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ARGUMENT

Proposition of Law I:

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

The State of Ohio and Ms. Roberts' have a fundamental difference in the application of United States Supreme Court precedent in this issue. The difference in the two positions can be very simply stated. The state argues that because this Court ordered a new sentencing hearing, and not a full penalty phase hearing, that Roberts was precluded from introducing any additional mitigation for consideration by the judge. The appellant's view point is that no ruling or statute can *ever* prevent the sentencer, in this case the judge, from considering relevant mitigation prior to his or her deliberation on the appropriateness of the penalty.

In Ohio, it is always the judge who is the ultimate sentencer, not the jury. A jury's finding is only binding on the court if a sentence less than death is recommended. This Court has, on too numerous of occasions to recount here, found that an instruction to the jury that its decision is a recommendation is entirely proper.

In Ms. Roberts' case, the trial court did not properly consider all evidence of mitigation at the first sentencing hearing by preparing the R.C. §2929.03(F) opinion prior to her allocution. The remand from this Court included an order to allow her allocution. The allocution is not merely perfunctory, it must be actually considered by the judge in determining the appropriate sentence in any case, particularly a capital case. Indeed, the very purpose of allocution is to

provide a defendant an avenue to argue mercy or mitigation to the judge to lessen the severity of the possible sentence. The jury in a death case does not and cannot under Ohio law hear the allocution to the judge. Thus, this Court's order did not restrict the trial judge from consideration of additional factors in mitigation.

Ms. Robert's did make a full allocution to the court. As addressed in Proposition of Law II in her Merit Brief, Roberts addressed the following non-exclusive matter in mitigation in her statement:

1. Sexually abused by cousins when she was a girl; (T. 46)
2. Depression, resulting in time spent in psychiatric ward. (T. 51, 52)
3. Severe head injuries from car accidents; (T. 49, 50, 53)
4. Ms. Robert was 58 at the time of the offense with no criminal record;
5. No danger to others in prison;
6. Volunteering to assist injured in Israel, possibly saving lives; (T. 54, 57-58)
7. Long work history; (T. 59-60)
8. Hallucinations; (T. 52)
9. Father was verbally abusive and he beat her mother and at times guns were involved; (T. 47)
10. Raised her younger sister and helped send her through college; (T. 62)
11. Received SSI for mental disability. (T. 53)

By not permitting the defense to introduce additional evidence to the court for its consideration, the above matters were not fully developed or corroborated. In other words, the

trial court understood the order from this Court to mean that he could hear some evidence on mental disability or sexual abuse, but not the rest. Roberts would be permitted to inform the judge of her creating an imaginary friend to cope with being abused, but the defense would not be permitted to have a forensic psychologist verify her statements.

Limitation Denies Roberts Her Sixth Amendment Right to Counsel

By limiting the defense presentation of mitigation evidence, the trial court denied Roberts the assistance of counsel. It should be unquestioned that Roberts, competent or not, was and is suffering from severe mental disabilities. The trial judge denied Roberts an independent psychologist for mitigation purposes. His actions of limiting what he would consider in mitigation denied the ability of counsel to assist her in persuading the judge of the weight that should be attached to her allocution.

If a state provides a defendant the right to make an unsworn statement or allocution, it may not additionally restrict defendant counsel from assisting the defendant in presenting that statement. In Ferguson v. Georgia, 365 U.S. 570 (1960), the United States Supreme Court found that such a restriction violated the Fourteen Amendment. Specifically, the court found that the specific Georgia statute could not deny the defendant “the right to have his counsel question him to elicit his statement.” Id. 595.

Ferguson relied upon the rational Powell v. Alabama, 287 U.S. 45 (1932). The Ferguson Court noted at p.594 that:

The tensions of trial for an accused with life or liberty at stake might alone render him utterly unfit to give his explanation properly and completely. Left without the “guiding hand of counsel,” (Powell v Alabama, p.69), he may fail properly to introduce, or to introduce at all, what may be a perfect defense.

The opinion also quoted the Michigan Supreme Court in Annis v. People, 13 Mich. 511, 519-520.

But to hold that the moment the defendant is placed upon the stand, he shall be debarred of all insistence from his counsel, and left to go through his statement as his fears and his embarrassment may enable him, in the face of the consequences which may follow from imperfect or unsatisfactory explanation, would in our opinion make, a trap into which none but the most cool and self-possessed could place himself with much prospect of coming out unharmed.

* * *

. . . and if he is unlearned, unaccustomed to speak in public assemblies, or to put together his thoughts in consecutive order any where, it will not be surprising is incoherent, or if it overlooks important circumstances.

Nowhere is the above reasoning more applicable than the allocution of a mentally impaired defendant pleading for her life at a sentencing proceeding of a capital trial. Even the most polished of public speakers would have a difficult time placing their thoughts in order when discussing typical subjects of an unsworn statements; such as family dysfunction, substance abuse, sexual abuse, prior convictions and remorse. When one is requesting that the jury preserve his very existence, the defendant ought not to be deprived of the assistance of counsel.

No Waiver of Precluded Evidence

The appellee argues that the bulk of the evidence was available to the defense at the time that she had waived the earlier mitigation. Because she waived some mitigation at the penalty phase here it is argued, Roberts no longer had the right to present the evidence to the forum which would ultimately determine her fate. It is argued that "This Court has already determined the she knowingly and intelligently waived her right to present mitigating evidence." Appellee brief p. 7. This is incorrect. This Court specifically found that she did *not* waive mitigation. This Court specifically found that she had the right to pick and choose which mitigation was

presented, which is far different than a complete waiver of mitigation.

[**P140] 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, P 47. Roberts was entitled to present no mitigation evidence.

Roberts, p.90.

Nevertheless, this Court noted that she did present mitigation in her unsworn statement.

Thus, she did not completely waive her mitigation hearing. Therefore, State v. Ashworth (1999)

85 Ohio St.3d 63 did not apply.

Here, Roberts presented an unsworn statement. An unsworn statement can constitute critical mitigating evidence. See *State v. Scott*, 101 Ohio St.3d 31, 2004 Ohio 10, 800 N.E.2d 1133, at P 64; *State v. Lynch*, 98 Ohio St.3d 514, 2003 Ohio 2284, 787 N.E.2d 1185, at P 1. *Barton*, 108 Ohio St.3d 402, 2006 Ohio 1324, 844 N.E.2d 307, P 50. We decline to extend *Ashworth* to the context Roberts presents.

There is nothing in the record to support that Roberts' waived mitigation that she did not possess or was not investigated. As she has the right to "pick and choose" she chose not to present the evidence the attorneys sought to present at the penalty phase hearing, and she chose to present the evidence to the judge at the remand hearing. The subjects of the evidence sought to be introduced at the penalty phase and attempted to be introduced in the remand hearing are not one and the same. For instance, there is no evidence the trial counsel were even aware Roberts was granted SSI for a mental disability as this was not proffered, filed or referred to in any of the mental health reviews by the local court clinic or mentioned in any discussions with the court or prosecution.

The fact is, Roberts chose to present the evidence to the sentencing judge before the judge rendered her sentence. The court refused to consider it. If it was ineffective assistance of counsel for not obtaining the evidence for Roberts to review and decide whether to present, it would appear the issue would be mooted by the fact that the evidence was obtained and was presented to the sentencing judge for his consideration at her sentencing hearing.

The state also appears to be arguing that once Roberts waived any aspect of her presentation of mitigation, she was barred from later changing her mind and deciding to have her attorneys present the same evidence, or additional evidence as occurred here. In other words, once any aspect of the mitigation presentation was waived, Roberts was not permitted to change her mind and present the mitigation in an effort to save her life. The litany of federal cases cited by Roberts in her Merit Brief strongly suggest at the least that once a defendant decides to have the sentencing body consider a factor in mitigation, no rule of court or procedure may preclude that consideration of such evidence. Again, it is the judge and not the jury who decides ultimately whether death is the appropriate sentence in the state of Ohio.

Federal Precedent

The State cites state authority, such as State v. Chinn (1999), 85 Ohio St.3d 548, for the proposition that a “defendant is not permitted to improve or expand his evidence in mitigation” simply because of an appellate court reversal. Appellee brief at p. 12. This, of course, is inconsistent with Davis v. Coyle 475 F.3d 761 (6th Cir 2007), as is addressed in the Merit Brief and decided eight years later.

The State cites State v. Barnett (2001) 93 Ohio St.3d 419, 2001 Ohio 1581 for the proposition that his court is not bound by Sixth Circuit precedent. Appellee brief at p. 8. In

Barnett, a federal district court found a city ordinance unconstitutional. State v. Colvin, 10th Dist. No. 04AP-421, 2005 Ohio 1448, also addresses federal interpretation of a statute or ordinance, not federal constitutional principals included in the Bill of Rights.

This Court did find that it was not bound by federal inferior courts on interpretation of statutory matters. Should this be extended to applications of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, it is not understood why this state is ever bound by the Sixth Circuit decisions or how a federal court has jurisdiction to grant habeas relief in any 28 U.S.C. 2254 case. If this is accurately the view of this Court, the issue will be played on another playing field, if necessary.

Having said this, it should be noted that Davis v. Coyle, *supra*, is not the establishment of a new precedent. Davis is the application of firmly established United States Supreme Court precedent which Barnett agrees that this Court is bound follow. The principles and cases in Davis are the same as argued here and appear in the Roberts Merit Brief.

Even if the remand were limited to “proceed from the point that at which the error occurred,” the argument would not be altered. Appellee at p. 12, citing State ex rel. Stevenson v. Murray (1982), 69 Ohio St. 2d 112. The State argues that “To permit the introduction of additional mitigation evidence is to require the trial court to proceed at a point *prior* to where the error occurred, which is contrary to this Court’s holding in *Murray* and *Chin*.” Appellee brief at 12. First, this is not what is requested. Roberts is not requesting the re-opening of the presentation to the jury. Roberts is arguing that in going back to the allocution to the judge, she is permitted to present additional mitigation in her allocution and support it for the court’s consideration.

Second, the State and trial court believe, apparently, that the judge is foreclosed from considering mitigation presented in Roberts' allocution. This will be more fully addressed in the following Proposition of Law.

Finally, as to the quality of the evidence presented, R.C. §2929.03(D)(1) holds specifically that:

The defendant shall be given great latitude in the presentence evidence of mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of the other factors in mitigation of the imposition of the sentence of death.

All of the proffered materials were admissible for the trial court's determination of the appropriateness of sentence. This Revised Code does not limit the sentencing judge's ability to consider mitigation to only evidence previously presented to the jury.

Proposition of Law Two:

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

The trial court on remand refused to consider the information provided at the hearing in the form of Roberts' allocution or mitigation evidence available from the original penalty phase hearing. The judge failed to identify a single factor as worthy of consideration for mitigation derived from Roberts' allocution. This Court remanded this matter with specific instructions to allow Roberts to allocute. Inherent in this order, and constitutionally required, is for the sentencing court to consider and give effect to her allocution.

In his opinion, the judge does not only not consider her allocution, but does not even mention that it was provided. The judge painstakingly reviewed all penalty phase procedures, yet failed to mention that Roberts provided the statement which was part of the reason for the remand.

The State refers to references that the trial court made at the original sentencing hearing, but these finding acknowledging physical abuse by the decedant to Roberts, were not included in the R.C. §2929.03(F) opinion. As this opinion is the statutorily and constitutionally required analysis of the mitigation and statutory aggravators, the failure to address it can only be interpreted to mean the court failed to consider anything, even her lack of prior record, in his required deliberations.

It is mandatory in Ohio that before a sentence of death may be found, that the panel "*shall state* in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of 2929.04 of the Revised Code, the existence of any other mitigating factors, . ." O.R.C. §2929.03(F). (emphasis added) As subsection O.R.C. §2929.04(B)(7)

mandates that any other factors be addressed, that statute itself does not limit the courts consideration. The failure to find *any* factor can mean only one thing, the judge did not identify any evidence in the case to be considered evidence of mitigation of a possible death sentence. The court, in the words of the statute, did not find the existence of any possible mitigation.

The statute provides, in relevant part:

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

Emphasis added)

The term “shall” under Ohio law is mandatory. In State v. Pless, (1996) 74 Ohio St.3d 333, 658 N.E.2d 766, this Court held that legislative commandments must be strictly adhered to by the courts. In Pless, the court reversed a death penalty conviction because the trial court had not complied with the legislative requirement that a jury waiver “shall” be made in writing and filed with the clerk before the court had jurisdiction to hear the case without a jury. O.R.C. § 2945.05 provides that:

"In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. *Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. * * **" (Emphasis added.)

The court then concluded that:

The requirements of R.C. 2945.05 are clear and unambiguous. The statute requires that in order to effectuate a valid waiver of the right to trial by jury, the defendant in a

criminal action must sign a written waiver, *and the waiver must be filed and made a part of the record in the criminal case*. In the absence of strict compliance with R.C. 2945.05, a trial court lacks jurisdiction to try the defendant without a jury.

Pless, p. 337

Similarly, the legislative mandate of R.C. §2929.03(F) is clear and unambiguous. The sentencing judge or three-judge panel “shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of 2929.04 of the Revised Code, the existence of any other mitigating factors. .”

The failure to record specific findings requires the granting of the writ for two reasons. First, the judge refused to consider and give effect to valid evidence in mitigation as is constitutionally required. Eddings v. Oklahoma, 455 U.S. 104 (1982), Skipper v. South Carolina, 476 U.S. 1 (1986), Hitchcock v. Dugger, 107 S.Ct. 1821 (1987) Second, the Ohio legislature created a liberty interest in statute. The statute provides capital defendants the right to have the reasoning of the court recorded with Lockett v. Ohio, 438 U.S. 586 (1978) considerations fully complied with before a death sentence may be carried out.

This Court has determined that R.C. §2929.03(F) requirements are much more than lip-service in more recent years. In Ohio v. Roberts I, (2006) 110 Ohio St.3d 71, 2006 Ohio 3665, this Court summarized the importance of strict adherence to the statute.

Our prior decisions have stressed the crucial role of the trial court's sentencing opinion in evaluating all of the evidence, including mitigation evidence, and in carefully weighing the specified aggravating circumstances against the mitigating evidence in determining the appropriateness of the death penalty. For example, in State v. Green (2000), 90 Ohio St.3d 352, 360, 2000 Ohio 182, 738 N.E.2d 1208, we vacated the death penalty because the trial court's sentencing opinion "was constitutionally deficient." There, the trial court's sentencing opinion "improperly considered nonstatutory aggravating circumstances, and failed to consider relevant mitigating evidence." *Id.* We concluded that "the collective deficiencies in the trial court's

decision to impose the death penalty, as reflected in the sentencing opinion, undermine our confidence in that decision. * * * These cumulative errors reflect grievous violations of the statutory deliberative process." Id. at 363-364, 738 N.E.2d 1208.

[**P158] Similarly, in *State v. Davis* (1988), 38 Ohio St.3d 361, 528 N.E.2d 925, we vacated the death sentence because of grievous errors in the trial court's sentencing opinion. In *Davis*, we noted, "[T]he General Assembly has set specific standards in the statutory framework it created to guide a sentencing court's discretion 'by requiring examination of *specific factors* that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.'" (Emphasis sic.) Id. at 372-373, 528 N.E.2d 925, quoting *Proffitt v. Florida* (1976), 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913.

Roberts I, p. 93,

In Roberts I, the court remanded the case for the court to permit allocution and for the court to prepare and independent opinion, as the evidence established that the R.C. §2929.03(F) opinion had been drafted with the aid of the prosecutors, again in violation of the statute.

In Ohio, absent a clear indication otherwise, the trial panels adjudication is presumed regular. Ohio v. Lott, 51 Ohio St.3d 160, 170, 555 N.E.2d 293, 304 citing Ohio v. Post, (1987) 32 Ohio St.3d 380, 513 N.E.2d 754. The record must support irregularity. Here, the record is clearly indicative of the failure of Roberts' judge to follow the mandates of R.C. §2929.03(F), and thus, the failure to consider and give effect to established mitigation.

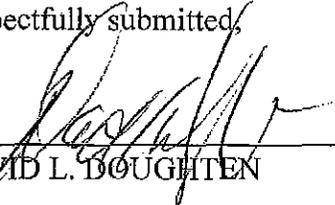
In this Proposition, the State again attempts to classify a choice not to present evidence at the penalty phase on a "pick and choose" basis as complete and binding waiver to present any additional evidence suggesting that a sentence of less than death may be appropriate. As argued in the previous Proposition, Roberts did not waiver her right to present mitigation. The failure to present evidence to the jury at a penalty phase hearing before the jury does not preclude a capital defendant to present the same or additional evidence to the body that will actually weigh the factors and determine the

appropriate sentence.

CONCLUSION

Pursuant to Propositions of Law Five, the defendant-appellant, Donna Roberts, respectfully requests that this Honorable Court reverse the sentence of death and find a life sentence to be appropriate. In the alternative, pursuant to Propositions of Law II, III and IV, the defendant-appellant respectfully requests that this Court reverse the sentence of death and remand her case for a new sentencing hearing with an appointment of a different judge. As this alternate judge has not heard the original hearing evidence, it is requested that a full penalty determination hearing be ordered before a newly selected jury.

Respectfully submitted,



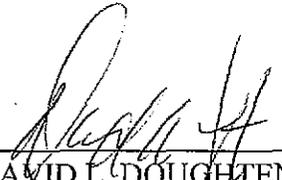
DAVID L. BOUGHTEN

JEFFREY J. HELMICK

Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing appellant's Brief was served upon Dennis Watkins, Trumbull County Prosecutor and/or LuWayne Annos, Esq. Assistant Trumbull County Prosecutor, Administration Building, 160 High Street, Warren, Ohio 44481, by Regular U. S. mail on this 31 day of December, 2008.



DAVID L. DOUGHTEN
JEFFREY J. HELMICK

Counsel for Appellant