

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee

-vs-

DONNA ROBERTS,

Defendant-Appellant

CASE No. 2007-2288

Appeal from the Trumbull County  
Court of Common Pleas  
Case No. 01-CR-793

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MERIT BRIEF PLAINTIFF-APPELLEE OF STATE OF OHIO

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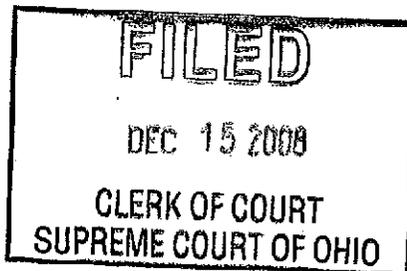
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## STATEMENT OF THE CASE

The Plaintiff-Appellee, the State of Ohio (“State”), takes no exception to the Statement of the Case presented by Defendant-Appellant Donna Roberts at pages 3 through 5 of her brief. The State files this brief in response to Appellant’s brief filed with this Court September 15, 2008.

## STATEMENT OF THE FACTS

As Appellant explains in her brief, this matter returns to this Court as a result of a remand mandated by *State v. Roberts* 110 Ohio St. 3d 71, 2006-Ohio-3665 (“*Roberts I*”). Appellant was previously sentenced to death by Judge John M. Stuard of the Trumbull County Common Pleas Court for the shooting death of her common-law husband, Robert Fingerhut. This Court affirmed her convictions on multiple charges of aggravated murder. *Roberts I*, supra, at ¶130. However, this Court remanded Appellant’s case for a new sentencing hearing because the prosecutor’s office assisted the court in drafting its sentencing opinion, and because the trial court began to announce her original sentence without allowing her right to allocution:

“Having found no prejudicial error in regard to Roberts's convictions, we affirm the convictions 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.” *Roberts I*, at ¶167.

Upon remand, defense counsel advised the court at the first recorded Status Conference on December 6, 2006, that “there may be an issue of competency” because Appellant had been placed on medication while on death row. (T.d. #211, p. 5-6). Furthermore, replacement counsel learned about a car crash in which Appellant had sustained head injuries. (T.d. #211, p. 6). On January 17, 2007, the trial court ordered the Forensic Psychiatric Center of Northeast Ohio, Inc., to conduct an evaluation to determine whether Appellant was competent to be re-sentenced. (T.d. # 172-173). After reviewing various records and consulting with Appellant’s counsel and the Director of Mental Health Services at the Ohio Reformatory for Women, Dr. Thomas G. Gazley, Ph.D., conducted a two-and-a-half hour interview with Appellant. He determined with a reasonable degree of psychological certainty that Appellant understands the sentencing process, understands what alternatives are available to her, and is capable of providing her counsel with evidence to mitigate her potential death sentence. (T.d. # 211, p. 22-23, State’s Ex. 1, p. 8-9, Competency Hearing Oct. 22, 2007, hereinafter, “Ex.1”).

Also in Dr. Gazley’s report, he noted that Appellant was 63 years of age at the time of the evaluation. Appellant expressed a preference for her sheltered existence on death row to life in general population among “these animals.” (Ex. 1, p. 2). Appellant told Dr. Gazley “[g]ive me death instead of having to live here among these animals and eating slop.” (Ex. 1, p. 9). She reported to Dr. Gazley that she is a 1962 graduate of Austintown Fitch High School where she was inducted into the National Honors Society. She was enrolled at Youngstown State University for two years and left in her third year to marry her first husband. Appellant and her first husband moved to Miami, Florida, where she “studied Judaism” under a Rabbi and converted to Judaism in 1980, much to the chagrin of her Italian Catholic family. (Ex. 1, p. 3).

From 1972 through 1994, she worked for a Miami plastic surgeon as a lab technician. She invested her money well with a broker named Leo. Id. Though she reported injuries from three car accidents and a youthful leap from a dresser, Dr. Gazley reported, “Ms. Roberts reported no residual effects\*\*\*from the head injuries. She was able to work capably.\*\*\*” (Ex. 1, p. 4).

Dr. Gazley reported Appellant is in remission with a bipolar disorder which is controlled by medication. A treatment plan from June 12, 2007, showed her compliant with her medication. He found her intelligence level “solidly within the average range.” (Ex. 1, p. 5). Appellant views her stay on death row as a “social statement” and feels she can help her fellow death row inmates by writing articles about her life experiences. (Ex. 1, p. 6).

Though acknowledging episodes of moderate to severe depression during her early days on death row, “the descriptors lessened, as time went on and she was treated both psychiatrically and psychologically there, to the point where the final diagnostic considerations by the mental health people at Marysville were that her symptoms were in fact in remission at the time that I saw her. She was progressively getting better, and when I saw her earlier this year, she was very coherent, her comments and responses to my questions were very relevant and I thought to the point.” (T.d. #211, p. 40).

Appellant did not call on any witnesses at the competency hearing relying solely on the cross examination of Dr. Gazley. Appellant introduced her Social Security records (Ex. A, T.d. # 195, Appendix) which chronicles her apparently unsuccessful application for disability benefits in 1999 and 2000. In a psychological evaluation conducted in 1999 by Dr. Donald Degli, Appellant scored a 65 on the Wechsler Adult Intelligence Scale. Dr. Degli found as follows: “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.” His DSM-IV diagnosis included “malingering or exaggeration.” She was turned down for benefits in December of 1999 because “You are still able to drive and perform your normal daily activities. Your medical condition is not so severe as to prevent you from doing most of your usual activities, including working.” (Ex. A, T.d. # 195, Dec. 10, 1999 Social Security Notice). In a Disability Determination and Transmittal form signed by Dr. Gerald W. Klyop dated December 9, 1999, she was categorized as “not disabled.” (Id.).

Dr. Gazley’s testimony and report were introduced at a hearing conducted October 22, 2007. Based upon the evidence presented at the competency hearing, the trial judge concluded Appellant was competent for purposes of re-sentencing. (T.d. #211, p. 44). The competency hearing then segued into the re-sentencing hearing ordered by this Court.

As per this Court’s instruction in *Roberts I*, Appellant was afforded her right to allocution. She gave a rather lengthy statement, which lasted for 18 pages of the transcript. (T.d. #211, p. 46-64.). At no time during this entire statement did ask for mercy or say that a death sentence was unwarranted. Instead, Appellant told the court about her good grades in school and college (Id. at p. 48). She described herself as an award-winning writer and a creative person. (Id. at p. 64). Appellant told the court about her solid work ethic, punctuated by 23 years of running a plastic surgeon’s office. (Id. at p. 59). She reminded the court that she had assisted her doctor in patching up wounded soldiers in Israel. (Id. at p. 57).

Appellant spoke very little about Robert Fingerhut’s murder. She expressed no remorse for his passing or her actions which brought about his death. Instead, she accused chief

investigator Paul Monroe of lying. (Id. at p. 59). Appellant claimed that the inculpatory prison letters exchanged with co-defendant Nathaniel Jackson were merely exercises in creative writing and that she never intended to kill Fingerhut. (Id. at p. 64). Appellant's counsel declined the court's invitation to offer further statements on her behalf. (Id. at p. 65).

The trial court adjourned the proceedings for one week. On October 29, 2007, the sentencing hearing reconvened. Defense counsel blamed her decision to present no mitigation during her original proceedings on her "mental instability." (Id. at p.68). He argued that Appellant was not the worst of the worst, and without specifically asking the court to spare her life, requested that the court "consider as much as it is allowed to by the dictates of the Supreme Court, why Donna said what she did, why she did what she did." (Id. at p. 69). The court re-imposed the death penalty and two consecutive ten-year sentences, plus two firearm specifications which were merged by the court. (Id. at p. 71-72).

Appellant filed a timely notice of appeal with this Court December 11, 2007, and followed with her brief September 15, 2008. The Plaintiff-Appellee, the State of Ohio ("State") files this brief in response. Other necessary facts will be brought to the Court's attention in the Argument portion of this brief.

## ARGUMENT

### APPELLEE'S PROPOSITION OF LAW ONE:

**Where a capital defendant waives her right to present mitigation evidence, and where a superior court remands a capital case for limited, non-evidentiary proceedings, a trial court properly confines those proceedings and does not err in curtailing the untimely admission of mitigating evidence not heard by the jury.**

Appellant spends several pages of this Proposition of Law arguing that the trial court erred in refusing to permit her to re-open her case and to present evidence which was not introduced during the penalty phase of her trial. Appellant leaves out two important facts from her argument: (1) This Court did not order a new *mitigation* hearing, but a new *sentencing* hearing. (2) With considerable fanfare and contrary to advice of the trial court and her trial counsel, Appellant waived her right to present mitigation evidence outside of her own unsworn statement to her jury.

This Court in *Roberts I* instructed as follows: "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." *Id.* at ¶ 167. It is important to note that this Court did NOT order the trial judge to conduct a new mitigation hearing. This Court did NOT

instruct the trial court to conduct an evidentiary hearing. This Court did NOT instruct the trial court to consider evidence which was not previously contained in the record.

The trial court scrupulously followed this Court's instructions. After determining that Appellant was competent to stand for re-sentencing, it afforded Appellant the right to give a lengthy allocution statement without interruption. It personally prepared and filed a new findings of fact and conclusions of law as to the appropriateness of the death penalty. Appellant spends 16 pages of her brief referencing her Social Security Administration records, unsubstantiated child sexual abuse allegations, an aberrant I.Q. score, depressive episodes, and decades old automobile accidents. She then argues that these documents and episodes should have been considered as "evidence" during her sentencing re-hearing. (Appellant's brf. at p.11-27). Appellant writes for almost two pages about "mitigation case law" (Appellant's brf. at p. 9-10), but fails to acknowledge that the mitigation phase of her trial is long over and not the subject of this Court's remand.

Moreover, the bulk of the evidence which Appellant argues should have been presented at her second sentencing was readily available for consideration during her mitigation hearing in 2003, but Appellant specifically and unequivocally waived her right to bring mitigating evidence before her jury. This Court has already determined that she knowingly and intelligently waived her right to present mitigating evidence: "The record shows that Roberts understood what she was doing when she decided to present only her unsworn statement during the mitigation hearing. The record also establishes that the trial court explained sufficiently the ramifications of that decision, that Roberts essentially told the trial court that she was not presenting additional mitigating evidence because she wanted to be given a death sentence, and that she disregarded her attorneys' advice and instead directed them not to present any mitigating evidence beyond her

unsworn statement.” *Roberts I*, at ¶148. Therefore, evidence contained in her Social Security Administration Records, her wholly unsubstantiated allegations of sexual abuse as a child, Dr. Donald Degli’s 1999 evaluation (which included her 65 IQ score), her supposed pre-offense episodes of anxiety, agitation, depression, auditory and visual hallucinations, suicidal ideations, medications, a two-week stint in a psychiatric hospital, and auto accident injuries were all available for the jury and the court’s consideration in 2003. She blocked their introduction. Therefore, she waived the right to present this evidence at her 2007 re-sentencing hearing.

Of all the evidence referenced in Appellant Proposition of Law No. I, the only evidence not available during her mitigation hearing was her prison records accumulated since her incarceration. Appellant cites to the U.S. Sixth Circuit Court of Appeals decision in *Davis v. Coyle* (C.A. 6, 2007), 475 F. 3d 761, to support her position that the records were improperly excluded from her re-sentencing. This Court in the past has held that decisions from the “inferior federal courts” are not binding upon this Court. “We therefore conclude that we are not bound by rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court. We will, however, accord those decisions some persuasive weight.” *State v. Burnett* (2001), 93 Ohio St. 3d 419, 2001-Ohio-1581, at 424. The U.S. Seventh Circuit of Appeals held, “because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.” -*Lawrence v. Woods* (1970), 432 F. 2d 1072, 1075-1076. Ohio’s Tenth Appellate District held that decisions from the Sixth Circuit Court of Appeals are instructive, but “not binding on this court.” *State v. Colvin*, 10<sup>th</sup> Dist. No. 04AP-421, 2005-Ohio-1448 , at ¶24. Ohio’s Eleventh Appellant District held that “the Sixth Circuit does not have the authority to render a binding decision as to Ohio

statutory law.” *State ex rel. Wilkinson v. Trumbull County Board of Elections*, 11<sup>th</sup> Dist. No. 2007-T-0081, 2007-Ohio-4762, at ¶28.

Even if this Court should find *Davis* binding, the facts in *Davis* are wholly distinguishable from the case at bar. With all due respect to the U.S. Sixth Circuit Court of Appeals, the State disagrees with its holding in *Davis*. One can only wonder if the U.S. Sixth Circuit would have permitted the prosecution to introduce *Davis*’ prison records upon re-sentencing if they were marginally relevant to the aggravating circumstances rather than the mitigating factors. While noting *Davis* was tried and re-sentenced by a three-judge panel, the State notes that there is a potential prejudice to either the prosecution or the capital defendant when the door is opened for additional evidence not heard by a jury and yet considered during re-sentencing on remand. In the State’s view, this Court properly held in *State v. Davis* (1992), 63 Ohio St. 3d 44, 46, that the trial court considered all relevant mitigating evidence during *Davis*’ trial, and that the post trial prison records were irrelevant to the re-sentencing proceedings. Nevertheless, several factors distinguish *Davis v. Coyle*, *supra*, and the case at bar.

First, unlike Appellant, *Davis* never waived his right to submit mitigation evidence. This Court’s opinion in *Roberts I* did not negate Appellant’s waiver. Instead, it reinforced the validity thereof. *Roberts I*, *supra*, at ¶148. Because waiver was not an issue in *Davis*’ case, neither this Court, nor the Sixth Circuit, addressed whether an earlier waiver would have precluded the introduction of *Davis*’ prison records. Appellant cites to no legal authority and presents no arguable rationale why her earlier waiver to present mitigation evidence would not apply to prison records accumulated since her mitigation hearing.

Second, according to the Sixth Circuit, *Davis* sought to present evidence of his “exemplary” behavior on death row to counter the State’s argument at re-sentencing that *Davis*

was a repeat killer who represented a “special danger” to society. *Davis*, supra, at 773.

“Although there could conceivably be some question about the relevance of such evidence in the abstract, the record in this case establishes without doubt that it was highly relevant to the single aggravating factor relied upon by the state – that future dangerousness should keep Davis on death row.” *Id.* at 773. By contrast, the State made absolutely no argument during the re-sentencing concerning Appellant’s potential punishment. (T.d. #211, p. 68-77). In an apparent attempt to follow the letter of this Court’s opinion in *Roberts I*, the trial court did not ask the State for further comment at the re-sentencing, nor did it offer the State the opportunity to produce additional evidence that the aggravating circumstances outweighed the mitigating factors. Thus, unlike Davis, there was no State’s argument to rebut.

Third, according to the above *Davis* quote, the Sixth Circuit found only one aggravating factor applicable to his case, to wit, his future dangerousness. As previously noted, the State made no arguments regarding any aggravating factors at the re-sentencing hearing. Nonetheless, the trial court referenced several aggravating circumstances in its Judgment Entry on sentencing including the fact that she was a complicitor in committing or attempting to commit aggravated burglary and aggravated robbery and that she committed the aggravated murder with prior calculation and design. (T.d. #203, p. 11).

Fourth, as the trial court pointed out, during in her unsworn statement to her jury June 4, 2003, Appellant “stated to the Jury that there were no mitigating factors, and during which she requested the Jury to impose the death sentence.” (T.d. #203, p. 16). Despite Appellant’s statement to the contrary, the Court nevertheless deemed mitigating the fact that Appellant was not the principal offender in Fingerhut’s murder, that the Appellant made statements in her correspondence with co-defendant Nathaniel Jackson that Fingerhut had abused her, and that she

was generally respectful and courteous to the court throughout the proceedings. (T.d. # 203, p. 17, 18, & 20). Even with Appellant's claim of no mitigating factors, the trial court cited to three. Davis, on the other hand, presented mitigating factors which included his attainment of a G.E.D. and associates degree while in prison for another killing, his attainment of partial employment while on parole, his diagnosis of a compulsory personality disorder and explosive disorder and strong family ties. *State v. Davis* (1988), 38 Ohio St. 3d 361, 367. There is no evidence that Davis asked for the imposition of the death penalty as did Appellant.

Fifth, this Court remanded Davis for the re-sentencing hearing challenged in the Sixth Circuit because the trial court had considered non-statutory aggravating circumstances in its original sentencing entry. *Id.* at 367-373. By contrast, this Court found no flaw in the trial court's original sentencing entry, other than the fact that the prosecutor's office assisted in the drafting thereof.

Finally, even if the prison records had been admitted, Appellant states in her brief that they merely confirm her bi-polar and depression diagnosis, her purported sexual abuse victimization as a child, her unsubstantiated claims of hallucinations, and her witnessing her father abusing her mother. (Appellant's brf. at p. 17). Again, these are potential mitigating factors known to Appellant in 2003 which could have been presented to her jury. However, Appellant forbade her trial counsel from using these snippets from her life to possibly benefit her at mitigation. Therefore, even if this Court were to find *Coyle v. Davis* applicable to the case sub judice, any error on the part of the trial court by refusing to admit the prison records is at worst harmless because the information contained therein was available to the defense team in 2003 and knowingly, voluntarily and intelligently omitted at Appellant's own insistence.

Appellant's case is likewise distinguishable from the line of cases flowing from the U.S. Supreme Court's decision in *Lockett v. Ohio* (1978), 438 U.S. 586, another case relied upon by Appellant in this Proposition of Law. In general, this Court has held that a capital defendant is "not entitled to an opportunity to improve or expand his evidence in mitigation simply because\*\*\*[the court of appeals] required the trial court reweigh the aggravating circumstances and mitigating factors." *State v. Chinn* (1999), 85 Ohio St. 3d 548, 565. As previously stated, this Court in *Roberts I* specifically ordered the trial court to engage in a re-weighing exercise with its remand. In fact, the *Chinn* court drew a sharp distinction with *Lockett* and its progeny. As this Court stated in *Chinn* when discussing *Lockett*, "each of those cases involved a situation where the capital sentencer was prohibited, in some form or another, from considering relevant migrating evidence at trial." *Chinn*, supra, at 564. The only reason the capital sentencer was prohibited from considering relevant mitigating evidence *at trial* was because Appellant refused to present anything more than her unsworn statement, wherein she asked for the death penalty.

Furthermore, this Court has also held that "[u]pon remand from an appellate court, the lower court is required to proceed from the point at which the error occurred." *State ex rel. Stevenson v. Murray* (1982), 69 Ohio St. 2d 112. This Court has determined that the error occurred at the sentencing phase, not the mitigation phase. The error was deemed to be a lack of allocution the part of the defendant, and the drafting of the sentencing opinion. Both of these errors were corrected with Appellant's 18-page allocution and the trial court's personal authorship of the sentencing opinion. To permit the introduction of additional mitigation evidence is to require the trial court to proceed at point *prior* where the error occurred, which is contrary to this Court's holding in *Murray* and *Chinn*, supra.

Moreover, the introduction of what is clearly cumulative evidence regarding Appellant's mental health status is barred by the doctrine of res judicata. See, *State v. Combs* (1994), 100 Ohio St. 3d 90, 97. While the *Combs* decision involves postconviction relief, the analogy here is helpful. The *Combs* court stated that "a petitioner may bring a claim of newly discovered mitigating evidence. If, however, the claim does not allege some constitutional deprivation, such as ineffective assistance of counsel, the trial court may not grant relief based on R.C. 2953.21." *Combs*, supra, at 97. While Appellant argues a constitutional claim there was no constitutional deprivation. She made the decision to forego mitigation evidence. The trial court did not deprive her of that right. Appellant could have raised mental issues at trial and declined to do so.

Finally, the State submits that should this Court disagree with State's position and hold that it fully intended for the trial court breach the four corners of this Court's order for allocution and redrafting, any error by the lack of additional mitigation evidence and testimony is at worst harmless error. See, Crim. R. 52(A). Appellant's allocution included information about her abusive father, incestuous cousin, (T.d. # 211, p. 46- 47), good grades in school, "breakdown" in 1987 (Id. at p. 48), car accidents which rendered her "spacey for while" (Id. at p. 49-50), aborted suicide attempt (Id. at p.51), a fall in prison requiring hospitalization (Id. at p. 53), her boundless generosity toward those in need (Id. at p. 55, 62), application for SSI for psychiatric reasons<sup>1</sup>, relocation of an Ethiopian Jew to Israel (Id. at p. 57), running a doctor's office for 23 years (Id. at p. 59), and savvy stock investments. (Id. at p. 60). She also took the liberty of correcting factual errors which she alleged this Court made in *Roberts I.* (Id. at p. 58-65).

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<sup>1</sup> Her own Ex. A. says she was turned down for SSI benefits because "You are still able to drive and perform your normal daily activities. Your medical condition is not so severe as to prevent you from doing most of your usual activities, including working." (Ex. A, Social Security Notice of Dec. 10, 1999, p.4).

This Court has stated, “[t]he purpose of allocution is to permit the defendant to speak on his own behalf or present any information in mitigation of punishment.” *State v. Reynolds* (1998), 80 Ohio St. 3d 670, 684. In that same case, this Court held, “[t]he penalty phase in a capital case is not a substitute for a defendant’s right of allocution.” *Id.* Likewise, an opportunity for allocution should not be transformed into a new penalty phase.

For the reasons stated above, the trial court followed this Court’s directive in *Roberts I* by permitting Appellant an uninterrupted opportunity to explain why the death penalty should not be re-imposed. This Court did not suggest, much less order, that the trial record be supplemented with arguments and evidence which, for the most part, could have been presented to the jury in 2003. No error occurred. This Proposition of Law lacks merit.

**APPELLEE'S PROPOSITION OF LAW TWO:**

**A sentencing judge should not be required to admit evidence during a remanded sentencing hearing which was knowingly, voluntarily, and intelligently waived during the original proceedings.**

In an argument bearing striking similarities to Proposition of Law I, Appellant posits that the trial judge failed to consider mitigating evidence at her re-sentencing. The record before this Court contradicts this argument. Moreover, as discussed in the previous Proposition of Law, Appellant waived her right to present mitigating evidence.

Appellant's waiver triggered a competency evaluation to assure the trial court and the reviewing courts to follow that she fully appreciated the consequences of her election to present no penalty phase evidence. (Trial T.p. Vol. XXVIII, p. 6231). This Court agreed with the trial court's finding that Appellant was completely aware of the likely results of a mitigation hearing proceeding without mitigating evidence: "[T]he record clearly establishes that the trial judge specifically addressed the likelihood of the jury's imposing a death sentence if Roberts failed to present mitigating evidence and that she understood that a death sentence was the probable outcome. In fact, Roberts asked the jury to impose that sentence. We reject her claim that she did not understand that the waiver would yield such a result." *Roberts I*, at ¶141. This Court continued, "[t]he record shows that Roberts understood what she was doing when she decided to present only her unsworn statement during the mitigation hearing. The record also establishes that the trial court explained sufficiently the ramifications of that decision, that Roberts essentially told the trial court that she was not presenting additional mitigating evidence because she wanted to be given a death sentence, and that she disregarded her attorneys' advice and instead directed them not to present any mitigating evidence beyond her unsworn statement." *Roberts I*, at ¶148.

On remand, Appellant did not specifically ask the court to impose the death penalty a second time. However, she did not make a plea for a life sentence either. During her competency evaluation she told Dr. Gazley that she preferred confinement on death row to confinement in general population. “She acknowledged that being imprisoned for life in the general population would be almost worse than being executed. She reported, ‘When you’re in prison your life is over anyway.’ Though Ms. Roberts insisted it was ‘not my view,’ she did report that, ‘As long as you’re on death row, there’s always the possibility of an appeal.’” (Ex. 1, p. 6). Dr. Gazley quoted Appellant as saying, “Give me death instead of having to live here among these animals and eating slop.” (Ex. 1, p. 9).

Appellant argues in her brief that the trial court’s sentencing entry falls “woefully short” of the U.S. Supreme Court’s dictates in *Lockett v. Ohio* (1978), 438 U.S. 586 and R.C. 2929.03(F). Appellant’s Brf. at 31. Appellant wrongly states that “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.” *Id.* A reading of the trial court’s sentencing opinion states otherwise.

The trial judge first noted that despite his advice to Appellant, she made a knowing, voluntary and intelligent decision to waive presentation of mitigating evidence and to rely solely upon her unsworn statement to the jury. (T.d. # 203, p. 16). “Despite the proceeding 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 was not the principal offender. Pursuant to Section 2929.04(B)(6), the Court considers this factor, but gives it very little weight.” *Id.* at p. 17. “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." Id. at p. 18-19. It should be noted that in her unsworn statement to the jury, Appellant specifically denied that Robert Fingerhut had abused her. (T.p. Vol. XXVIII, p. 6298-6299). The court referenced her unsworn statement to her jury, but gave it "very little weight." "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." Id. at p. 19.

Finally, citing R.C. 2929.04(A)(7), the Court accorded "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 problem to this Court and those who transported her to Court each day." Id. at p. 20. Thus, any inference by Appellant that the trial did not address potential mitigating factors is belied by the record before this Court. Clearly, the trial judge scoured the trial record to articulate some mitigating factors even though Appellant had instructed him to not to do so.

The State further takes issue with Appellant's statement at page 30 of her brief wherein she writes, "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." The State did *nothing* to prevent

Appellant from presenting any relevant mitigating information. Contrary to the advice of her trial counsel and the trial court, Appellant elected to block the admission of any mitigating evidence and to solely rely on her unsworn statement. (Trial T.p. Vol. XXVIII, p. 6221-6224). The State agrees with Appellant that Ohio statutes permit the introduction of mental health testimony, but Appellant plainly and unequivocally waived her right to present it. Moreover, in her unsworn statement, she told her jury, “We haven’t given you one piece of mitigating evidence. You are bound by law to give me one sentence, the death penalty. You have no other choice. That is what I’m asking you to do.” *Id.* at 6295. The State disagrees with Appellant’s statement that the trial judge precluded the introduction of mitigating evidence. As this Court noted in *Roberts I* at ¶141 & 148, the trial court openly discouraged Appellant from waiving mitigation by bluntly discussing the likelihood of a death recommendation if she chose that option. The trial court so scrupulously guarded Appellant’s right to present mitigating evidence that it ordered a psychological evaluation to determine whether Appellant was competent to waive the introduction of mitigating evidence. In Dr. Thomas Eberle’s expert opinion, there was “no psychiatric or psychological abnormality that would prevent her from having the faculties needed to make that decision in a rational way.” *Id.* at 6231.

But this Court has never held that *Eddings* and *Lockett* require a capital defendant to present mitigating evidence against his or her wishes. In fact, in *Roberts I*, this Court held: “The United States Supreme Court has never suggested that the Eighth Amendment requires forcing an unwilling defendant to present mitigating evidence in a capital case. *State v. Ashworth* (1999), 85 Ohio St.3d 56, 63, 706 N.E.2d 1231. No societal interest counterbalances the defendant's right to control his or her own defense. *Tyler*, 50 Ohio St.3d at 28, 553 N.E.2d 576. We have held that a defendant is entitled to decide what she wants to argue and present as mitigation in the penalty

phase, see, e.g., *Jenkins*, 15 Ohio St.3d at 189, 15 OBR 311, 473 N.E.2d 264, citing *Lockett v. Ohio* (1978), 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973, including the decision to present no evidence. Ohio's death-penalty statute itself confers 'great latitude' on a defendant in such decisions. R.C. 2929.04(C). See, also, *State v. Barton*, 108 Ohio St.3d 402, 2006-Ohio-1324, 844 N.E.2d 307, ¶ 47. *Roberts was entitled to present no mitigation evidence.*" (Emphasis added). *Roberts I*, at ¶139, 140. As Appellant's trial counsel told the court in 2003, "My reading of the case law \*\*\* is actually fairly consistent with my own view of what the Constitution requires and that is if a person has a liberty under the United States or Ohio Constitutions and they knowingly and voluntarily and intelligently decide to forego or give up that liberty, then that is something that all of us are duty bound to honor. (Trial T.p. Vol.XXVIII, p. 6226) If Roberts had no entitlement to present mitigating evidence to her jury in 2003, she had no entitlement to change strategy and present mitigating evidence to the court upon remand. As stated in Proposition of Law I, this Court did not remand Appellant's case for a new mitigation hearing. It remanded the case for allocution and a re-draft of the sentencing opinion.

Despite that fact, Appellant enjoyed the added benefit of Dr. Gazley's report which included statements about Appellant's purported sexual abuse as a child, life with a physically abusive father, treatment for depression while living in Miami, prescriptions for anti-depressants, one-week hospitalization in a psychiatric hospital for a suicide attempt, head injuries, pain medications and a self-reported lack of a criminal history. Notably, Appellant's trial counsel placed on the record that they were aware of at least some of these arguable mitigating factors, and Appellant had specifically instructed them *not* to bring them to the jury's attention. The court also saw Dr. Gazley's diagnosis of a bipolar disorder in partial remission, an unspecified personality disorder with histrionic and narcissistic features, and self-reported back pain due to

arthritis. (Ex. 1). Thus, the trial court's grant of a competency evaluation upon remand supplemented the record with evidence not before the trial court in 2003, even though this Court's order did not provide for such supplementation.

Notably, her trial counsel told the court in 2003, "We have obtained hospital records relating to a six day psychiatric stay in the year 2000. There was a hospitalization in April of two hospitalizations of [sic] April of 1999 relating to a traffic accident. We have obtained counseling records from Valley Counseling. We made arrangements for basically family members to come and testify during the sentencing phase. Those witnesses were canceled. Donna has instructed us not to present mitigating evidence." (Trial T.p. Vol. XXVIII, p. 6225). Appellant waived the right to present this evidence in 2003 and this Court's remand should not be construed as an opportunity to reformulate her defense strategy for the penalty phase.

Finally, the Appellant in this Proposition of Law attempts to convince the court of an "error" which her waiver generated. "Under the invited-error doctrine, a party cannot take advantage of an error that the party invited or induced the court to commit." *State v. LaMar* (2002), 95 Ohio St. 3d 181, 206. Appellant waived her right to submit mitigating evidence and now seeks to claim error because the court failed to consider evidence which was available at the time of her 2003 trial. The State concedes no error; but if this Court finds error it is indeed of the invited variety.

For the above reasons, Appellant's Proposition of Law Two is without merit.

**APPELLEE'S PROPOSITION OF LAW THREE:**

**When a trial court correctly articulates statutory aggravating circumstances, Ohio law presumes the court relied only upon those circumstances and not upon nonstatutory aggravating circumstances.**

In her third Proposition of Law, Appellant argues that the trial court arbitrarily and capriciously re-imposed the death sentence she requested because it referred to the aggravating circumstance of her aggravated burglary offense as "heinous" and the aggravating circumstance of her aggravating robbery conviction as "the worst form of the offense." This proposition is without merit.

It should first be noted that the very language which Appellant challenges in this Proposition of Law appeared in her original sentencing opinion and she failed to object to it in her direct appeal to this Court. (See, T.d. # 126 p. 16). This Court has previously used both the doctrine of *res judicata* and judicial economy to bar a criminal defendant from raising on a subsequent appeal issues which could have been brought to the reviewing court's attention during the original appeal. "Our holding that a 'sentence' includes only the sanction or combination of sanctions imposed for a single offense also comports with our long-standing precedent that any issue that could have been raised on direct appeal and was not *res judicata* and not subject to review in subsequent proceedings. *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607, 797 N.E.2d 948, ¶ 37; *State v. D'Ambrosio* (1995), 73 Ohio St.3d 141, 143, 652 N.E.2d 710. As we explained nearly 40 years ago: 'Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant \* \* \* on an appeal from that judgment.*' (Emphasis added.) *State v. Perry* (1967), 10 Ohio St.2d 175, 39

O.O.2d 189, 226 N.E.2d 104, paragraph nine of the syllabus.” *State v. Saxon* , 109 Ohio St. 3d 176, 2006-Ohio-1245, at ¶16-17.

This Court reiterated its holding in *Saxon* by noting, “we reasoned that our ruling promotes finality in sentencing, as well as judicial economy, by denying a criminal defendant the opportunity to raise, on remand or on subsequent appeal from a resentencing order, issues that could have been raised in his or her direct appeal.” *State v. Evans* 113 Ohio St. 3d 100, 2007-Ohio-861, at ¶12. This Court remanded Appellant’s case for re-sentencing, nothing more, nothing less. While the State acknowledges that the original entry was remanded for re-drafting, Appellant did not challenge this language in *Roberts I*. In fact, Appellant’s original appeal to this Court did not raise one solitary error in content of the original opinion, only its authorship. Based on this Court’s previous authority in *Evans* and *Saxon* Appellant is barred from the opportunity to re-litigate this issue in this subsequent appeal.

Should this Court disagree and view this language subject to appellate review, R.C. 2929.03(F) mandates, in pertinent part, “[t]he 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. \* \* \* ” (Emphasis added.) Moreover, this Court has held, “[u]nder R.C. 2929.03(F), a trial court or three-judge panel may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors.”

*State v. Sowell* (1988), 39 Ohio St. 3d 322, 329, citing *State v. Stump* (1987), 32 Ohio St. 3d 95, paragraph one of the syllabus.

Notably, this Court previously considered whether the inclusion of such language as “heinous” in a sentencing opinion taints that opinion with “nonstatutory aggravating circumstances” as argued by Appellant in her brief. It has held it does not. For example, in *State v. Hill* (1995) 73 Ohio St. 3d 433, this Court held that when a trial court articulates an aggravating circumstance, added verbiage does not signify reliance upon nonstatutory aggravating circumstances in its sentencing decision. “Neither the trial court nor the court of appeals relied upon nonstatutory aggravating circumstances. Both courts accurately identified the single aggravating circumstance. When a court does so correctly, that court is presumed to rely only on that circumstance, and not on nonstatutory aggravating circumstances. *State v. Rojas* (1992), 64 Ohio St.3d 131, 142, 592 N.E.2d 1376, 1386; *State v. Wiles* (1991), 59 Ohio St.3d 71, 90, 571 N.E.2d 97, 120. Neither the court of appeals' description of Hill's crime as ‘heinous,’ nor the trial court's alleged ‘disgust’ for Hill's offense, created nonstatutory aggravating circumstances. The facts of the robbery form part of the aggravating circumstance. *State v. Lott* (1990), 51 Ohio St.3d 160, 171, 555 N.E.2d 293, 305. Moreover, a court ‘may rely upon and cite the nature and circumstances of the offense as reasons supporting its finding that the aggravating circumstances were sufficient to outweigh the mitigating factors.’ *State v. Stumpf* (1987), 32 Ohio St.3d 95, 512 N.E.2d 598, paragraph one of the syllabus.” *Hill*, supra, at ¶441.

The State would also note that this Court has declined to find reversible error even when the jury instructions described the capital offense as “heinous, shocking and brutal.” “After reviewing all of the jury instructions in this case, we find that the court properly explained to the jury when a defendant may be sentenced to death. While it may have been improper for the court

to refer to capital crimes as 'heinous, shocking or brutal' the defendant has failed to demonstrate that he suffered prejudice as a result of the statement. See *State v. Scott* (1986), 26 Ohio St.3d 92; *State v. Wade* (1978), 53 Ohio St.2d 182. Thus, Appellant's comment at page 34 of her brief that "[h]einousness is not a valid consideration due to the arbitrariness of the term" is not supported by authority from this Court.

The only subsection of R.C. 2929.04(A) referenced by the trial court in its opinion is R.C. 2929.04(A)(7). This statute enumerates the following aggravating circumstances for the trial court's consideration: "The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design." The trial judge specifically cited to Appellant's commission of aggravated robbery and aggravated burglary during the commission of an aggravated murder committed with prior calculation and design as the applicable statutorially defined aggravated circumstances.

According to the trial court, the facts supporting the aggravated burglary conviction are as follows: Appellant (1) permitted co-defendant Jackson to trespass in the home she shared with the victim, Robert Fingerhut, (2) provided Jackson with gloves, a ski mask, a firearm and access to the home and (3) assured the victim's arrival with phone calls to Fingerhut while he was at the bus station and en route home. The trial court opined these actions were committed with prior calculation and design because Appellant (1) made a plan with Jackson to kill Fingerhut, (2) confirmed the value of Fingerhut's life insurance policies ahead of the murder, (3) paid for Jackson's motel room hideout for a full week after the murder, (4) followed her plan to

feign grief as police secured the murder scene, and (5) deliberately sought to misdirect the police investigations by suggesting suspects other than Jackson to the police. (T.d. #203, p. 12).

With respect to the aggravated robbery specification, the trial judge found Appellant and Jackson plotted to kidnap Fingerhut and drive him to Youngstown in Fingerhut's own car in order to kill him. While Fingerhut fought for his life and was actually killed in his own home, Jackson nevertheless stole Fingerhut's Chrysler 300M and abandoned it near his own home in Youngstown. The plan to steal the car is illustrated in several phone calls introduced into evidence. (T.d. #203, p. 14).

In conclusion, Appellant has waived any issue of the trial court labeling the aggravated burglary of Fingerhut's home as "heinous" or the aggravated robbery as "the worst form." In the alternative, a reading of the sentencing entry in its entirety shows that the trial court did inject non-statutory aggravating circumstances into its weighing process. Any error is at worst harmless and non-prejudicial to Appellant. Her Proposition of Law Three is without merit.

**APPELLEE'S PROPOSITION OF LAW FOUR:**

**Ohio law vests exclusive authority in the Chief Justice of this Court to disqualify a trial judge, and gives no authority to an Ohio appellate court to find error when a trial judge declines to recuse himself.**

Appellant alleges error on the part of the trial court for failure to voluntarily step aside for purposes of re-sentencing. Appellant fails to articulate any evidence to suggest that the trial court was not fair and impartial in the re-sentencing proceedings. Moreover, Appellant did not follow the proper procedure in seeking the trial judge's disqualification from her re-sentencing.

Ohio's Constitution vests discretion solely in the Ohio Supreme Court's Chief Justice to determine when a common pleas judge should be removed from a case. "The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law." Sec. 5 of Art. IV, of the Ohio Constitution. R.C. 2701.03(A) lists the process which a litigant must follow to effect the removal of a trial judge. "If a judge of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court in accordance with division (B) of this section."

This Court has interpreted Sec. 5 of Art. IV of the Ohio Constitution as precluding appellate review of a trial court's refusal to recuse itself. "Since only the Chief Justice or his designee may hear disqualification matters, the Court of Appeals was without authority to pass

upon disqualification or to void the judgment of the trial court upon that basis.” *Beer v. Griffith* (1978), 54 Ohio St. 2d 440, 441-442. See, also, *Grogan v. T.W. Grogan Co.* (2001), 143 Ohio App. 3d 548, 557. Furthermore, this Court has held that when a party fails to follow the procedures articulated in Sec. 5(C), Art. IV, Ohio Constitution, the party is foreclosed from complaining about a judge remaining on a particular case. *State v. Moore* 93 Ohio St. 3d 649, 2001-Ohio-1892.

Though Appellant filed a motion for the voluntary recusal of Judge John Stuard in the trial court (T.d. # 184), she provides no evidence that she followed that motion with an affidavit to the Chief Justice as mandated by R.C. 2701.03(A). Based on this Court’s prior holdings in *Beer* and *Moore* this claim is improperly before this Court. Once Judge Stuard orally denied Appellant’s motion on Oct. 22, 2007 (T.d. #211, p. 41), she should have filed an affidavit with the Chief Justice, not an appeal with the full panel of this Court. Indeed, after Judge Stuard orally denied the motion for voluntary recusal, he permitted Appellant’s allocution, but recessed the sentencing proceedings until Oct. 29, 2007, which would have been ample time to follow the mandates of R.C. 2701.03(A). Therefore, this Proposition of Law should be discounted by this Court for procedural reasons.

Additionally, there are practical reasons for finding no merit to this Proposition. When this Court remanded this matter for re-sentencing, it directed as follows: “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.” (Emphasis added) *Roberts I*, at ¶167. Obviously, if this Court viewed Judge Stuard as anything less than fair and impartial, or subject to “undue” pressure as argued now by Appellant, this Court could have appointed a visiting judge to hear the re-sentencing on remand. It did not. This Court has never indicated that any judge other Judge Stuard should preside over Appellant’s re-sentencing proceedings.

Moreover, when co-defendant Nathaniel Jackson filed a motion for a new sentencing hearing based on the *Roberts I* decision and sought to remove Judge Stuard by way of an affidavit for disqualification, Chief Justice Moyer denied that motion finding, “I conclude that the record before me does not compel his disqualification for any alleged bias or prejudice. To be sure, if a judge's words or actions convey the impression that the judge has developed a ‘hostile feeling or spirit of ill will,’ *State ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463, 469, 58 O.O. 315, 132 N.E.2d 191, or if the judge has reached a ‘fixed anticipatory judgment’ that will prevent the judge from hearing the case with ‘an open state of mind \* \* \* governed by the law and the facts,’ *id.*, then the judge should not remain on the case. There is no evidence in the record before me, however, to suggest that the judge has shown any hostility or bias toward either party, and there is no indication that he is unable or unwilling to resolve any remaining disputed matters with an open state of mind.” *In re Disqualification of Stuard* 113 Ohio St. 3d 1236, 2006-Ohio-7233, at ¶8.

Likewise, Appellant has failed to argue, much less demonstrate, that Judge Stuard harbored any hostile feeling or ill will toward her. There is no evidence to suggest Judge Stuard was biased toward either party. Even if Appellant had followed the proper procedure by filing an

affidavit of disqualification, based on the record before this Court, the Chief Justice would have been unable to find any bias or prejudice toward or against Appellant or the State. As such, Appellant's Proposition of Law No. IV is without merit.

## **APPELLEE'S PROPOSITION OF LAW FIVE:**

**Res judicata bars this Court from considering arguments that a capital defendant's trial counsel were ineffective for a purported, though unsupported, failure to conduct a proper mitigation investigation.**

Appellant argues in this Proposition of Law that her original defense team was ineffective because they failed to conduct a proper mitigation phase investigation. As will be discussed below, the record in the trial court specifically belies this allegation. Moreover, the doctrine of res judicata precludes her from raising this claim now.

Generally speaking, "to show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, 143. In *Bradley*, this Court refused to label trial counsel ineffective despite allegations that they failed to conduct a mitigation investigation. *Id.* at 144.

It is inarguable that Appellant's lack of mitigation evidence in 2003 was due not to ineffective assistance of her trial counsel, but to her informed and calculated insistence that no mitigation evidence be presented. Appellant concedes in her brief at page 41 that "Roberts did attempt to restrict the evidence presented in mitigation at that time." "Attempt to restrict" is a classic understatement. The record irrefutably establishes that Appellant forbade her trial counsel from offering any evidence at her mitigation hearing.

Appellant now argues that because there is no evidence in the record to suggest she knew about her own Social Security records she waived her right to present any mitigation evidence under the misimpression that there was nothing to introduce. This argument strains credibility to the breaking point.

Appellant's Social Security records were proffered during the re-sentencing as Defendant's Ex. A. Here are just a few random examples of Appellant's own action to secure Social Security benefits: Appellant's signature appears on a February 24, 2000, and October 30, 1999 release of information forms which in bold, black letters states are for **Adjudication of Social Security and/or Supplemental Security Income disability claim**. (Defendant Robert's Appendix to Third Motion to Proffer Evidence, Defense Ex. A). Her signature appears on an **Authorization for Source to Release Information to the Social Security Administration (SSA)** on October 9, 1999. She signed a Fee Agreement March 27, 2000, with Atty. Robert Heller to represent her in her claim for Social Security benefits. Id. She contested Atty. Heller's fee in a **Statement of Claimant or Other Person** in a form provided by the Social Security Administration.

In a **Social Security Notice** dated Dec. 10, 1999, she was informed her claim for disability benefits had been denied because "your condition is not severe enough to be considered disabling. In deciding this, we considered the medical records, your statements and how your condition affects your ability to work. \*\*\* Your medical condition is not so severe as to prevent you from doing most of your usual activities, including working." Id. Furthermore, in her 18-page allocution at re-sentencing she told the trial court, "Robert [the deceased victim] made me go to the Social Security and they made me go to a psychiatrist, that was in 2000." (T.d. #211, p. 53). Appellant submitted a **Request for Rconsideration** for Social Security benefits February 11, 2000. Parenthetically, she told the court she was awarded those benefits, but there is no evidence to support that claim before this Court. Therefore, any suggestion that

Appellant was somehow oblivious to her own Social Security claim is completely belied by the documents she proffered into evidence and her allocution at re-sentencing.

Moreover, while Robert Fingerhut may have represented to the Social Security Administration that Appellant was lacking in the emotional stability to hold down a job, the opinion from this very Court demonstrates that Appellant was hard at work the day she orchestrated and facilitated Fingerhut's murder: "In this period of initial investigation, Roberts told police that she had left work at the Greyhound bus terminal in Warren at 5:30 that evening, had dined alone at a Red Lobster restaurant, and had then gone home. According to Roberts, Fingerhut called her and said he would be late coming home and suggested that she go shopping." *Roberts I* at ¶19.

During her unsworn statement to her jurors, Appellant decried news accounts which short changed her professional accomplishments. "I have been a business woman for about 40 years. You know, I worked for a plastic surgeon for about 25 of those. It was just me and him. I did a lot. When we moved up here, we had the Avis franchise at the airport, then we had the Greyhounds. I also ran a business in Youngstown, a restaurant, which he [a local news reporter] referred to me as a restaurant worker." (T.p. Vol. XXVIII, p. 6259). She told her jury she almost single-handedly ran the Warren Greyhound terminal. "My husband and I had two Greyhound stations. You are not allowed to have two in one name. His name was in Youngstown. My name was in Warren. We had no other employees in Warren. If he was there in the morning, I was there in the afternoon." *Id.* at p. 6276.

No rational scrutiny of this record supports Appellant's inference in her brief that she was somehow unaware of her claims with Social Security and could not alert her trial

counsel to the records which she ultimately proffered as Ex. A at re-sentencing. If she knew about the records at her re-sentencing in 2007, she certainly would have known about them in 2003 when she completely commandeered her mitigation proceedings and forbade counsel from presenting *any* mitigation evidence. Additionally, this previously-quoted exchange illustrates trial counsel's awareness of potential mitigating evidence available to Appellant, and her steadfast refusal to present it: "We have obtained hospital records relating to a six day psychiatric stay in the year 2000. There was a hospitalization in April of – two hospitalizations of [sic] April of 1999 relating to a traffic accident. We have obtained counseling records from Valley Counseling. We made arrangements for basically family members to come and testify during the sentencing phase. Those witnesses were canceled. Donna has instructed us not to present mitigating evidence." (Trial T.p. Vol. XXVIII, p. 6225). Appellant is asking this Court to believe that she would knowingly bury her psychiatric stay, her Valley Counseling records, and the input from sympathetic family members, but permit her trial counsel to introduce her failed Social Security claim when she was going to request the death penalty anyway.

Appellant's instructions to trial counsel in and of themselves are dispositive of this Proposition of Law. Appellant cannot now claim error when it was Appellant who tied her counsel's hands with enough rope to hang herself during the penalty phase. According to the doctrine of invited error, a party may not take advantage of error for which he himself invited or induced. *Lester v. Leuck* (1943), 142 Ohio St. 91, 92. Yet with this Proposition of Law, she attempts to benefit from an error which she personally invited by tagging her trial counsel as ineffective.

Nevertheless, as Appellant tacitly admits in her brief, this argument is barred by the

doctrine of res judicata. Appellant in her direct appeal to this Court argued ineffective assistance of her trial counsel for their mitigation performance claiming they failed to properly advise her and ensure that she understood the ramifications of her waiver of her right to present mitigating evidence. *Roberts I*, at ¶146. This Court rejected this argument. *Id.* The State submits that her slightly new slant on this old argument - that counsel were ineffective for failing to unearth Social Security records which Appellant herself knew about and refused to present – is barred by the doctrine of res judicata. “The doctrine serves to preclude a defendant who has had his day in court from seeking a second on that same issue. In so doing, res judicata promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard. See *State ex rel. Willys-Overland Co. v. Clark* (1925), 112 Ohio St. 263, 268, 147 N.E. 33.” *State v. Saxon* 109 Ohio St.3d 176, 2006-Ohio-1245, ¶18. Appellant has had her day in court and further litigation of her trial counsel’s pre-re-sentencing performance is barred by the authority from this very Court.

Several Ohio appellate courts have addressed this issue in light of the numerous cases reversed and remanded to the trial courts for re-sentencing only per this Court’s decision in *State v. Foster* 109 Ohio St. 3d 1, 2006-Ohio-856. Some criminal defendants have attempted to bootstrap other appellate claims which pre-date their *Foster* re-sentencing, and the appellate courts below have responded in unison with a chorus of “too late.”

For example, the Second Appellate District, relying upon this Court’s decision in *State v. Perry* (1967), 10 Ohio St. 2d 175, held: “The error Defendant assigns has nothing whatsoever to do with the final judgment from which this appeal was taken, which is the trial court’s May 9, 2007 judgment resentencing Defendant. The assigned error instead relates solely to Defendant’s prior trial proceeding and involve alleged defects and errors in the indictment. Such errors, which

challenge the validity of Defendant's judgment of conviction, could have been raised in Defendant's direct appeal from his conviction, Case No. 05CA125, but were not. Therefore, those claims are now barred by res judicata. *State v. Armstrong*, Montgomery App. Nos. 22450, 22277, 2008-Ohio-4532; *State v. Perry* (1967), 10 Ohio St.2d 175." *State v. North*, 2<sup>nd</sup> Dist. No. 07CA0059, 2008-Ohio-6239, at ¶16. See, also, *State v. Fernbach*, 12<sup>th</sup> Dist. No. CA2006-11-130, 2008-Ohio-5670, ¶19; *State v. Withers* 10<sup>th</sup> Dist. No. 08AP-39, 08 AP-40, 2008-Ohio-3175, ¶12; *State v. Hill*, 4<sup>th</sup> Dist. No. 06CA63, 2007-Ohio-5360, ¶5.

For the reasons stated above, Appellant's trial counsel were not ineffective, they were hamstrung by Appellant's unyielding prohibition of the presentment of mitigating evidence. Moreover, the doctrines of both invited error and res judicata bar Appellant from raising this issue at this time. Therefore, Appellant's fifth Proposition of Law completely lacks merit.

## APPELLEE'S PROPOSITION OF LAW SIX:

**An expert opinion which states a criminal defendant understands the nature and objective of her re-sentencing, and can assist in her own defense comprises reliable, credible evidence as to the defendant's competency to stand for re-sentencing.**

In her Proposition of Law No. Six, Appellant argues the record does not reflect her competency for purposes of re-sentencing. The State submits Appellant's argument lacks merit.

Ohio's Revised Code provides that all criminal defendants are presumed competent to stand trial. "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." R.C. 2945.37(G).

Appellant argues at page 47 of her brief that "[w]ithout evidence that Roberts could properly assist counsel, the hearing should not have been conducted." This statement misconstrues R.C. 2945.37 and improperly shifts her own burden of proof on the issue of competency. Ohio authority places the burden of proving *incompetency* squarely upon the defendant. No burden is placed upon the State or the court to prove *competency*. "Under R.C. 2945.37(A), a defendant is presumed competent *unless he proves* incompetence by a preponderance of the evidence." (Emphasis added). *State v. Hicks* (1989), 43 Ohio St.3d 72, 79. In general, an appellate court will not disturb a trial court's finding of legal competency if the record contains reliable and credible evidence in support of that finding. "Since the adequacy of the data relied upon by the expert who examined the appellant is a question for the trier of fact, and since there was some reliable, credible evidence supporting the trial court's conclusion that

appellant understood the nature and objective of the proceedings against him, this court will not disturb the finding that appellant was competent to stand trial. See 5 Ohio Jurisprudence 3d (1978) 212, Appellate Review, Section 608.” *State v. Williams* (1986) 23 Ohio St.3d 16, 19.

Appellant argues the trial court erred by denying her motion of December 6, 2006, for an “independent evaluation” in addition to the one conducted by Dr. Thomas Gazley. However, a trial court is not required to order more than one competency evaluation. Section (A) of R.C. 2945.371 provides, in pertinent part: “If the issue of a defendant's competence to stand trial is raised under section 2945.37 of the Revised Code, the court *may* order one or more, but not more than three evaluations of the defendant's mental condition.” (Emphasis added.)

The Eleventh District Court of Appeals has interpreted this section to allow the trial court's discretion in determining if any and how many evaluations are necessary to assess a defendant's competency. “Again, the use of the word ‘may’ supports the conclusion that a trial court is not required to order an evaluation of the defendant's mental condition every time he raises the issue. Instead, the wording of the statute implies that the ordering of an examination is a matter within the discretion of the trial court.” *State v. Bailey* (1992) 90 Ohio App.3d 58, 67. Likewise, the Twelfth Appellate District has held, “the competency statutes do not require multiple forensic psychological examinations, nor does due process demand such a policy. See 2945.371(A).” *State v. Fugate* (June 1, 1998), 12<sup>th</sup> Dist. No. CA97-02-031, at \*3, unreported.

Appellant in her brief at page 45 argues that the trial court refused to grant “an independent evaluation” which she requested December 6, 2006. As a point of clarification, Appellant filed a “Motion for Appropriation of Funds for Expert Assistance” on December 4, 2006. (T.d #168). That motion was mentioned in passing during a status conference conducted December 6, 2006. (T.d. #211, p. 4-7). However, it should be noted that Appellant's “Motion

for Appropriation of Funds for Expert Assistance” did not request expert assistance for the purpose of determining Appellant’s competency to be re-sentenced. Instead, Appellant sought funds to hire Dr. James Eisenberg “as an [sic] forensic psychologist for the preparation of the sentencing.” (T.d. #168). Appellant never specifically requested Dr. Eisenberg conduct a competency evaluation. Indeed, the motion does not address the issue of Appellant’s competency at all, just “preparation of the sentencing.” *Id.* While the State acknowledges that the court did not authorize funds to hire Dr. Eisenberg, it nevertheless ordered the Forensic Psychiatric Center of Northeast Ohio to conduct a forensic examination to determine Appellant’s “competency to be sentenced.” (T.d. # 172). This evaluation was conducted by Dr. Thomas Gazley.

Appellant refused to stipulate to Dr. Gazley’s report which found her competent. (State’s Ex. 1). The matter proceeding to a full hearing October 22, 2007, during which Dr. Gazley testified that Appellant has “the ability to understand the sentencing process and the ability to understand what the alternatives available are to her as well as her ability to provide her counsel with any mitigating circumstances, should she desire to do so.” (T.d. #211, p. 21-22). Dr. Gazley agreed Appellant is aware of her right to present evidence to possibly spare herself the re-imposition of the death penalty. (T.d. #211, p. 22-23).

Appellant complains in her brief at page 45 that Dr. Gazley rendered an opinion as to her ability to interact with counsel, but never personally observed such interactions. Appellant cites absolutely no authority – legal or medical – to suggest that the sole method of determining one’s ability to assist counsel is to monitor these encounters. While Appellant asserts in her brief that that there was no “testimony relevant” as to her ability to assist counsel, Dr. Gazley testified, “based on her ability to interact with me and provide me information, provide a coherent account of her own perceptions about the situation, I came to the conclusion that she would be able to do

so with her defense counsel as well.” (T.d. # 211, p.27). Appellant offers no explanation as to why Appellant’s ability to interact with Dr. Gazley would not serve as a barometer to assess how she would ultimately interact with her counsel.

It should also be noted that Appellant had undergone at least two competency evaluations prior to her initial sentencing. The second evaluation was specifically directed toward her competency to waive the presentation of mitigation evidence: “The court then heard from Dr. Thomas Eberle, a psychologist who had evaluated Roberts earlier during the prosecution and who did so again just prior to the hearing. Dr. Eberle testified that Roberts’s decision to forgo presentation of mitigating evidence was rational. He further found that she suffered no psychiatric or psychological abnormality that would prohibit a rational decision regarding presentation of mitigating evidence.” *Roberts I*, ¶135.

And while Appellant’s prison records indicate she reported hallucinations in the early days of her incarceration, such episodes would not necessarily impact her competency to stand for re-sentencing. “A person who is psychotic, a person who has paranoid schizophrenia, a person who has a major depressive disorder can be and often is found competent to stand trial.” (T.d. #211, p. 35). Since her incarceration, Appellant has been prescribed Trazodone, Lithium and Wellbutrin. These medications are typically prescribed for depression and mood swings. (T.d. #211, p. 30). According to Dr. Gazley, the prescriptions appeared to be working for Appellant. “I believe\*\*\*that she was moderately to severely depressed, and then the descriptors lessened as time went on and she was treated both psychiatrically and psychologically there, to the point where the final diagnostic considerations by the mental health people at Marysville were that her symptoms were in fact in remission at the time that I saw her. She was progressively getting better, and when I saw her earlier this year, she was coherent, her

comments and responses to my questions were very relevant and I thought to the point.” (T.d. # 211, p. 40). Though certainly not an expert opinion, her counsel told the court, “I believe she’s on the right medication and in my view doing fine right now. I believe she’s competent, but there is that in the past that I want to look into. “ (T.d. #211, p. 5-6).

The evidence adduced at the competency hearing which preceded the re-sentencing was uncontroverted: Appellant was capable of understanding the nature and the objective of her re-sentencing and was likewise capable to assist in her defense. R.C. 2945.37(G). The record is completely devoid of any opinion that Appellant was mentally incompetent. Therefore, she failed to carry her burden to demonstrate incompetence and the trial court properly evaluated reliable, credible evidence in finding Appellant competent for the second time in four years. Appellant’s Proposition of Law Six is without merit.

**APPELLEE'S PROPOSITION OF LAW NO. SEVEN:**

**Res judicata bars Appellant from attempting to relitigate the issue of her competency to stand trial or to waive her right to present mitigating evidence at trial.**

In her seventh and final Proposition of Law, Appellant revisits the long-settled issue of her competency to waive presentment of mitigating evidence. Appellant's argument must fail for two reasons: (1) She fails to demonstrate that she was incompetent when she barred her trial counsel from presenting any mitigating evidence to possibly spare her the death penalty, (2) The argument is barred by the doctrine of res judicata.

Despite the voluminous documents which Appellant introduced during her re-sentencing, not one supports her claim that she was incompetent to waive the presentation of mitigation evidence. While she now seeks to portray herself as a suicidal zombie barely able to drag herself through the day, her persona at trial was that of a generous, successful business woman willing to suffer the death penalty to promote racial equality. She proffered Defense Ex. A which chronicles her quest for Social Security disability benefits, but which does not support her allocution claim that she was awarded the benefits. As previously stated, she was turned down for these benefits and deemed capable of working. In her Motion to Proffer Evidence filed with the Court September 20, 2007, she cites to the mitigating factor of "Steady Employment" at page 4 of her motion. (T.d. #195). Appellant cannot have it both ways. Her current proposed scenario of an unemployable, concussion-dazed, victim is defeated by her admitted and proffered exhibits along with the record before this Court.

Appellant's statement at page 47 of her brief that she "was not competent to make decisions at her penalty phase hearing of the original trial" is not only unsupported by the record, it is pointedly contradicted by the record and this own Court's prior rulings in this case. "The

court then heard from Dr. Thomas Eberle, a psychologist who had evaluated Roberts earlier during the prosecution and who did so again just prior to the hearing. Dr. Eberle testified that Roberts's decision to forgo presentation of mitigating evidence was rational. He further found that she suffered no psychiatric or psychological abnormality that would prohibit a rational decision regarding presentation of mitigating evidence.” *Roberts I*, at ¶135. This Court continued: “Her contention that she did not fully understand the ramifications of her decision and that the trial judge did not sufficiently inquire of her in that regard is belied by the record. As set forth above, the record clearly establishes that the trial judge specifically addressed the likelihood of the jury's imposing a death sentence if Roberts failed to present mitigating evidence and that she understood that a death sentence was the probable outcome. In fact, Roberts asked the jury to impose that sentence. We reject her claim that she did not understand that the waiver would yield such a result.” *Id.* at ¶141.

None of Appellant's voluminous post-remand records contradicts these previous findings. Despite claims of depression, suicidal ideations, bi-polar disorders, mood swings, and failed Social Security disability benefit claims, she has not submitted one piece of evidence to demonstrate mental incompetence.

Moreover, Appellant is barred by the doctrine of res judicata from re-litigating the issue of her mental competence in her original trial at this juncture. “The doctrine serves to preclude a defendant who has had his day in court from seeking a second on that same issue. In so doing, res judicata promotes the principles of finality and judicial economy by preventing endless relitigation of an issue on which a defendant has already received a full and fair opportunity to be heard. See *State ex rel. Willys-Overland Co. v. Clark* (1925), 112 Ohio St. 263, 268, 147 N.E. 33.” *State v. Saxon* 109 Ohio St.3d 176, 2006-Ohio-1245, ¶18. Appellant's attempt to backdoor

this settled issue with extraneous documents which have no bearing on her competency during her original trial should be summarily rejected by this Court.

Appellant seeks to analogize her case to *United States v. Blohm* (1984), 579 F. Supp. 495, wherein a trial judge heard expert testimony which found Blohm competent to stand trial, but nevertheless found him incompetent because of his obsessive fixation with a civil copyright case. Blohm had purportedly sent a threatening letter to the judge in the civil case which resulted in criminal charges. Contrary to his attorney's advice, Blohm insisted in advancing a conspiracy defense which encompassed the judge, President Richard Nixon, and golfing legend Arnold Palmer. Though finding him competent to stand trial, one of Blohm's psychiatrists referred to his ideation of the "golf conspiracy" as "delusional," "false," "unshakable," and "irrational." *Blohm*, supra, at 503.

By contrast, Appellant knowingly and rationally waived her right to present mitigating evidence to highlight her perception that the death penalty is imposed in a racially discriminatory fashion. Not only is this belief NOT delusional or irrational, it's a position repeatedly espoused by defense lawyers in capital appeals. *State v. Steffen* (1987), 31 Ohio St. 3d 111, 124; *State v. Zuern* (1987), 32 Ohio St. 3d 56, syllabus; *State v. LaMar*, 95 Ohio St. 3d 181, 2002-Ohio-2128, ¶46; *State v. Freeman* (1985), 20 Ohio St. 3d 55, 58; *State v. Keene* (1998), 81 Ohio St. 3d 646, 652. This Court has never overturned a death sentence for reasons of racial discrimination, but that does not necessarily mean that the defense bar is delusional or irrational for raising the issue. Likewise, Appellant cannot be retroactively branded incompetent for championing a cause echoed in countless appellate briefs filed in this very Court under the protective cloak of zealous representation.

Appellant's hefty post-remand record augmentation does nothing to prove that she was mentally incompetent when she offered herself as a sacrificial lamb in the war against racial inequality. It should be noted that Appellant's true motivation came to light during the Gazley evaluation when she admitted she asked for the death penalty because she preferred the solitude of death row to life among the "animals" in general population. (State's Ex. 1, Competency Hearing Oct. 22, 2007). Appellant's post-remand filings do not overcome a res judicata bar. This Court has previously affirmed the trial court's assessment of her competency during her trial. Appellant's Proposition of Law No. Seven is without merit.

### CONCLUSION

For reasons stated above, Appellant's seven Propositions of Law lack merit. The State urges this Court to affirm Appellant's death sentence.

Respectfully submitted by:  
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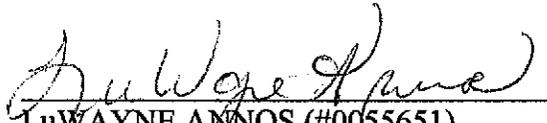
  
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I do hereby certify that a copy of this brief was sent by ordinary U.S. Mail to Atty. David L. Doughten (#0002847), 4403 St. Clair Ave., Cleveland, Ohio 44103-1125, and Jeffery J. Helmick (#0040197), 1119 Adams St., 2<sup>nd</sup> Floor, Toledo, Ohio 43604, Counsel for Defendant-Appellant Donna Roberts on this 12<sup>th</sup> Day of December 2008.

  
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## **APPENDIX**



administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

**HISTORY:** (Amended, effective Nov. 6, 1973; SJR No.30. Adopted May 7, 1968. Former § 4 repealed.)

### § 5 Additional powers of supreme court; supervision; rule making.

(A)(1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

**HISTORY:** (Amended, effective Nov. 6, 1973; SJR No.30. Adopted May 7, 1968.)

Not analogous to former § 5, repealed October 9, 1883.

### § 20 Style of process, prosecution, and indictment.

The style of all process shall be, "The State of Ohio;" all prosecutions shall be carried on, in the name, and by the authority, of the state of Ohio; and all indictments shall conclude, "against the peace and dignity of the state of Ohio."

## ARTICLE V: ELECTIVE FRANCHISE

Section

3 Repealed, June 8, 1976.

4 Forfeiture of elective franchise.

### § 3 Repealed, June 8, 1976.

This section referred to the privilege from arrest of voters during elections.

### § 4 Forfeiture of elective franchise.

The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony.

**HISTORY:** (Amended, effective June 8, 1976; SJR No.16.)

## ARTICLE XVIII: MUNICIPAL CORPORATIONS

Section

3 Powers.

7 Home rule.

### § 3 Powers.

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. (Adopted September 3, 1912.)

The provisions of § 3 of HB 386 (149 v —) read as follows:

SECTION 3. (A) The provisions of the Revised Code, including, but not limited to, Titles XI, XIII, XVII, and XLVII, relating to the origination, granting, servicing, and collection of loans and other forms of credit prescribe rules of conduct upon citizens generally, comprise a comprehensive regulatory framework intended to operate uniformly throughout the state under the same circumstances and conditions, and constitute general laws within the meaning of Section 3 of Article XVIII of the Ohio Constitution.

(B) The provisions of the Revised Code, including, but not limited to, Titles XI, XIII, XVII, and XLVII, relating to the origination, granting, servicing, and collection of loans and other forms of credit have been enacted in furtherance of the police powers of the state.

(C) Silence in the Revised Code, including, but not limited to, Titles XI, XIII, XVII, and XLVII, with respect to any act or practice in the origination, granting, servicing, or collection of loans or other forms of credit shall not be interpreted to mean that the state has not completely occupied the field or has only set minimum standards in its regulation of lending and other credit activities.

(D) It is the intent of the General Assembly to entirely preempt municipal corporations and other political subdivisions from the regulation and licensing of lending and other credit activities.

# CHAPTER 2701: COURTS OF RECORD—GENERAL PROVISIONS

Section	
2701.01	Renumbered.
2701.02	Courts must render decisions within time limit.
2701.03	Disqualification of common pleas judge; proceedings after affidavit filed against common pleas or appellate judge.
[2701.03.1]	2701.031 Disqualification of municipal or county court judge.
2701.04	Removal of residence of judge.
	[COMMISSIONS]
2701.05	Commission to judge of the supreme court.
2701.06	Transmitting commission.
	[CONSTABLES]
2701.07	Court constables; duties.
2701.08	Court constables; compensation.
	[CALENDAR]
2701.09	Publication of court calendar.
	[RETIREMENT, REMOVAL, SUSPENSION]
2701.10	Registration of retired judges; referral of civil action or submission of issue or question.
2701.11	Rules for retirement, removal and suspension of judges; appointment of commission.
2701.12	Retirement, removal or suspension of judge.
	[ABORTIONS]
2701.15	Court may not order abortion.
	[MISCELLANEOUS PROVISIONS]
2701.17	Misprision of clerk.
2701.18	Premature judgment deemed clerical error.
2701.19	Lien of judgment on appeal.
2701.20	Clerk of court may refuse to process document not required or authorized to be filed or that is materially false or fraudulent.

**§ 2701.01** Amended and renumbered RC § 2503.44 in 141 v H 412. Eff 3-17-87.

**§ 2701.02** Courts must render decisions within time limit.

When submitted to a court on motion, demurrer, or motion for new trial, or when submitted to a court on appeal on questions of law or on final trial on the issues joined, a cause begun in a court of record shall be determined and adjudicated within thirty days after such submission.

This section applies to causes sent to a referee or special master, and to motions affecting the confirmation, modification, or vacation of a report thereof. This section does not affect, alter, or change the rules of the supreme court.

**HISTORY:** RS §§ 557-1, 557-2, 557-3; 90 v 192, §§ 1, 2, 3; 95 v 410; GC §§ 1685, 1686; Bureau of Code Revision, 10-1-53.

**Research Aids**

Time limit for decision:

**O-Jur3d:** Cts & Jud §§ 242, 324; Judgm § 20; Plead § 317; Trial § 85

**Am-Jur2d:** Courts § 22

**C.J.S.:** Judges § 35 et seq  
**West Key No. Reference**  
 Judges 24

**CASE NOTES AND OAG**

1. (1952) Revised Code § 2701.02 is directory merely, and is binding upon the conscience of the judge, and is among the duties which he is sworn to perform by his oath of office; but it is not jurisdictional, and failure to render an adjudication within the time specified does not oust the court of jurisdiction: *Kyes v. Pennsylvania R. Co.*, 158 OS 362, 49 OO 239, 109 NE2d 503; *State ex rel. Ticknor v. Randall*, 152 OS 129, 39 OO 440, 87 NE2d 340 (1949); *James v. West*, 67 OS 28, 65 NE 616 (1902).

2. (1992) The time limit under RC § 2701.02 for acting on motions is directory only. *CPSupR 6(A)* does not create a right in a litigant to have a motion ruled upon within 120 days: *State ex rel. Rodgers v. Cuyahoga Cty. Court of Common Pleas*, 83 OApp3d 684, 615 NE2d 689.

3. (1986) A party who has submitted his case to the court should not be required to sue the judge in mandamus in order to force a decision, for trial judges should render their decisions in a timely fashion: *Knox v. Knox*, 26 OApp3d 17, 26 OBR 186, 498 NE2d 236.

4. (1951) A court does not lose jurisdiction over a cause by a delay of over four years in ruling on the defendant's motion for a new trial under GC § 1685 (RC § 2701.02): *Renner v. Pennsylvania R. Co.*, 61 OLA 298, 103 NE2d 832 (App).

5. (1993) Revised Code § 2701.02 was derived from two separate General Code sections, GC §§ 1685 and 1686. They were originally enacted in 1893 (90 Ohio Laws 192), and have been essentially unchanged since that time. The first paragraph of RC § 2701.02 is derived from GC § 1685, and the second paragraph from GC § 1686, which commences with the words "[t]he preceding section shall apply to causes sent to a referee or special master." The recodification of the General Code into the Revised Code did not change the law as expressed in the General Code: *State ex rel. Lucas v. Reece*, No. 92AP-1330 (10th Dist.), 1993 Ohio App. LEXIS 3227.

**§ 2701.03** Disqualification of common pleas judge; proceedings after affidavit filed against common pleas or appellate judge.

(A) If a judge of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court in accordance with division (B) of this section.

(B) An affidavit of disqualification filed under section 2101.39 or 2501.13 of the Revised Code or division (A) of this section shall be filed with the clerk of the supreme court not less than seven calendar days before the day on which the next hearing in the proceeding is scheduled and shall include all of the following:

(1) The specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts to support each of those allegations or, in

relation to an affidavit filed against a judge of a court of appeals, a specific allegation that the judge presided in the lower court in the same proceeding and the facts to support that allegation;

(2) The jurat of a notary public or another person authorized to administer oaths or affirmations;

(3) A certificate indicating that a copy of the affidavit has been served on the probate judge, judge of a court of appeals, or a judge of a court of common pleas against whom the affidavit is filed and on all other parties or their counsel;

(4) The date of the next scheduled hearing in the proceeding or, if there is no hearing scheduled, a statement that there is no hearing scheduled.

(C)(1) Except as provided in division (C)(2) of this section, when an affidavit of disqualification is presented to the clerk of the supreme court for filing under division (B) of this section, all of the following apply:

(a) The clerk of the supreme court shall accept the affidavit for filing and shall forward the affidavit to the chief justice of the supreme court.

(b) The supreme court shall send notice of the filing of the affidavit to the probate court served by the judge if the affidavit is filed against a probate court judge, to the clerk of the court of appeals served by the judge if the affidavit is filed against a judge of a court of appeals, or to the clerk of the court of common pleas served by the judge if the affidavit is filed against a judge of a court of common pleas.

(c) Upon receipt of the notice under division (C)(1)(b) of this section, the probate court, the clerk of the court of appeals, or the clerk of the court of common pleas shall enter the fact of the filing of the affidavit on the docket of the probate court, the docket of the court of appeals, or the docket in the proceeding in the court of common pleas.

(2) The clerk of the supreme court shall not accept an affidavit of disqualification presented for filing under division (B) of this section if it is not timely presented for filing or does not satisfy the requirements of divisions (B)(2), (3), and (4) of this section.

(D)(1) Except as provided in divisions (D)(2) to (4) of this section, if the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section, the affidavit deprives the judge against whom the affidavit was filed of any authority to preside in the proceeding until the chief justice of the supreme court, or a justice of the supreme court designated by the chief justice, rules on the affidavit pursuant to division (E) of this section.

(2) A judge against whom an affidavit of disqualification has been filed under divisions (B) and (C) of this section may do any of the following that is applicable:

(a) If, based on the scheduled hearing date, the affidavit was not timely filed, the judge may preside in the proceeding.

(b) If the proceeding is a domestic relations proceeding, the judge may issue any temporary order relating to spousal support pendente lite and the support, maintenance, and allocation of parental rights and responsibilities for the care of children.

(c) If the proceeding pertains to a complaint brought

pursuant to Chapter 2151. of the Revised Code, the judge may issue any temporary order pertaining to the relation and conduct of any other person toward a child who is the subject of a complaint as the interest and welfare of the child may require.

(3) A judge against whom an affidavit of disqualification has been filed under divisions (B) and (C) of this section may determine a matter that does not affect a substantive right of any of the parties.

(4) If the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section, if the chief justice of the supreme court, or a justice of the supreme court designated by the chief justice, denies the affidavit of disqualification pursuant to division (E) of this section, and if, after the denial, a second or subsequent affidavit of disqualification regarding the same judge and the same proceeding is filed by the same party who filed or on whose behalf was filed the affidavit that was denied or by counsel for the same party who filed or on whose behalf was filed the affidavit that was denied, the judge against whom the second or subsequent affidavit is filed may preside in the proceeding prior to the ruling of the chief justice of the supreme court, or a justice designated by the chief justice, on the second or subsequent affidavit.

(E) If the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section and if the chief justice of the supreme court, or any justice of the supreme court designated by the chief justice, determines that the interest, bias, prejudice, or disqualification alleged in the affidavit does not exist, the chief justice or the designated justice shall issue an entry denying the affidavit of disqualification. If the chief justice of the supreme court, or any justice of the supreme court designated by the chief justice, determines that the interest, bias, prejudice, or disqualification alleged in the affidavit exists, the chief justice or the designated justice shall issue an entry that disqualifies that judge from presiding in the proceeding and either order that the proceeding be assigned to another judge of the court of which the disqualified judge is a member, to a judge of another court, or to a retired judge.

**HISTORY:** RS § 550; S&C 387; 57 v 5; 82 v 24; 84 v 129; 85 v 267; 86 v 263; 98 v 59; GC § 1687; 103 v 405(417); Bureau of Code Revision, 10-1-53; 130 v 654 (Eff 10-14-63); 138 v S 332 (Eff 3-23-81); 140 v H 426 (Eff 4-4-85); 146 v S 263, Eff 11-20-96.

#### Cross-References to Related Sections

Affidavit of disqualification—

Court of appeals judge, RC § 2501.13.

Probate court judge, RC § 2101.39

Compensation of judges holding court outside county of residence, RC § 141.07.

#### Ohio Constitution

Additional powers of supreme court, OConst art IV, § 5.

#### Ohio Rules

Disqualification of judges, Code of Judicial Conduct, Cano