The Defendant's plan included buying her codefendant a new Cadillac or Lincoln in exchange for killing her ex-husband, promises of trips, and a nice home in a wealthy neighborhood.

The record is overwhelming that, but for the Defendant's planning and actions, the victim would be alive today. The Defendant discussed and planned for months with the principal offender, how they would kill the victim. The Defendant checked on the status of the insurance policies in order to ensure that she would be able to collect the proceeds, and advised the principal offender of the status of the policies. The Defendant then transported the principal offender in the Aggravated Murder from prison to a predetermined location, in order to engage in love making before the murder.

The Defendant fed the principal offender prior to the crime. The Defendant provided the principal offender with gloves, a ski mask, murder weapon and hideout after the Aggravated Murder, all as planned and discussed prior to the Aggravated Murder.

The Defendant gave the principal offender entry into the residence of the victim for the sole and exclusive purpose of killing the victim. This plan was clearly discussed in both the letters, and recorded telephone conversations, including the last telephone call on December 8, 2001, the day before the principal offender was released from prison. The Defendant failed to advise police of her relationship with the principal offender until she was confronted with the evidence of the relationship by the police. And prior to being confronted by the existence of this relationship, the Defendant gave the police a number of red herrings implicating a number of potential suspects, but never mentioned the relationship with the principal offender, and her discussions with him regarding the Aggravated Murder of Robert Fingerhut.

The Court gives very slight weight to the fact that the Defendant indicates in her letters that the victim may have been physically abusive to her. This factor is pursuant to Section 2929.04(B)(1)(2). However, the existence of this

factor is given very slight weight due to the fact that it is unsubstantiated, and even if it were true, would not warrant the Defendant's action in this case.

The Court gives very little weight to the Defendant's unsworn statement. During the course of her unsworn statement, the Defendant apologized to her Defense team and thanked them for the hard work. The few positive things gleaned from this statement were overshadowed by the Defendant's personal attacks, and statements that were clearly contrary to the evidence. The Defendant denied guilt and personally attacked the jurors by claiming they were not a Jury of her peers.

The Defendant accused the lead investigator as being motivated solely by career advancement and accusing him of obstruction of justice and perjury. The Defendant referred to the other investigators as lackeys and claimed that one member of the Prosecution team was anti-Semitic and racist.

The Defendant also chastised jurors for being uninformed about current events. The Defendant also stated to the Jury that she and the victim had a loving relationship, and planned to live happily ever after.

These statements are in direct contravention of her statements in the letters and the phone calls expressing her

desire and wishes that the victim meet an untimely death, and her desire to marry and live with Nathaniel Jackson.

The Defendant also appeared to brag to the Jury that she and the deceased have earned over \$200,000 per year and that the \$550,000 in life insurance proceeds was of little value to her, because that sum would only sustain her for a few years. It is difficult for this Court or any finder of fact to give any weight to such a statement.

Pursuant to Section 2929.04(A)(7), the Court will give very slight weight to the Defendant's behavior during the course of this trial. The Defendant was courteous, pleasant and properly addressed the Court at all times. The Defendant appeared intelligent and interested in the proceedings and appeared to assist in her defense at all times. The Defendant presented no security problems to this Court and those who transported her to Court each day.

Now the Court has carefully and independently weighed the accumulation of all of the mitigating factors against each aggravating circumstance separately, as to each of the two specifications. In other words, the Court has weighed the evidence twice, first the Court weighed all of the mitigating factors against the aggravating circumstances surrounding the aggravated burglary, and then the Court engaged in a second

weighing, whereby the Court again weighed all of the mitigating factors against the aggravating circumstances surrounding the aggravating robbery.

With respect to the first weighing of the aggravating circumstances relating to the aggravated burglary against all of the mitigating factors, this Court finds that the aggravating circumstances not only outweigh the mitigating factors by proof beyond a reasonable doubt, but in fact, they almost completely overshadow them.

The legislature of the State of Ohio, has recognized that under certain circumstances, the death penalty is an appropriate sanction to a Defendant who commits an Aggravated Murder during the commission of certain felonies. In the case at bar, the underlying felonies were aggravated burglary and aggravated robbery. In this particular case, the Court accords substantial weight to the aggravated burglary specification in the weighing process.

In order to prove an aggravated burglary, the State is required to prove that a Defendant trespassed in an occupied structure, for the purpose of committing a criminal offense. In this particular case, the Defendant purposely had her codefendant trespass in the occupied structure of Robert S. Fingerhut, with the specific purpose of committing

an Aggravated Murder, which had been meticulously planned over a number of months with prior calculation and design.

Under the facts of this case, this Court cannot see any other form of aggravated burglary where the weight of this particular aggravating circumstance could ever be greater. The evidence reveals that the aggravated burglary was committed for the sole purpose of killing Robert S. Fingerhut, pursuant to a planned and methodical execution scheme designed by the Defendant and her codefendant and whereby the Defendant would collect \$550,000 in insurance proceeds. This is a most heinous form of aggravated burglary and is entitled to great weight.

In this Court's view, this aggravating circumstance standing alone, outweighs all of the mitigating evidence in this case. Therefore, with respect to Specification One to Count One, this Court concurs with the Jury's recommendation, and finds that the death sentence is an appropriate penalty.

With respect to the aggravating circumstances of the aggravated robbery, the Court concedes that this offense is not quite heinous as the circumstances surrounding those concerned with the aggravated burglary; however, the aggravated robbery was clearly committed to facilitate the escape from the Aggravated Murder, and is extremely close to

being the worst form of aggravated robbery. This statement is galvanized by the fact that the aggravated robbery was planned by the Defendant to be part of a kidnapping, whereby the victim was to be removed, taken to a different location where the Defendant would then engage in oral sex with her codefendant, while the Defendant was forced to watch prior to his execution. This plot is clearly spelled out in the letters between the Defendant and codefendant. The plan clearly went awry when the victim engaged the codefendant in the struggle at the residence. Again this scheme was hatched for the purpose of the Defendant collecting the \$550,000 in insurance proceeds.

Therefore, the aggravating circumstance specification relating to the aggravated robbery, when weighed against all of the mitigating factors in this case, clearly and undeniably outweighs by proof beyond a reasonable doubt, all of the mitigating evidence in this case.

Therefore, with respect to Specification Two to Count One, the Court concurs with the Jury's recommendation and finds that the death sentence is the appropriate penalty. The Court recognizes that the death sentence recommendation by the Jury must be merged and the Court does hereby merge the death sentences for purposes of sentencing.

For the reasons set forth herein, and after independently and separately weighing the aggravating circumstances against all of the mitigating factors, it is the judgment of this Court that the Jury's recommendation is accepted, and the Court does find that the sentence of death is the appropriate penalty in this case.

10/29/07

John M. Stuard

DATE

JUDGE JOHN M. STUARD

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D. Dougherty

FIFTH AMENDMENT, UNITED STATES CONSTITUTION

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.

SIXTH AMENDMENT, UNITED STATES CONSTITUTION

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.

EIGHTH AMENDMENT, UNITED STATES CONSTITUTION

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

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

R.C. 2929.03(F)

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

R.C. 2929.04(B)

(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.

R.C. 2945.37(G)

(G) A defendant is presumed to be competent to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the court shall find the defendant incompetent to stand trial and shall enter an order authorized by section 2945.38 of the Revised Code.