

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee

-vs-

PHILLIP JONES

Appellant

\* CASE NO. 08-0525

\* On Appeal from the Summit County  
Common Pleas Court,  
\* Case No. 2007 04 1294

\*  
\* CAPITAL CASE

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BRIEF OF APPELLANT PHILLIP JONES

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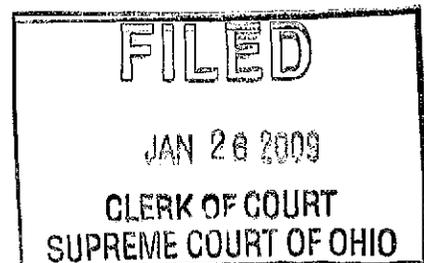


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### STATEMENT OF THE CASE

On May 8, 2007, Phillip L. Jones was indicted by the Summit County Grand Jury. Mr. Jones was charged in Count 1 with the Aggravated Murder of Susan Yates. He was charged in Count 2 with the Murder of Susan Yates and he was charged in Counts 3 and 4 with Rape. This indictment did not carry with it any death penalty specifications.

On October 22, 2007, Mr. Jones was indicted on a supplement indictment by the Summit County Grand Jury. The supplemental indictment contained the specifications for death in this case. Specification 1 to Count 1 charged that the aggravated murder of Susan Yates was committed during the course of a rape. Specification 2 to Count 1 contained a repeat violent offender specification. Specification to Count 2 contained the repeat violent offender specification. Specification 1 to Count 3 contained a repeat violent offender specification and Specification 1 to Count 4 contained a repeat violent offender specification.

On May 9, 2007, Mr. Jones was arraigned on the original indictment and entered pleas of not guilty. On October 24, 2007, Mr. Jones was arraigned on the supplement indictment at which time he entered not guilty pleas to the supplemental indictment.

On December 3, 2007, individual voir dire began in this case. Jury selection continued until December 7, 2007, when a jury was seated in this matter. On December 10, 2007, the guilt/innocent phase of the trial began. On December 17, 2007, the jury reached its verdict. The jury found Mr. Jones guilty of Aggravated Murder under Count 1, guilty of Murder under Count 2 and guilty of Rape under Counts 3 and 4. The jury also found Mr. Jones guilty of the specifications as attached to each count in the indictment.

On January 10, 2008, the mitigation phase of the trial began. The mitigation phase concluded on January 11, 2008, on which day the jury returned its recommendation that Phillip

Jones be sentenced to death on Count 1. The trial accepted this recommendation and on January 30, 2008, sentenced Mr. Jones to death.

Mr. Jones timely filed his Notice of Appeal on March 14, 2008. This matter is now before this Court on a direct appeal as of right.

### STATEMENT OF FACTS

In the first phase of the trial, the state called sixteen witnesses, the Appellant called two and the state offered two witnesses on rebuttal. Appellant will discuss the import of each witness' testimony in the order in which they were called.

1. The state called Lois Christin. Lois was the older sister of Susan Yates (Tr. Vol. X, p.1315). Lois apparently has had custody of Susan's children because Susan had a long standing drug problem (Tr. Vol. X, p.1317). Susan did keep in contact with Lois because of the children. Susan always kept her purse with her and she carried a knife because of her lifestyle (Tr. Vol. X, p.1319). Susan was married to Willie Lee Yates. Susan was a crack cocaine user.

2. The state called Richard Wisneski. Richard is an archivist at the University of Akron. He was a jogger (Tr. Vol. X, p.1328). On April 23, 2007, he jogged into the Mount Peace Cemetery in Akron on Aqueduct Street. He entered the cemetery from the entrance that is the furthest away from West Market Street, it was not the main entrance. When he entered the cemetery he stayed on the paved path. This was about 6:15 a.m. As he was running he happened to look over to his left and saw a woman lying there (Tr. Vol. X, p.1333). He didn't go up to her at all. He just ran out of the cemetery up to the McDonald's on Market Street and asked them to call the police (Tr. Vol. X, p.1337). He never saw anybody in the cemetery nor has he ever encountered anyone in the cemetery on the occasions in which he ran there before (Tr. Vol. X, p.1345). He used a cell phone from someone at McDonald's and actually made the 911 call to the police.

3. Susan Blaydes is an administrator at Mount Peace Cemetery. The Appellant, Phillip Jones, worked on the grounds as a maintenance man, April through June, 2006 (Tr. Vol. X, p.1353). Appellant's father is actually buried in Mount Peace Cemetery (Tr. Vol. X, p.1354).

4. Deborah Stalnaker is a patrolman for the City of Akron (Tr. Vol. X, p.1362). She was dispatched on the 911 call that was made regarding the body seen in the cemetery. When she pulled up to the cemetery she saw Mr. Wisneski by the fence flagging her down (Tr. Vol. X, p.1364). Mr. Wisneski led her to where he had found the body laying on the ground. He did not approach the body. She identified state's Exhibit 6, which was a picture of Ms. Yates' body and cross placed across her eye. She described the cross as a greenish glow in the dark plastic cross (Tr. Vol. X, p.1364). After she arrived the paramedics came in as well. Neither she nor they touched the body as it was obvious to them that Ms. Yates was deceased. She secured the scene and called the detectives (Tr. Vol. X, p.1368).

5. Richard Morrison, an Akron Police Department Detective, was called by the state. He was on his way to work in the early morning hours of April 23, 2007 when he was notified that a body was found in the cemetery and he was dispatched there (Tr. Vol. X, p.1391). There was no identification on the body so the detective used a picture taken by the coroner's office of the body so that it could be used in a neighborhood canvass to try and get some identification of the body (Tr. Vol. X, p.1395). Later in the day the body was identified as Ms. Yates via her fingerprint (Tr. Vol. X, p.1397). The next day, while Det. Morrison was in the middle of his dinner, he received a call from another detective indicating to him that there was a female calling and would like to speak with the detective that was actually working the case (Tr. Vol. X, p.1399). He got the address and then drove to Alexander Street to speak to this person. There was another female name, whose name was Delores Jones, who is the wife of Appellant (Tr. Vol. X, p.1399). She kept running back and forth looking out the windows and pacing and making sure no one was coming. She was hyperventilating and basically hysterical. She said "my husband is the one that killed that girl in the cemetery". Det. Morrison asked her how do you

know this and she said "because he told me her name was Susan". (Tr. Vol. X, p.1401).

Morrison transported the woman to the station. While at the station she was paranoid and upset, still thought that people were going to come get her (Tr. Vol. X, p.1425).

Morrison was also aware that a cross had been placed on the eye of Ms. Yates. He obtained the cross from the evidence and showed the cross to Mrs. Jones. Det. Morrison showed the cross to Mrs. Jones who said she did not recognize it (Tr. Vol. X, p.1407). Based upon the information given by Mrs. Jones a warrant was issued for Phillip Jones (Tr. Vol. X, p.1408).

6. The next witness was Charletta Jeffries. Charletta is a friend of Delores Jones, the wife of Appellant (Tr. Vol. XI, p.1434). On April 24, 2007, Delores came to Charletta's house and she was upset and said "he did it he did it". Charletta answered "he, who, did what?" Further, Charletta asked her "did what" and Delores said "murdered the woman". Charletta asked "what woman" and Delores said "the woman that they found in the cemetery". (Tr. Vol. XI, p.1436,1437). After that Delores called the police.

7. Delores Jones, Appellant's wife testified. Delores stated that Appellant would stay out at night in the months prior to his being arrested (Tr. Vol. XI, p.1450). On the morning of April 23, she got home from work and Phillip was sleeping. He had a scratch on his shoulder and on his lip. On the 23<sup>rd</sup> he was also very quiet, which was unusual (Tr. Vol. XI, p.1454).

She stated she had a conversation with Phillip about something that was on the news (Tr. Vol. XI, p.1456). After that she and Phillip walked to the store because he wanted to get some cigarettes. She went with him. She stated she was scared (Tr. Vol. XI, p.1458). She said she was trying to find a way to leave. She then walked home with him and left in her car to go to her friend Charletta's house (Tr. Vol. XI, p.1459). At Charletta's house she talked to a policeman and then went down to the police station. At the police station the detective showed her a cross

and at the time she did not recognize it (Tr. Vol. XI, p.1463). She was then taken to a half way house. The next day she called the police to tell them that she had a cross like the one she had seen at the station and she was taken by two detectives to the house to get some clothes (Tr. Vol. XI, p.1465). One of the things that she took from the home was her jewelry box which she identified in the courtroom and she also identified as Exhibit 13, a cross taken from that jewelry box (Tr. Vol. XI, p.1467).

8. David Hayes, a detective in the Akron Crime Scene Unit, testified (Tr. Vol. XI, p.1502). He went to the scene and tagged evidence. There was a knife by the decedent's arm and a cross lying across her eye. He tagged many other items found near and around the body as evidence, and identified photos and the evidence obtained from the scene (Tr. Vol. XI, p.1518).

9. Brian Simcox, an Akron Police Officer, testified. Lt. Simcox was involved in the arrest of the Appellant (Tr. Vol. XII, p.1537). He did not flee nor did he resist his arrest. Appellant was arrested about 7:00 p.m. on April 24, 2007 (Tr. Vol. XII, p.1546).

10. George Sterbenz, is a medical examiner for Summit County (Tr. Vol. XII, p.1547). He did the autopsy in this case. He identified the knife, cross and clothing that was taken from the scene. He testified that the toxicology showed that Susan Yates had ingested cocaine and alcohol prior to her death. It was his opinion that there were indications of strangulation on the body (Tr. Vol. XII, p.1576). There was a concentration of injury around the neck area and bruises to the head, as well as, a break in the hyoid bone (Tr. Vol. XII, p.1601). Bleeding in the throat larynx being broken and bruised (Tr. Vol. XII, p.1614). There was no external evidence of a sexual assault to the genital or anal areas but there was a great deal up internal evidence of injury to both the vagina and rectum (Tr. Vol. XII, p.1619,1620). There was toilet type paper present in the vagina (Tr. Vol. XII, p.1625). His opinion was that Susan Yates died of

asphyxiation by strangulation (Tr. Vol. XII, p.1630). He stated that the injuries were not consistent with erotic asphyxiation nor was there a recreational sexual stimulation (Tr. Vol. XII, p.1677).

11. The next witness was Donald Frost. Donald was a detective in the Akron Crime Scene Unit (Tr. Vol. XIII, p.1681). Det. Frost went to the autopsy to take photographs, collected evidence and processed the vehicle in which he found a stain on the door handle and stain on the front seat (Tr. Vol. XIII, p.1687). Det. Frost cataloged and tagged the evidence from the scene, car and in addition photographed and tagged state's Exhibit 13, which was the cross found in the jewelry box given to the police by Delores Jones (Tr. Vol. XIII, p.1690).

12. The next witness Dale Laux, an employee of the Bureau of Criminal Identification and Investigation (Tr. Vol. XIII, p.1767). He tested swabs taken from the vehicle of the Appellant and found no seminal fluid identified (Tr. Vol. XIII, p.1767). He found blood on the right fingernail of the victim. He found no seminal fluid on the swab taken by the coroner from the victim's mouth. There was general information from the swab from the vagina indicated the presence of seminal fluid and found sperm, which indicated a recent sexual encounter. He found no seminal fluid in the rectal swab taken by the coroner (Tr. Vol. XIII, p.1768).

13. Earl Gliem a fingerprint expert from BCI testified next. Mr. Gliem found no identifiable prints on any of the items he examined, which included the knife and cross found at the scene (Tr. Vol. XIV, p.1811).

14. Stacy Violi who is a DNA expert from BCI testified next. The findings were as follows: the DNA results from the vaginal swabs of the victim were consistent with Susan Yates' and Appellant; the DNA profile from the swab of the right fingernail and the cutting from the skirt were consistent with Susan Yates; the DNA profile from the breast swabs was a mixture

of at least two individuals; the major profile was from an unknown male and a minor profile was consistent with Susan Yates (Tr. Vol. XIV, p.1823,1834,1839).

15. Terry Hudnall an Akron Police Detective was the next to testify. Det. Hudnall was one of the detectives called to the scene after the body was found. He found buttons in the graveyard roadway which were logged and marked as state's Exhibit 31 (Tr. Vol. XIV, p.1867). Det. Hudnall said that the buttons looked like the buttons came from Susan Yates' dress. In addition, he was involved in the questioning of Delores Jones at the police department on the 24<sup>th</sup> of April. He testified that Delores Jones was still visibly upset and appeared to be afraid. She would talk a little bit and then clam up almost to the point of hyperventilating (Tr. Vol. XIV, p.1873). She was then taken to a shelter for battered woman.

16. Thea Johnson testified as an "other act" witness (Tr. Vol. XIV, p.1904). She testified that she lived with her grandmother in 1990 when she was 16 she knew the Appellant through her sister (Tr. Vol. XIV, p.1906). On April 16, 1990 the Appellant along with some other individuals came to her house looking for her sister. She went with these individuals, one of which was Phillip Jones, who was the driver of the car. She testified that Phillip dropped the other individuals off and they drove to a local park (Tr. Vol. XIV, p.1907). She testified the Appellant pulled the car over and moved closer to her and started choking her. She tried to get out. He got out and pulled her into wooded area (Tr. Vol. XIV, p.1909). She testified that he penetrated her anally and also raped her vaginally in the car (Tr. Vol. XIV, p.1912,1914). She testified that she was hit and choked and that he told her he would kill her if she told anyone (Tr. Vol. XIV, p.1916). When he dropped her off at home she ran to her grandmother's house and then went to the hospital.

After the testimony from Ms. Johnson the state rested with the introduction of its Exhibits. The Appellant renewed all of his pretrial motions and all of his trial objections. The Court ordered that all of those rulings remain intact. The Appellant argued a Rule 29 motion which was also overruled by the Court.

17. The Appellant himself testified. He stated that he saw a female in a fight on Balch Street and he pulled over to assist her (Tr. Vol. XV, p.1966). This was a physical fight. She got in the car and she smoked some cocaine. He drove her to an apartment in the projects occupied by Deitra Snodgrass (Tr. Vol. XV, p.1970). They then went and bought cocaine on the street and drove to the cemetery (Tr. Vol. XV, p.1974). They had vaginal sex on the ground on top of a blanket gotten from the car (1984). Then she wanted her breathing restrained so he put his hands around her throat, heard a crack and she quit moving (Tr. Vol. XV, p.1986). He tried CPR but it was not successful (Tr. Vol. XV, p.1987). He panicked and put the blanket back in the car and drove away (Tr. Vol. XV, p.1988). On cross-examination the prosecutor had the Appellant straddle a life size doll apparently on the floor of the courtroom.

18. Another defense witness was Deitra Snodgrass. She has known Appellant all of her life (Tr. Vol. XV, p.2006). She is living in Channelwood Village which is a project in Akron. In the Spring of 2007 she remembers Appellant coming to her apartment with an African American woman. She had a Winnie the Pooh blue jean outfit on. Deitra noticed that this woman's skirt was split (Tr. Vol. XV, p.2012). Her face was swollen and she had bruises on her face (Tr. Vol. XV, p.2025). They were only there five or ten minutes. She had learned two days later that Phillip was arrested for the murder of a woman. She learned that that was the same woman that Appellant was accused of killing.

19. In rebuttal the State of Ohio called Dr. Sterbenz again. Dr. Sterbenz testified that this lady's death could not have happened as the Appellant said (Tr. Vol. XVI, p.2107). He testified the evidence showed a violent act and a level of force was used on her person (Tr. Vol. XVI, p.2109). Once one becomes unconscious pressure need to be continued to cause death (Tr. Vol. XVI, p.2116). The fractures would not result in her paralysis or her going limp nor would the fractures cause the noisily pop (Tr. Vol. XVI, p.2118).

20. Finally, the state called Officer Hudnall again in rebuttal. He testified that he found a bottle of long island ice tea 75 yards away from the body and a condom some 100 yards away from the body (Tr. Vol. XVII, p.2146,2147).

At the mitigation phase, the defense called eleven witnesses. The first witness to testify in this matter was Dr. James Siddall, who is a licensed psychologist in the State of Ohio. Dr. Siddall testified that Mr. Jones is the eighth of eight children (Tr. Vol. XIX, p.2364). In reviewing Mr. Jones' background, Dr. Siddall established that in Mr. Jones' family system, his parents were divorced when he was fairly young. He came from a rather troubled family where there was domestic violence. Also the children in the family had problems that appeared to be related. Dr. Siddall noted that, looking back in time, the grandparents on the paternal side and maternal side also had psychiatric problems. There were also problems with substance abuse (Tr. Vol. XIX, p.2343). For Dr. Siddall, one of the unusual aspects of this case is that there were several generations of a dysfunctional family. As Dr. Siddall noted, often in a family system you will see one or two of the children that may be manifest to significant problems as a result of domestic violence, abuse or whatever, but in this particular family, it was across generationally, where you see serious problems being transmitted across the generation. As Dr. Siddall noted, that is rather unusual. From a statistical point of view, almost everybody in this family has been

affected. An example of this is that for the grandmother on the paternal side there was a domestic abuse situation as well as some form of undiagnosed but mental instability and alcohol use. The maternal grandmother was in Marysville Prison in the 1930's for apparently murdering her boyfriend who had raped and killed her son. The next generation would be Mr. Jones' mother and father. As Dr. Siddall noted, once again there is domestic abuse problem in the family and there was a learning disability that Mr. Jones had wherein he dropped out of school possibility around the 8<sup>th</sup> grade (Tr. Vol. XIX, p.2345). Mr. Jones' mother was placed in state care and moved through many foster placements. Once again there was some alcohol related problems in her background (Tr. Vol. XIX, p.2346). In reviewing the background of Mr. Jones, Dr. Siddall determined that there had been domestic violence between Phillip Jones' mother and father. It was determined that not only had Mr. Jones viewed the domestic violence but that he was also the victim of domestic violence at some level in the home (Tr. Vol. XIX, p.2347).

In his educational background, Phillip Jones was placed in the Akron Public School System. He was placed in special education in elementary school. At that time he had difficulties with vision and suffered from wandering eye for which he had corrective surgery (Tr. Vol. XIX, p.2347). During this time it was determined that Mr. Jones was the subject of bullying and harassment by others. Mr. Jones was married at the time of this incident, but he didn't have any children with that wife. However, Mr. Jones did have other children by a former relationship, a son and a daughter (Tr. Vol. XIX, p.2348).

Dr. Siddall determined that Mr. Jones did a very extensive mental health history. Dr. Siddall found that his mental health history goes back to when he was a young child. He was depressed off and on and there were a variety of different kinds of acting out behaviors. There were problems in school and there was contact with mental health professionals back as far as

between 5 and 8 years old (Tr. Vol. XIX, p.2349). Further, during his early years, Mr. Jones had adjustment difficulty. He was retained in a couple of different grades and was moved between schools several times.

Dr. Siddall also determined that there were some very complicated custody issues as well as learning issues. He was moved around a lot during this period of time so marking the beginning of a lot of instability that continued on to later in life (Tr. Vol. XIX, p.2350). In Mr. Jones' background there are also records which indicate suicide attempts. Specifically, there was an attempt by hanging when Mr. Jones was at the Mohican Youth Camp. His age at that time would have been approximately 16 years old. There was also an overdose of pills at the age of 17, as well as an attempt to commit suicide at an earlier age by drinking gasoline (Tr. Vol. XIX, p.2352).

In testing which was conducted on Mr. Jones, Dr. Siddall found that Mr. Jones tested at approximately the 8<sup>th</sup> grade reading level (Tr. Vol. XIX, p.2353). Other testing showed that Mr. Jones scored in terms of estimated full scale IQ in the low average range (Tr. Vol. XIX, p.2354). Dr. Siddall's diagnosis in this case was that Mr. Jones' primary problems include significant mood disorder (Tr. Vol. XIX, p.2360). Mood disorder in this case is a serious history of depression and mood instability. It is associated with repeated suicidal behaviors, jesters and attempts (Tr. Vol. XIX, p.2361). Dr. Siddall also determined that Mr. Jones suffered from a personality disorder. Specifically, a personality disorder is a maladaptive pattern of behavior that leads to a significant impairment and ability to function. It usually shows up in very troubled, interpersonal kinds of relationships. The main features of antisocial personality disorders which Mr. Jones suffered from include problems with authority, rule breaking behavior, impulsive behavior, and aggressive acting out (Tr. Vol. XIX p.2363).

Interviews with Mr. Jones and his family members characterized the Jones' family as being dominated by an extensive history of biological and system based psychiatric problems, alcohol and drug abuse, domestic violence and involvement with the criminal justice system. And these problems are a cross generational problem, they are severe problems and affect most members of Mr. Jones' family. Dr. Siddall also pointed out that it is rather unusual to see a cluster of very serious problems in a given family.

Dr. Siddall used the term biological. What he meant is there are certain psychiatric problems, certain psychological problems that are known to be biologically based or genetically transmitted from family member to family member across generations of the Jones' family. There are those symptoms that exhibit and repeat themselves, such as the unstable mood bi-polar conditions, such as the serious psychotic or schizophrenic like conditions and substance abuse conditions. All of those appear to have some biological and genetic linkage, and the fact that they seem to affect all family members is very significant to Dr. Siddall. For Dr. Siddall, the effect of domestic violence on the family system was also extremely important. Dr. Siddall noted that boys who witnessed domestic violence like this have a higher likelihood of battery on their spouses or their companions. And children without appropriate role models or adequate supervision may learn to use aggression to resolve disputes, have problems delaying gratification, and fail to develop empathy. Dr. Siddall also noted that Mr. Jones has a chronic history of mental illness which has required very expansive psychiatric treatment while he was incarcerated and in the community (Tr. Vol. XIX, p.2368). Mr. Jones has been treated with antidepressants, mood stabilizing drugs and antipsychotic medication on a repeated basis (Tr. Vol. XIX, p.2369).

In Dr. Siddall's opinion, there were five mitigating factors in this case. First, was in regards to his family history of mental illness and antisocial behavior. Second, were the likely responses people have to growing up in highly disturbed families. Third, were Mr. Jones education and learning abilities. Fourth, were the mental illnesses that Mr. Jones' suffered from, such as the antisocial personality disorder and the mood disorder. Fifth, were the results of the evaluation diagnostic results (Tr. Vol. XIX, p.2407).

Henrietta Jones also testified on behalf of Phillip Jones. Henrietta Jones is Mr. Jones' mom. Ms. Jones testified that she had eight children and that all of them had trouble with drugs and the law. She further testified that her mom went to prison for murder (Tr. Vol. XX, p.2422). Ms. Jones further testified that she and her husband fought and that Phillip Jones' witnessed this. She stated that Mr. Jones was 7 years old when the parents divorced (Tr. Vol. XX, p.2424). Ms. Jones testified that Mr. Jones was born with lazy eye and that people picked on him because of this (Tr. Vol. XX, p.2425). Ms. Jones also testified as to Mr. Jones' suicide attempts. When he was 8, Mr. Jones drank gasoline in an attempt to commit suicide. She also testified that while at Indian River Mr. Jones tried to hang himself (Tr. Vol. XX, p.2426).

Yolanda White also testified in this matter. Ms. White is Mr. Jones' older sister. Ms. White testified that she has felony convictions. When Mr. Jones was young Ms. White testified that he said he heard voices. It was her recollection that when he was 6 he tried to kill himself. She further testified that Mr. Jones did poorly in school and had to repeat a couple of grades (Tr. Vol. XX, p.2450-2451).

Christy Harmel was the next witness in the mitigation phase. Ms. Harmel is the mother of Mr. Jones' children, Phillip, Jr. and Melany. Ms. Harmel testified that while Mr. Jones was incarcerated he worked in prison to pay child support (Tr. Vol. XX, p.2469).

Joseph Dubina is with the Adult Parole Authority. Mr. Dubina testified as to the truth in sentencing law as well as the life without parole provision. He also testified as to the 30 years to the board and what all of the sentencing structure meant as it related to Mr. Jones (Tr. Vol. XX p.2480).

J.C. Patterson next testified. Mr. Patterson is employed at the Oriana House where he is an employment specialist. Mr. Patterson testified that Mr. Jones' sister, Rhonda, introduced him to Mr. Jones. Specifically, Mr. Jones came to the Oriana House on his own to meet with the witness and that the witness tried to help him find a job. Mr. Patterson testified that he found Mr. Jones' to be motivated (Tr. Vol. XX, p.2493).

The next witness to testify was David Hargrove. He is a campus minister at a residential treatment center for at risk youths. He is also a Pastor at the Church of God in Akron. Mr. Hargrove had met Mr. Jones approximately 2 years earlier when he had come to a church service. Mr. Jones had advised Mr. Hargrove that he was troubled and said that he was hearing voices. He further stated he believes it would be a mistake for Mr. Jones to receive the death penalty (Tr. Vol. XX, p.2505).

Larry Bradshaw was the next witness. Mr. Bradshaw is a minister with the People's Baptist Church. Mr. Bradshaw first met Mr. Jones in 2004 when he came to a service at his church. Further, Mr. Bradshaw testified that he has met with Mr. Jones in the county jail on 15 to 16 different occasions as his clergyman (Tr. Vol. XX, p.2519).

Melany Harmel also testified in this matter. Ms. Harmel is Mr. Jones' daughter and was 16 years old at the time of her testimony. She testified that she wanted her father to receive a life sentence (Tr. Vol. XX, p.2530).

Phillip Jones, Jr., Mr. Jones' son, also testified in this matter. At the time of his testimony he was 17 years old. Phillip Jones, Jr. testified that when his dad was in prison they would talk on the phone a lot. Further, it had been a good couple of years for him and his father since his dad had got out of prison. Phillip Jones, Jr. further testified that he has seen his father almost every day (Tr. Vol. XX, p.2536). He further testified that if his father were in prison for the rest of his life there would still be a bond there (Tr. Vol. XX, 2539).

Finally, Phillip Jones, Sr., made an unsworn statement to the jury. In his statement, Mr. Jones stated that he had an abusive childhood. There was alcohol and drug abuse in his family. He further testified that he witnessed domestic violence on numerous occasions to his mother. He further testified that his mother would strike back at his father (Tr. Vol. XXI, p.2547). Mr. Jones further described how the different siblings would feud and beat each other up. There were 4 boys and 4 girls and Mr. Jones was the youngest of all of them so he would always be in a fight with his sister Lena, who has since passed away (Tr. Vol. XXI, p.2547). For Mr. Jones, childhood was stressful. He was traumatized from it somewhat, but he went on to state that he still tried in life. Mr. Jones went on to describe how he tried to kill himself by drinking gasoline at the age of 8 and again tried to hang himself at Mohican and they had to cut him down and send him to the Mansfield Psychiatric Hospital (Tr. Vol. XXI, p.2548). Mr. Jones noted that he did not have any positive role models as far as his brothers and sisters. When he was growing up, all he saw was his father and mother fight, feuding, arguing, drinking; his brothers and sisters getting in all kinds of trouble with the law; and were handing him liquor to drink and getting him drugs and stuff, that is what he saw (Tr. Vol. XXI, p.2550).

In concluding his statement, Mr. Jones stated that he was sorry for what he did in this case and that he prays for the victim's family and her children. Mr. Jones indicated he wanted to

try to continue to keep helping folks like he helped his sister get off drugs and his mom when she became elderly. Further, he was a caregiver to his father before he died of emphysema (Tr. Vol. XXI, 2558).

## LAW AND ARGUMENT

### PROPOSITION OF LAW NUMBER ONE

THE TRIAL COURTS PERMITTING THE STATE TO USE A LIFE SIZED DOLL IN THE CROSS-EXAMINATION OF APPELLANT VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AS GUARANTEED BY AMENDMENT IV OF THE UNITED STATES CONSTITUTION.

Prior to the Appellant's testimony, the state announced to the Court that the state would use a doll as demonstrative evidence. The doll was approximately the same size of Ms. Yates. The Appellant objected and the court stated "He may use it" (Tr. Vol. XV, p.2004).

During the cross-examination of Appellant by the prosecutor, over the renewed objection of Appellant (Tr. Vol. XVI, p.2065), the prosecutor used the life sized doll. The record is not entirely clear as to how the doll was used, but it appears Appellant was asked to lay on top of the doll, apply pressure to the neck with both hands, mimicking having sex (Tr. Vol. XVI, p.2060,2067).

In rebuttal, the prosecutor again called Dr. Sterbenz to the stand and after the prosecutor himself demonstrated what he thought the Appellant had testified to regarding the use of the doll, the doctor was asked for an opinion regarding whether or not the physical evidence supported the Appellant's testimony.

The prosecutor attempted a hypothetical question to elicit the doctor's response. The prosecutor tried to replicate what Appellant did (Tr. Vol. XVI, p.2108). Appellant objected again and the court permitted the prosecutor to proceed (Tr. Vol. XVI, p.2103). The prosecutor recounted for the doctor what he thought the Appellant had testified to in his direct and cross, regarding the events immediately preceding Ms. Yates' death. The doctor's opinion was that the physical evidence is "unexplained by this hypothetical as placed" (Tr. Vol. XVI, p.2107).

The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173. An appellate court will not disturb evidentiary rulings absent an abuse of discretion that produced material prejudice to the aggrieved party. An abuse of discretion is more than an error of judgment, it means that the trial court was unreasonable, arbitrary or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 O.St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pans v. Ohio St. Med. Bd.* (1993), 66 O.S.2d 619, 621. An appellate court should not disturb the decision of the trial court absent a clear showing of an abuse of discretion. *State v. Allen* (1995), 73 Ohio St.3d 626; *State v. Jackson*, 86 Ohio App.3d 568.

Appellant believes that the courts permitting the use of this life sized doll by the prosecutor was an abuse of the court's discretion. The jury saw three people straddle this doll in the courtroom – the Appellant, the prosecutor and Dr. Sterbenz. This put too much emphasis on the cross-examination of Appellant to the exclusion of all of the other evidence. The court permitted three reenactments of this event, which focused the jury's attention on only the cross-examination of Appellant, to the exclusion of the rest of the evidence.

Demonstrative evidence is commonly used in today's courtrooms. Courts have considered this kind of evidence a favorable development. *Chevoresky v. St. Luke Hospital of Cleveland*, 1995 WL739608 Ohio App. 8 Dist. 1995.

If one party is surprised by the use of demonstrative evidence, the introduction of demonstrative evidence can give rise to an abuse of discretion. *Florin v. Whiston* (1993), 92 Ohio App.3d 419, 424. In this case, it would appear that counsel for Appellant was surprised by the use of this evidence. The announcement of the use of the doll came after Defendant had

testified. It is apparent from the record that the Appellant and his counsel were surprised. After the prosecutor indicated what he was going to do and how he was going to use the doll, counsel for Appellant stated "it destroys the cross-examination for our side, your Honor" (Tr. Vol. XV, p.2005). It is obvious that counsel was surprised and felt his case was devastated by the use of the doll. Because the court permitted the use of the doll after Appellant being surprised by its use, the trial court abused its discretion by permitting the use of the doll by the prosecution.

Permitting the state to use a life size doll in this case denied Appellant JONES a fair trial and due process of law in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Ohio Constitution.

**PROPOSITION OF LAW NUMBER TWO**

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO ADMIT A HEARSAY STATEMENT OF APPELLANT'S WIFE AS AN 'EXCITED UTTERANCE' IN VIOLATION OF APPELLANT'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEEN AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 10 OF THE OHIO CONSTITUTION.

Prior to trial, both Appellant and the state briefed the issue that is the subject of this proposition of law. The important events are these: Appellant's wife testified that on April 24, 2007 Appellant was home, watching the news on TV, and sitting with the newspaper in hand (Tr. Vol. XI, p.1457). (Appellant asserted the marital privilege and the wife did not testify to the contents of the conversations.) She further testified that after a little while she and Appellant left the house and walked to the store. She said she was scared, trying to get away (Tr. Vol. XI, p.1458). They went home and she left in the car. She went to Charletta Jeffries' house and told her what Appellant said (Tr. Vol. XI, p.1459). Charletta testified that Delores came over to her house and was very upset. Delores ran through her house, she was like screaming and said:

"He did it, he did it"

She asked "he who" and she said

"My husband, Phil"

She said "Did what" and she said

"murdered the woman."

She asked "what woman" and she said

"That woman that they found in the cemetery."

Delores Jones then called the police and the police came and she talked to them.

Charletta did not hear that conversation (Tr. Vol. XI, p.1437,1438).

Regarding this issue, the state elicited testimony from Detective Morrison that on April 24, he received a call from a fellow officer who told him that someone wanted to talk to the officer handling the case of the woman found in the cemetery. He went to Charletta Jeffries' home (Tr. Vol. X, p.1399). He said Delores Jones was running back and forth, looking out windows, hyperventilating and hysterical. She told the detective "my husband is the one that killed that girl in the cemetery." He asked her how did she know this and she said "because he told me her name was Susan.. Isn't it Susan? Is it Susan?" (Tr. Vol. X, p.1400,1401).

This error is properly preserved for this appeal. A motion was filed before trial, Appellant asserted his privilege (Tr. Vol. X, p.1384); objected to both Charletta Jeffries' testimony (Tr. Vol. XI, p.1436) and Detective Morrison's testimony as it was offered (Tr. Vol. X, p.1401). In fact, a discussion was held between counsel and the court prior to the taking of the evidence and the court determined that "the state of Ohio's position in this instance is correct." (Tr. Vol. X, p.1385).

- A. The statement made by Delores Jones to Charletta Jeffries and Detective Morrison were not "excited utterance".

Evidence Rule 801(C) defines hearsay as "a statement other than one made by declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

Evidence Rule 803(2) defines excited utterance as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

This court in *Potter v. Baker* (1955), 102 O.S. 488, 55 O.O. 389, 124 N.E.2d 140, established a four part test in determining the admissibility of these kinds of statements:

“Such testimony as to a statement or declaration may be admissible under an exception to the hearsay rule for spontaneous exclamations where the trial judge reasonably finds (a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make this statements and declarations the unreflective and sincere expression of his actual impressions and belief, and thus render his statement or declaration spontaneous and unreflective, (b) that the statement or declaration, even if not strictly contemporaneous with its exiting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, (c) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration.”

This court has continued to follow the Potter criteria since adoption of the Rules of Evidence. *State v. Taylor* (1993), 66 O.S.3d 295, 612 N.E.2d 316.

Here, the second, third and fourth requirements are the ones at issue here. Appellant feels that the statements were not the unreflective and sincere expressions of Delores Jones' actual impressions and beliefs. It would appear from the facts that Delores Jones' statements were the result of reflective thought. *State v. Huertan* (1990), 51 O.St.3d 82, 553 N.E.2d 1058 and *State v. Taylor*, supra at 303. Delores Jones asks questions and answers questions posed to her, all of which requires reflection and results in the loss of domination of her reflective faculties as requested.

In addition, the statements do not pass muster in the third and fourth requirements. The statements at issue in this case do not relate to the startling event nor did Delores Jones personally observe the matters asserted in her statement. Delores Jones did not witness the

murder nor did she see the body in the cemetery. She had no personal knowledge of the murder. What startled her, what her husband said about the murder which was once removed from the murder. See *State v. Smith* (2002), 97 O.S.3d 367, 376, 78 N.E.2d 2221, 230.

- B. Even if the statements are considered “excited utterance” the statement’s admission violates the marital privilege and the Sixth Amendment to the United States Constitution.

### The Marital Privilege

O.R.C. §2925.42 states:

Husband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness, or in case of personal injury by either the husband or wife to the other, or rape or the former offense of felonious sexual penetration in a case in which the offense can be committed against a spouse, or bigamy, or failure to provide for, or neglect or cruelty of either to their children under eighteen years of age or their physically or mentally handicapped child under twenty-one years of age, violation of a protection order or consent agreement, or neglect or abandonment of a spouse under a provision of those sections. The presence or whereabouts of the husband or wife is not an act under this section. The rule is the same if the marital relation has ceased to exist.

In this case, there appears to be no exception to the statute. The privilege clearly applies.

### The Sixth Amendment Application

Appellant claims that the introduction of these hearsay statements violates his Sixth Amendments confrontation rights.

In *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d, 177, the Supreme Court held that with respect to testimonial evidence, the confrontation clause requires both unavailability and a prior opportunity for cross-examination. In *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the Supreme Court expanded *Crawford* and

classified the definition of “testimonial” for purposes of determining whether the confrontation clause applies to a particular statement. A statement will be considered “testimonial” when an objective consideration of the circumstances indicate that the statement was not elicited for the purpose of responding to an emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Conversely, a statement will be considered “nontestimonial” when an objective consideration of the circumstances indicates that the interrogation was emergency related or that the interrogation had a primary purpose other than to establish its value for future litigation.

In *State v. Siles* (2007), 116 O.St.3d 39, 876 N.E.2d 534, this Court adopted the primary purpose test set out in *U.S. v. Davis*.

Here, the statements made to Detective Morrison indicate that the primary purpose was testimonial. Delores Jones called the police and asked to talk to the officer in charge of the investigation of the murder in the cemetery. Detective Morrison left his dinner at home and went to Charletta Jeffries’ home and asked Delores Jones “Do you have something to tell me? you called me out” (Tr. Vol. X, p.1400). It would certainly appear that the primary purpose of the interrogation was to establish past events potentially relevant to a criminal prosecution.

The analysis regarding Charletta Jeffries is the same. No emergency existed and what other primary purpose could it be other than to establish the statement’s value for future litigation?

**PROPOSITION OF LAW NUMBER THREE**

THE ADMISSION OF STATE'S EXHIBIT 13, A CROSS WHICH WAS GIVEN TO THE POLICE BY APPELLANT'S WIFE, VIOLATED OHIO LAW AND APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL AS GUARANTEED BY AMENDMENT V, UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

The trial court admitted into evidence state's exhibit 13, which was a cross given by Appellant to his Wife during their marriage. The cross was turned over to the police by the wife. On the witness stand, Delores Jones answered the question "and do you recall where that cross came from?" and she answered "Phillip had gave it to me" (Tr. Vol. XI, p.1467). The cross resembled the cross found on the victim's eye (Exhibit 10).

R.C. § 2925.42 prohibits testimony concerning any "act done by either in the presence of the other."

Appellant feels that R.C. § 2925.42 prohibited the testimony that state's Exhibit 13 came from Appellant. Contra *Hanley v. State* (1896) 5 Ohio CD 488, 12 Ohio CC 584, 1896 WL 558.

**PROPOSITION OF LAW NUMBER FOUR**

THE ADMISSION OF "OTHER ACT" TESTIMONY IN THIS CASE VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL AS GUARANTEED BY AMENDMENT V, UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

Prior to trial, upon notice from the state of its intent to offer 804(B) evidence, the Appellant filed a motion to exclude the other act evidence. As a result of that motion and prior to the taking of trial testimony in this case, during a recess of voir dire, a hearing was conducted on the admission of "other acts" testimony. The court heard argument of counsel and heard the testimony of Thea Johnson.

Ms. Johnson was 16 in 1990 and she knew Defendant through her sister. Appellant came over to her house looking for her sister and wanted "weed". She got into a car with Appellant and some friends of the Appellant. The friends were dropped off and she thought Appellant was taking her to where her sister was but he did not (Tr. Vol. VII, p.1111). She stated she was taken to a wooded area and was raped (Tr. Vol. VII, p.1113). She stated that he tried to choke her and beat her. He had his hand around her throat (Tr. Vol. VII, p. 1114). She fell out of the car and he took her into the woods. In the woods she stated she was raped anally and vaginally (Tr. Vol. VII, p.1115). Her clothing was ripped and she stated she was told if she told anyone what had happened she would be killed. He then took her home (Tr. Vol. VII, p.1116). She told her grandmother and was taken to the hospital (Tr. Vol. VII, p.1117).

The trial court ruled that Thea Johnson could testify at Appellant's trial as a "similar act" (Tr. Vol. VII, p.1127) and overruled Appellant's pretrial motion.

Ms. Johnson testified at trial. During her testimony Appellant's counsel objected again and renewed his motion at which time the testimony proceeded (Tr. Vol. XIV, p.1913). Her testimony was similar to her pretrial hearing testimony.

At the close of the state's case, Appellant renewed all pretrial motions (Tr. Vol. XV, p.1935) and again renewed all pretrial motions at the end of testimony (Tr. Vol. XVI, p.2095) and at the end of the rebuttal testimony (Tr. Vol. XVII, p.2167). Appellant timely objected to the introduction of this testimony and has preserved the objection for review by this Court.

The principle that proof that the accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime. *State v. Curry*, 43 Ohio St.2d 66, 68 (1975). Evidence which tends to show that an accused has committed another crime which is wholly independent of the offense for which he is on trial is generally inadmissible. This general rule of inadmissibility is subject to a few exceptions. These exceptions are codified in R.C. § 2945.59, which states:

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any act of the defendant which tends to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior to subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

Similarly, R. 404(B) states:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person . . . it may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . ."

Because admission is the exception with respect to evidence of other acts of wrongdoing, the evidence must be construed against admissibility, and the standard is strict. *State v. Broom*,

40 Ohio St.3d 277, 282 (1988). Evidence of other acts is admissible only when it “tends to show” one of the matters enumerated in the statute and only when it is relevant to proof of guilt of the Appellant of the offense in question. *State v. Burson*, 38 Ohio St.2d 157, 158 (1974).

### 1. Scheme, Plan or System

Scheme, plan or system evidence is relevant in two general factual situations. The first of those situations is when the other act forms part of the immediate background of the alleged act and the other act forms the foundation of the crime charged in the indictment. The other act must concern events that are inextricably related to the alleged crime. *State v. Broom*, supra at 282. Here, the other act was some 17 years in advance, it cannot be said that the other act formed a part of the immediate background for the indicted act.

Identity of the perpetrator of the crime is the second factual situation in which scheme, plan, or system evidence is admissible. One recognized method of establishing that the accused committed the crime set forth in the indictment is to show that he had committed similar crimes within a time reasonably near to the offense charged. *State v. Broom*, supra, at 283.

### 2. Motive

“Motive” has been defined as a mental state which induces action. *State v. Curry*, supra, at 70. Motive generally is not a material issue in a case involving sexual crimes. *State v. Wright*, 2001 WL 1627643 (Ohio App. 4 Dist.). Motive was not a material issue in this case.

### 3. Identity

With identity, there must be some similarity of methodology employed which itself would constitute probative evidence of the probability that the same persona committed both crimes. *State v. Burson*, supra at 159. Identity is not an issue in this case. Defendant admitted to being there. Identity was not a material issue in this case.

#### 4. Absence of Mistake or Accident

For evidence to be admissible to prove absence of mistake or accident, it must be shown that a connection, in the mind of the defendant, must have existed between the offense in question and the other act is of a similar nature. The other acts of the defendant must have a temporal, modal, and a situational relationship with the acts constituting the crimes that the evidence discloses purposeful action. *State v. Burson*, supra at 159. The prior act of the defendant in this case lacks the temporal relationship with the crime charged in that the other act occurred some 17 years earlier.

Section 2945.59 is to be strictly construed against and conservatively applied. *State v. DeMarco* (1987), 31 O.St.3d 191, 194. The use of evidence of other act committed by Appellant is limited because there is a substantial danger that a jury will convict the Appellant simply because it assumes that the Appellant has a propensity to commit criminal acts, or deserves punishment even if he did not commit the crimes charges in the indictment. *State v. Curry*, supra at 68. The danger is especially high when the other acts alleged are exceptionally similar to the charged offense, or of an inflammatory nature. *State v. Schaim* (1992), 65 O.St.2d 51, at 59.

“Because of the severe social stigma attached to crimes of sexual assault and child molestation, evidence of these past acts poses a higher risk, on the whole, of influencing the jury to punish the Defendant for the similar act rather than the charged act. Accordingly, the state may not parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the Defendant only by unsubstantiated innuendo” *Heddleston v. U.S.* (1988), 485 U.S. 681, 689, 108 S.Ct. 1496, 99 L.Ed.2d 771.

The presentation of other act evidence was crucial to the state in this case. In her closing, the prosecutor argued that “Thea is the living Susan Yates.” (Tr. Vol. XVII, p.2251). Its

introduction was highly prejudicial especially in light of the fact that the other act and the indicted act were similar. This case was one of those cases that the admission of other act evidence posed a high risk of influencing the jury to punish the Appellant for the similar act rather than the charged act.

The admission of other acts evidence in this case denied Appellant JONES a fair trial and due process of law in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Ohio Constitution.

**PROPOSITION OF LAW NUMBER FIVE**

PROSECUTORIAL MISCONDUCT DURING THE PENALTY PHASE OF APPELLANT JONE'S TRIAL DEPRIVED HIM OF HIS RIGHT TO DUE PROCESS OF LAW AND AGAINST CRUEL AND UNUSUAL PUNISHMENT PURSUANT TO THE UNITED STATES AND OHIO CONSTITUTIONS.

During the penalty phase of his trial, Mr. Jones put on Joseph Dubina as a witness in his case. Mr. Dubina is employed with the Akron Regional Adult Parole Authority located in Akron, Ohio. Mr. Dubina testified that the agency supervises probation and parolees that are released from prison and also put on supervision by the Courts. He has been with the Adult Parole Authority for over 26 years. Mr. Dubina testified that in 1996 the law in Ohio changed as it relates to criminal defendants with the passing of Senate Bill 2, which has been referred to as the Truth in Sentencing Law. He further testified that the Truth in Sentencing Law established that there was no more good time for defendants sentenced to prison under Ohio law, rather a defendant serves day for day for whatever the sentence is. Mr. Dubino further testified that if Mr. Jones had been sentenced to life with no parole, he would never get out of prison (Tr. Vol. XX, p.2480). Mr. Dubino further testified that if Mr. Jones were sentenced to 30 years imprisonment that means that he would be in prison for 30 years before he would ever be eligible for parole, and that therefore Mr. Jones would not be to the parole board until 2038. Mr. Dubino also testified as to a 25 year sentence (Tr. Vol. XX, p.2481). Mr. Dubino further testified that in the last 15 years, to his knowledge, no governor had ever pardoned or let anybody off of death row (Tr. Vol. XX, p.2482).

During the cross-examination of Mr. Dubino, the prosecutor asked the following question:

Regarding commutation of death if the defendant was on death row today.

Counsel objected to this question which was overruled (Tr. Vol. XX, p.2486). The prosecutor then questioned Mr. Dubino as follows:

Are you aware of a defendant named Spirko, I believe out of Cuyahoga County, who had been on death row and his sentence just today was commuted, just in the paper today, commuted by the governor?

It is the position of Mr. Jones that this was an improper line of questioning. It left the jury with the impression that Mr. Jones' sentence at some point and time could have been commuted. This effectively would have eliminated from the juries' consideration any of the sentencing options other than the death sentence. The fact that Mr. Spirko's case was commuted by the governor was irrelevant to this case and should never have been put before the jury for their consideration in this matter.

Putting this information before the jury denied Mr. Jones a fair trial and due process of law as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

**PROPOSITION OF LAW NUMBER SIX**

THE EXCUSAL FOR CAUSE OF POTENTIAL JURORS BASED UPON THEIR VIEWS OF THE DEATH PENALTY VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE OHIO CONSTITUTION.

The excusal of prospective Juror Pan (Tr. Vol. II, p.91-117) and Juror Powell (Tr. Vol. III, p.437-452) in the present case violated the standards set forth in *Wainwright v. Witt*, 469 U.S. 412 (1985). During the initial questioning and individual voir dire, prospective Juror Pan indicated there would be no problem imposing the death penalty in this case. The initial colloquy which took place between prospective Juror Pan and the Court was as follows:

The Court: If you find the mitigating circumstances do not - - or do outweigh the aggravating, then there are prison terms to which you will have to make a determination. But we need to know, would you be able to impose the death sentence if the aggravated circumstances outweigh?

Mr. Pan: I mean, find guilty, was criminal, would be for the death penalty.

The Court: I'm sorry, you would be able to impose if the circumstances warranted.

Mr. Pan: Yes

(Tr. Vol. II, p.94).

The prosecutor then questioned prospective Juror Pan as follows:

Prosecutor: So, if you kill somebody during the commission of a rape, that can be an aggravating circumstance.

Mr. Pan: Ok

Prosecutor: Under that scenario, if the state proves beyond a reasonable doubt that he committed a rape, and that he purposely killed the victim in this case.

Mr. Pan: Yes.

Prosecutor: Would you be able then on those facts be able to impose the death penalty?

Mr. Pan: I mean, has to be proven beyond a reasonable doubt.

(Tr. Vol. XX, p.96-97).

Further colloquy with the prosecutor was as follows:

Mr. Pan: The serious punish to me, criminal would be life in prison.

Prosecutor: Life in prison?

Mr. Pan: Yes, that's my opinion.

Prosecutor: Are you saying that you would not impose the death penalty?

Mr. Pan: No.

Upon further inquiry by the Court, Mr. Pan stated as follows:

Mr. Pan: That's right. The best I can do is prison without parole.

Upon questioning by the defense, Mr. Pan stated:

Mr. Pan: I could vote for the death penalty in some situations

(Tr. Vol. XX, p.113).

Finally, Mr. Pan stated:

Mr. Pan: I would like to against the death.

(Tr. Vol. XX, p.115).

At that point and time the Court excused Mr. Pan to which defense counsel objected (Tr. Vol. XX, p.115).

As the questioning indicates, this prospective juror originally indicated that he would impose the death penalty or that he would follow the Court's instructions. In *Witt*, supra, the Supreme Court reexamined its decision in *Adams v. Texas*, 448 U.S. 38 (1980). In *Adams*, the Court found that certain jurors had been improperly excused because "... there acknowledgement that the possible imposition of the death penalty would or might affect the

deliberations was meant only to indicate that they would be more emotionally involved or would view their task with greater seriousness and gravity - - the Court reasoned that such an 'affect' did not demonstrate that the prospective jurors were unwilling or unable to follow the law and obey their oaths. *Wainwright*, at 424-425 (citations omitted)." While this prospective juror vacillated in his viewpoint, his original statement was that he would follow the instructions of the law and if necessary he would impose the death penalty in this case. His view was such that he would approach this task as a juror, "... with greater seriousness and gravity". *Id.* For the trial court to excuse this prospective juror denied Mr. Jones a fair trial and due process of law as guaranteed by the United States and Ohio Constitutions.

The excusal of prospective Juror Powell in the present case also violated the standards set forth in *Wainwright v. Witt*, supra. During the initial questioning in individual voir dire, prospective Juror Powell indicated that there would be a problem in imposing the death penalty in this case. The Court conducted the following colloquy with this juror:

The Court: So our question to you is, if the state has proved beyond a reasonable doubt that the aggravating circumstances outweigh mitigating, the law says that you must render a verdict for death, would you be able to do that?

Mr. Powell: I would have a real problem with that.

After questioning by the prosecutor, Mr. Powell stated as follows:

Mr. Powell: Because, again, I just feel that the reasonable doubt, you can't define that for me any better than what the Judge has already defined it in the jury instructions, and I understand what that is, and I'm saying that that's not good enough to put somebody to death no matter how much they deserve it.

(Tr. Vol. III, p.447).

Questioning by the defense counsel established the following:

Defense Counsel: In your questionnaire, the last question, you indicate that you are opposed to the death penalty with few exceptions. So that seems to be slightly different than

what you have told Judge Spicer and Mr. LoPrinzi. My sense is that you told Judge Spicer and Mr. LoPrinzi that you are opposed to the death penalty and you cannot sign a death verdict form.

(Tr. Vol. III, p.448).

Mr. Powell: Not based upon a reasonable doubt, which is the law, and what I'm saying is if there was videotaped evidence, if there was an eyewitness, and uncontrovertable witnesses, a confession, a person says I don't want to go to jail, I did this horrible thing, and I want to be put to death, hey, that's certainly - - that persons option to take that course.

It is just that I don't think that death can be imposed upon someone. And the other rare circumstances would be if there was someone in my family, I don't know how I would feel about that. I think that the rage in me would probably in all likelihood take over and I would be all for the death penalty for that person.

Mr. Powell again noted "Those are the exceptions and, again, it is because I can't be certain."

Defense counsel then questioned Mr. Powell as follows:

Defense Counsel: That's what I would like to make sure of. If you have these other pieces of evidence, such as videotape confessions, then you feel that you could get into the realm of the death penalty?

Mr. Powell: Yes.

The prosecutor at the conclusion of the questioning moved to dismiss prospective Juror Powell for cause, which the Court granted and to which defense counsel objected to the challenge (Tr. Vol. III, p.452).

As the questioning indicates, this juror indicated at the end that, with the right evidence, he could consider the death penalty. Pursuant to *Witt*, supra, and *Adams*, supra, the removal of this potential juror was improper. While this juror vacillated in his viewpoint, his position was that, with enough evidence he could consider the death penalty. His view was such that he would approach this task as a juror, ". . . with greater seriousness and gravity". *Id.* For the trial court to excuse this prospective juror denied Mr. Jones a fair trial and due process of law as guaranteed by the United States and Ohio Constitutions.

**PROPOSITION OF LAW NUMBER SEVEN**

PROSECUTORIAL MISCONDUCT DURING THE PENALTY PHASE OF APPELLANT'S TRIAL DEPRIVED APPELLANT OF HIS RIGHT TO DUE PROCESS OF LAW AND AGAINST CRUEL AND UNUSUAL PUNISHMENT PURSUANT TO THE UNITED STATES AND OHIO CONSTITUTION.

This Court has addressed the issue of prosecutorial misconduct in a number of different cases. *State v. Williams* (1988), 38 Ohio St.3d 346; *State v. Esparza* (1988), 39 Ohio St.3d 8, *State v. DePew* (1988), 38 Ohio St.3d 275. The Eleventh Circuit has noted that "it is most important that the sentencing phase of the trial not be influenced by passion, prejudice or any other arbitrary factor . . . with a man's life at stake, a prosecutor should not play on the passion of the jury." *Hanze v. Zant* (11<sup>th</sup> Cir. 1983), 69 F.2d 940, 951, cert. den. 463 U.S. 1210. In *State v. Thompson*, (1987), 33 Ohio St. 3d 1, this Court noted that, "any egregious error in the penalty phase of a death penalty proceeding, including prosecutorial misconduct, will be cause to vacate the sentence of death with a subsequent remand to the trial court for a new sentencing procedure pursuant to R.C. § 2929.06."

The prosecutor in this case appealed to the passions of the jury as follows:

"What has been determined in the state of Ohio, as in some other states throughout the country, is that a citizen should not have to worry about walking down the street and being raped and murdered, and in this case, I would say specifically Susan Yates. That is why this case has such significance, because it was in connection, this aggravated murder was in connection with this rape."

(Tr. Vol. XIX, p. 2319).

In *State v. Mills* (1992), 62 Ohio St.3d 357, this Court found that, "an appeal to the jury's sense of outrage and sympathy for the victim is particularly troublesome when made after the

jury has already determined a defendant's guilt, and the only remaining task is to decide his fate." Here, the prosecutor addressed the fears and passions of the jury by telling them that the death penalty was appropriate because citizens should be able to walk the streets without being murdered and raped.

Because defense counsel did not object at trial, the plain error rule controls and permits reversal only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, Criminal Rule 52(B). In order to establish plain error, the Appellant must show that the outcome of the trial clearly would have been otherwise. *Long, supra*. In Mr. Jones's case, the prosecutor appealed to the passions of the jury by indicating that citizens should be free to walk the streets and not have to worry about being raped and murdered as happened in this case. Had the prosecutor not argued that it was this jury's obligation to protect all citizens, the question remains whether the jury would have imposed the death sentence in this case.

Prosecutorial misconduct in this case denied Appellant JONES a fair trial and due process of law in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Ohio Constitution.

**PROPOSITION OF LAW NUMBER EIGHT**

THE DEATH SENTENCE IN APPELLANT JONES' CASE IS UNRELIABLE AND INAPPROPRIATE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Ohio Revised Code § 2929.05(A) requires this Court to review all death sentences in this state to determine: (1) whether the sentence of death in the particular case is appropriate; (2) whether the sentence of death in the particular case is excessive or disproportionate to the penalty imposed in similar case.

Ohio Revised Code § 2929.05(A) directs the Appellate Courts to affirm a sentence of death only if the particular court is persuaded from the record that the aggravated circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in this case." The record in this case merits the independent conclusion by this Court that the sentence of death is not appropriate for Phillip Jones.

Under the Eighth and Fourteenth Amendments to the United States Constitution, the sentence of death is not appropriate in any case where there is not the highest degree of reliability to support it. As the United States Supreme Court held in *Woodson v. North Carolina* (1976), 428 U.S. 280, 305:

The conclusion rests squarely on the predicate that the penalty of death is qualitatively different from the sentence of imprisonment, however, long. Death, in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference and the need for reliability and the determination that death is the appropriate punishment and specific case.

A review of the mitigation phase of Mr. Jones trial establishes that the sentence of death is not appropriate in this case. Dr. James Siddall, a licensed psychologist in the State of Ohio, was the first mitigation witness. Dr. Siddall testified that Mr. Jones is the eighth of eight

children (Tr. Vol. XIX, p.2364). In reviewing Mr. Jones' background, Dr. Siddall established that in Mr. Jones' family system, his parents were divorced when he was fairly young. He came from a rather troubled family where there was domestic violence. Also the children in the family had problems that appeared to be related. Dr. Siddall noted that, looking back in time, the grandparents on the paternal side and maternal side also had psychiatric problems. There were also problems with substance abuse (Tr. XIX, p.2343). For Dr. Siddall, one of the unusual aspects of this case is that there were several generations of a dysfunctional family. As Dr. Siddall noted, often in a family system you will see one or two of the children that may be manifest to significant problems as a result of domestic violence, abuse or whatever, but in this particular family, it was across generationally, where you see serious problems being transmitted across the generation. As Dr. Siddall noted, that is rather unusual. From a statistical point of view, almost everybody in this family has been affected. An example of this is that for the grandmother on the paternal side there was a domestic abuse situation as well as some form of undiagnosed but mental instability and alcohol use. The maternal grandmother was in Marysville Prison in the 1930's for apparently murdering her boyfriend who had raped and killed her son. The next generation would be Mr. Jones' mother and father. As Dr. Siddall noted, once again there is domestic abuse problem in the family and there was a learning disability that Mr. Jones had wherein he dropped out of school possibility around the 8<sup>th</sup> grade (Tr. XIX, p.2345). Mr. Jones' mother was placed in state care and moved through many foster placements. Once again there was some alcohol related problems in her background (Tr. XIX, p.2346). In reviewing the background of Mr. Jones, Dr. Siddall determined that there had been domestic violence between Phillip Jones' mother and father. It was determined that not only had Mr.

Jones viewed the domestic violence but that he was also the victim of domestic violence at some level in the home (Tr. XIX, p.2347).

In his educational background, Phillip Jones was placed in the Akron Public School System. He was placed in special education in elementary school. At that time he had difficulties with vision and suffered from wandering eye for which he had corrective surgery (Tr. XIX, p.2347). During this time it was determined that Mr. Jones was the subject of bullying and harassment by others. Mr. Jones was married at the time of this incident, but he didn't have any children with that wife. However, Mr. Jones did have other children by a former relationship, a son and a daughter (Tr. XIX, p.2348).

Dr. Siddall determined that Mr. Jones did a very extensive mental health history. Dr. Siddall found that his mental health history goes back to when he was a young child. He was depressed off and on and there were a variety of different kinds of acting out behaviors. There were problems in school and there was contact with mental health professionals back as far as between 5 and 8 years old (Tr. XIX, p.2349). Further, during his early years, Mr. Jones had adjustment difficulty. He was retained in a couple of different grades and was moved between schools several times.

Dr. Siddall also determined that there were some very complicated custody issues as well as learning issues. He was moved around a lot during this period of time so marking the beginning of a lot of instability that continued on to later in life (Tr. XIX, p.2350). In Mr. Jones' background there are also records which indicate suicide attempts. Specifically, there was an attempt by hanging when Mr. Jones was at the Mohican Youth Camp. His age at that time would have been approximately 16 years old. There was also an overdose of pills at the age of

17, as well as an attempt to commit suicide at an earlier age by drinking gasoline (Tr. XIX, p.2352).

In testing which was conducted on Mr. Jones, Dr. Siddall found that Mr. Jones tested at approximately the 8<sup>th</sup> grade reading level (Tr. XIX, p.2353). Other testing showed that Mr. Jones scored in terms of estimated full scale IQ in the low average range (Tr. XIX, p.2354). Dr. Siddall's diagnosis in this case was that Mr. Jones' primary problems include significant mood disorder (Tr. XIX, p.2360). Mood disorder in this case is a serious history of depression and mood instability. It is associated with repeated suicidal behaviors, jesters and attempts (Tr. XIX, p.2361). Dr. Siddall also determined that Mr. Jones suffered from a personality disorder. Specifically, a personality disorder is a maladaptive pattern of behavior that leads to a significant impairment and ability to function. It usually shows up in very troubled, interpersonal kinds of relationships. The main features of antisocial personality disorders which Mr. Jones suffered from include problems with authority, rule breaking behavior, impulsive behavior, and aggressive acting out (Tr. XIX p.2363).

Interviews with Mr. Jones and his family members characterized the Jones' family as being dominated by an extensive history of biological and system based psychiatric problems, alcohol and drug abuse, domestic violence and involvement with the criminal justice system. And these problems are a cross generational problem, they are severe problems and affect most members of Mr. Jones' family. Dr. Siddall also pointed out that it is rather unusual to see a cluster of very serious problems in a given family.

Dr. Siddall used the term biological. What he meant is there are certain psychiatric problems, certain psychological problems that are known to be biologically based or genetically transmitted from family member to family member across generations of the Jones' family.

There are those symptoms that exhibit and repeat themselves, such as the unstable mood bi-polar conditions, such as the serious psychotic or schizophrenic like conditions and substance abuse conditions. All of those appear to have some biological and genetic linkage, and the fact that they seem to affect all family members is very significant to Dr. Siddall. For Dr. Siddall, the effect of domestic violence on the family system was also extremely important. Dr. Siddall noted that boys who witnessed domestic violence like this have a higher likelihood of battery on their spouses or their companions. And children without appropriate role models or adequate supervision may learn to use aggression to resolve disputes, have problems delaying gratification, and fail to develop empathy. Dr. Siddall also noted that Mr. Jones has a chronic history of mental illness which has required very expansive psychiatric treatment while he was incarcerated and in the community (Tr. XIX, p.2368). Mr. Jones has been treated with antidepressants, mood stabilizing drugs and antipsychotic medication on a repeated basis (Tr. XIX, p.2369).

In Dr. Siddall's opinion, there were five mitigating factors in this case. First, was in regards to his family history of mental illness and antisocial behavior. Second, were the likely responses people have to growing up in highly disturbed families. Third, were Mr. Jones education and learning abilities. Fourth, were the mental illnesses that Mr. Jones' suffered from, such as the antisocial personality disorder and the mood disorder. Fifth, were the results of the evaluation diagnostic results (Tr. XIX, p.2407).

Henrietta Jones, Phillip Jones mom, testified that she had eight children and that all of them had trouble with drugs and the law. She further testified that her mom went to prison for murder (Tr. XX, p.2422). Ms. Jones further testified that she and her husband fought and that Phillip Jones' witnessed this. She stated that Mr. Jones was 7 years old when the parents

divorced (Tr. XX, p.2424). Ms. Jones testified that Mr. Jones was born with lazy eye and that people picked on him because of this (Tr. XX, p.2425). Ms. Jones also testified as to Mr. Jones' suicide attempts. When he was 8, Mr. Jones drank gasoline in an attempt to commit suicide. She also testified that while at Indian River Mr. Jones tried to hang himself (Tr. XX, p.2426).

Yolanda White is Mr. Jones' older sister. Ms. White testified that she has felony convictions. When Mr. Jones was young Ms. White testified that he said he heard voices. It was her recollection that when he was 6 he tried to kill himself. She further testified that Mr. Jones did poorly in school and had to repeat a couple of grades (Tr. XX, p.2450-2451).

Christy Harmel is the mother of Mr. Jones' children, Phillip, Jr. and Melany. Ms. Harmel testified that while Mr. Jones was incarcerated he worked in prison to pay child support (Tr. XX, p.2469).

Joseph Dubina is with the Adult Parole Authority. Mr. Dubina testified as to the truth in sentencing law as well as the life without parole provision. He also testified as to the 30 years to the board and what all of the sentencing structure meant as it related to Mr. Jones (Tr. XX p.2480).

J.C. Patterson is employed at the Oriana House where he is an employment specialist. Mr. Patterson testified that Mr. Jones' sister, Rhonda, introduced him to Mr. Jones. Specifically, Mr. Jones came to the Oriana House on his own to meet with the witness and that the witness tried to help him find a job. Mr. Patterson testified that he found Mr. Jones' to be motivated (Tr. XX, p.2493).

David Hargrove is a campus minister at a residential treatment center for at risk youths. He is also a Pastor at the Church of God in Akron. Mr. Hargrove met Mr. Jones approximately 2 years earlier when he had come to a church service. Mr. Jones had advised Mr. Hargrove that he

was troubled and said that he was hearing voices. He further stated he believes it would be a mistake for Mr. Jones to receive the death penalty (Tr. XX, p.2505).

Larry Bradshaw is a minister with the People's Baptist Church. Mr. Bradshaw first met Mr. Jones in 2004 when he came to a service at his church. Further, Mr. Bradshaw testified that he has met with Mr. Jones in the county jail on 15 to 16 different occasions as his clergyman (Tr. XX, p.2519).

Melany Harmel is Mr. Jones' daughter and was 16 years old at the time of her testimony. She testified that she wanted her father to receive a life sentence (Tr. XX, p.2530).

Phillip Jones, Jr., is Mr. Jones' son, and was 17 years old at the time of his testimony. Phillip Jones, Jr. testified that when his dad was in prison they would talk on the phone a lot. Further, it had been a good couple of years for him and his father since his dad had got out of prison. Phillip Jones, Jr. further testified that he has seen his father almost every day (Tr. XX, p.2536). He further testified that if his father were in prison for the rest of his life there would still be a bond there (Tr. XX, 2539).

Finally, Phillip Jones, Sr., made an unsworn statement to the jury. In his statement, Mr. Jones stated that he had an abusive childhood. There was alcohol and drug abuse in his family. He further testified that he witnessed domestic violence on numerous occasions to his mother. He further testified that his mother would strike back at his father (Tr. XXI, p.2547). Mr. Jones further described how the different siblings would feud and beat each other up. There were 4 boys and 4 girls and Mr. Jones was the youngest of all of them so he would always be in a fight with his sister Lena, who has since passed away (Tr. XXI, p.2547). For Mr. Jones, childhood was stressful. He was traumatized from it somewhat, but he went on to state that he still tried in life. Mr. Jones went on to describe how he tried to kill himself by drinking gasoline at the age of

8 and again tried to hang himself at Mohican and they had to cut him down and send him to the Mansfield Psychiatric Hospital (Tr. XXI, p.2548). Mr. Jones noted that he did not have any positive role models as far as his brothers and sisters. When he was growing up, all he saw was his father and mother fight, feuding, arguing, drinking; his brothers and sisters getting in all kinds of trouble with the law; and were handing him liquor to drink and getting him drugs and stuff, that is what he saw (Tr. XXI, p.2550).

In concluding his statement, Mr. Jones stated that he was sorry for what he did in this case and that he prays for the victim's family and her children. Mr. Jones indicated he wanted to try to continue to keep helping folks like he helped his sister get off drugs and his mom when she became elderly. Further, he was a caregiver to his father before he died of emphysema (Tr. XXI, 2558).

A death sentence is not appropriate under the Fifth, Eight and Fourteenth Amendments to the United States Constitution if there is not the highest degree of confidence in its reliability. For the reasons set forth above, this Court should reverse Mr. Jones death sentence.

**PROPOSITION OF LAW NUMBER NINE**

THE PROPORTIONALITY REVIEW THAT THIS COURT MUST CONDUCT IN THE PRESENT CAPITAL CASE PURSUANT TO OHIO REVISED CODE § 2929.05 IS FATALLY FLAWED AND THEREFORE THE PRESENT DEATH SENTENCE MUST BE VACATED PURSUANT TO THE FIFTH, EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SECTIONS 5 AND 10, ARTICLE I OF THE OHIO CONSTITUTION AND OHIO REVISED CODE § 2929.05.

When the Ohio Legislature reenacted the death penalty it required the appellate courts of Ohio to conduct a proportionality review of any death sentence that it reviews. Ohio Revised Code § 2929.05. To insure that the courts had a sufficient body of data by which to conduct a proportionality review, the legislature created an information gathering system as to capital cases. Ohio Revised Code § 2929.03(G), § 2929.021, and § 2929.05(A).

Like any other informational resource, the capital tracking system is only as valuable as the completeness of its information. Information as to cases in which life imprisonment was imposed after a capital sentencing hearing is essential for the reviewing courts to fulfill their responsibility of assuring that excessive, disproportionate sentences of death are not imposed. Baldus, Pulaski, Woodworth and Kyle, "*Identifying Comparatively Excessive Sentences of Death: A Quantative Approach*", 33 Stan. L. Rev. 1, 7 n.15 (1980); *Woodson v. North Carolina*, 428 U.S. 280, 316 (1976); *McCaskill v. State*, 344 So.2d 1276, 1280 (Fla. 1977).

Common sense dictates that life sentences should be included in the informational tracking system. When the individual judges have to determine if a death sentence is appropriate, they will surely wish to know when a death sentence was previously found to be inappropriate by juries and judges, as well as when one was found to be appropriate. There is no other manner in which a knowledgeable, intelligent decision can be made.

The trial courts in Ohio have repeatedly failed to file sentencing opinions in those cases in which a jury has returned a life verdict in a capital case. The result has been an information tracking system that contains only death verdicts.

Failure to conduct the required proportionality review with an adequate informational base violates Appellant's statutory right to a meaningful proportionality review and Appellant's constitutional rights to due process and to not be subject to cruel and unusual punishment.

A. FAILURE TO CONDUCT A PROPORTIONALITY REVIEW IN A MEANINGFUL MANNER VIOLATES APPELLANT'S RIGHT TO DUE PROCESS

A stated need not require a proportionality review with respect to a capital case. *Pulley v. Harris*, 465 U.S. 37 (1984), certiorari denied, 110 S.Ct. 854 (1990).

However, the United States Supreme Court has further held that state law "may create . . . interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980). Through its statutory provisions for mandatory appellate review of death sentences, the State of Ohio has created an "interest" entitled to Fourteenth Amendment protection. That "interest" is a defendant's rightful expectation that each appellate court which reviews his death sentence compare to or other death sentences to insure that it is not excessive. Such a state-created interest cannot be arbitrarily abrogated without violating the Due Process Clause. *Vitek v. Jones*, supra at 488-89; *Wolff v. McDonald*, 418 U.S. 539, 558 (1974); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). Cf. *Evitts v. Lucy*, 469 U.S. 387, 401 (1985); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). The defendant has a substantial and legitimate expectation that he will be deprived of his life only in accordance with the procedures prescribed by state law.

In the present case, due process procedures cannot be followed in conducting the required proportionality review. The trial courts have not filed opinions in which life sentences were

imposed. These may be the only decisions that support a capitally convicted Appellant's argument that his sentence was disproportionate. A hearing cannot be termed "fair" if the only evidence that supports a party's claim is excluded.

**B. FAILURE TO CONDUCT A PROPORTIONALITY REVIEW IN A MEANINGFUL MANNER RESULTS IN A DEATH SENTENCE WHICH IS ARBITRARY AND CAPRICIOUSLY IMPOSED.**

Although death penalty statutes may be constitutional on their face, discrimination in the administration of an otherwise facially valid statute is unconstitutional:

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."

*Yick Wo v. Hopkins*, 118 U.S. 356, 373-374 (1885).

Notwithstanding the divergent views expressed by the majority Justices in *Furman v. Georgia*, 408 U.S. 238 (1972), rehearing denied, 409 U.S. 902 (1972), the opinions contain a vital common denominator, expressed in the two following formulations:

"\*\*\*[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be \*\*\* wantonly and \*\*\* freakishly imposed. *Furman*, supra at 310 (concurring opinion of Justice Stewart). \*\*\*[The Eighth and Fourteenth Amendments are violated if] the death penalty is exacted with great infrequency even for the most atrocious crimes and \*\*\* there is not meaningful basis for distinguishing the few cases in which it is not."

*Id.* at 313 (concurring opinion of Justice White).

*Furman* therefore stands for the proposition that the arbitrary and capricious application of the death penalty violates the Eighth and Fourteenth Amendments.

The prevailing opinions in *Gregg v. Georgia*, 428 U.S. 153 (1976), rehearing denied, 429 U.S. 875 (1976), explicitly reasserted that "the basis concern of *Furman* centered on those

defendants who were being condemned to death capriciously and arbitrarily” and that *Furman’s* basic requirement of regularity in the capital sentencing process was designed to eliminate “a substantial risk that uncontrolled procedures would result in juries acting wantonly and freakishly to impose the death sentence.” *Gregg*, *supra* at 206.

When the Ohio Legislature rewrote the Ohio death penalty, it attempted to avoid the arbitrary and capricious application of the death penalty by imposing a statutorily mandated duty upon the Courts of Appeals and the Ohio Supreme Court to review each death sentence to determine whether a particular sentence is excessive or disproportionate to the penalty imposed in similar cases. Ohio Revised Code § 2929.05(A).

The shallow proportionality review currently conducted in Ohio does not accomplish this goal of insuring that the death penalty is not arbitrarily and capriciously imposed. The nearsighted review which focuses only on death verdicts does not guarantee that there is any meaningful rationale for distinguishing the limited number of cases in which the death penalty is imposed from the large number in which it is not.

Instead the review system has guaranteed that no meaningful review can be conducted. Cases that would support the arbitrariness of a particular death sentence have been eliminated from the data bank. A system that was designed to eliminate capricious death sentences has now been implemented in a way that arbitrary death sentences will not be eliminated during the appellate process.

**C. OHIO’S PRESENT PROPORTIONALITY REVIEW PROCESS O.R.C. § 2929.03(G), § 2929.021, AND § 2929.05(A), MANDATES THAT TRIAL COURTS FILE WRITTEN OPINIONS IN WHICH LIFE SENTENCES ARE IMPOSED.**

Ohio Revised Code § 2929.05(A) imposes a statutorily mandated duty upon this Court and the Ohio Supreme Court to review each death sentence to determine if a particular sentence

is in fact appropriate. Included within this appropriateness review is a comparison of the death-sentenced defendant to sentences in all other capitally indicted defendants:

“\*\*\* In determining whether the sentence of death is appropriate, the court of appeals, and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases \*\*\*”

Ohio Revised Code § 2929.05(A).

In an effort to insure meaningful proportionality review, the Ohio Legislature adopted several comprehensive procedures:

1. If an indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications, the clerk of the court in which the indictment is filed shall file a notice with the supreme court indicating that the indictment was filed.

Revised Code § 2929.021

2. The trial court is required to prepare a written opinion identifying the aggravating and mitigating factors and the resulting balance when it imposes a life or death sentence.

Revised Code § 2929.03(F)

3. The appellate court is required to prepare its own written opinion when it reviews a death sentence.

Revised Code § 2929.05(A)

4. The above opinions are required to be filed with the Ohio Supreme Court.

Revised Code § 2929.03(G) and § 2929.05(A).

The purpose of the information collecting system of O.R.C. § 2929.03(G), § 2929.021 and § 2929.05(A) is obvious: It provides the Ohio appellate courts with a body of information based on Ohio cases from which to determine whether a particular death sentence is excessive or disproportionate when compared to other cases. An appellate court may request information at

any time on the outcome of a particular factual pattern or type of capital case. The value of such a detailed and accessible body of case law cannot be overemphasized.

No proper legal determination is made in the abstract. One can only decide that death is the appropriate punishment in a particular case by comparing it to those cases in which the ultimate punishment has been found to be inappropriate.

The Ohio Legislature reached the same conclusion when enacting the Ohio death penalty. For this reason, the Ohio Legislature required the court or panel to write a decision when a life sentence was imposed.:

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

(Emphasis added). O.R.C. § 2929.03(F).

The statute is quite clear and concise: When the court imposes a life sentence, it shall make specific findings and file its opinion.

Ohio courts have consistently refused to file these opinions in life verdicts. There exists no rational reason to have a trial judge make findings of fact when he rejects a jury's death recommendation and not make such findings when he accepts a life recommendation. In both

cases, findings of fact are needed to have a complete data bank for the purposes of O.R.C. § 2929.03(G), § 2929.021, and § 2929.05(A).

The Ohio Legislature created proportionality review as a safeguard to insure that the death penalty was not wrongly imposed. The system has failed miserably. With its biased data base, the proportionality review has ceased to be a safeguard and become a justification for imposing death sentences. The creation of the biased data bank not only ignores the plain language of the statute, but denies Appellant the right to a fair proportionality review and results in the arbitrary and capricious imposition of the death penalty in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution.

**PROPOSITION OF LAW NUMBER TEN**

OHIO'S DEATH PENALTY LAW IS UNCONSTITUTIONAL. OHIO REV. CODE ANN. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04 AND 2929.05 DO NOT MEET THE PRESCRIBED CONSTITUTIONAL REQUIREMENTS AND ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED TO PHILLIP JONES. UNITED STATES CONSTITUTION AMENDMENT FIVE, SIX, EIGHTH AND FOURTEENTH; OHIO CONSTITUTION, ARTICLE I, §§ 2, 9, 10, AND 16. FURTHER OHIO'S DEATH PENALTY STATUTE VIOLATES THE UNITED STATE'S OBLIGATIONS UNDER INTERNATIONAL LAW.

The Eighth Amendment to the United States Constitution and Article I, § 9 of the Ohio Constitution prohibit the infliction of cruel and unusual punishment. The Eighth Amendment's protections are applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962). Punishment that is "excessive" constitutes cruel and unusual punishment. *Coker v. Georgia*, 433 U.S. 584 (1977). The underlying principle of governmental respect for human dignity is the Court's guideline to determine whether this statute is constitutional. *See, Furman v. Georgia*, 408 U.S. 238 (1972) (Brennan, J., concurring); *Rhodes v. Chapman*, 452 U.S. 337, 361 (1981); *Trop v. Dulles*, 356 U.S. 86 (1958). The Ohio scheme offends this bedrock principle in the following ways:

**1. Arbitrary and unequal punishment.**

The Fourteenth Amendment's guarantee of equal protection requires similar treatment of similarly situated persons. This right extends to the protection against cruel and unusual punishment. *Furman*, 408 U.S. at 249 (Douglas, J., concurring). A death penalty imposed in violation of the Equal Protection guarantee is a cruel and unusual punishment. *See, Id.* Any arbitrary use of the death penalty also offends the Eighth Amendment. *Id.*

Ohio's capital punishment scheme allows the death penalty to be imposed in an arbitrary and discriminatory manner in violation of *Furman* and its progeny. Prosecutors' virtually uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death

penalty. Mandatory death penalty statutes were deemed fatally flawed because they lacked standards for imposition of a death sentence and were therefore removed from judicial review. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Prosecutors' uncontrolled discretion violates this requirement.

Ohio's system imposes death in a racially discriminatory manner. Blacks and those who kill white victims are much more likely to get the death penalty. While African-Americans are less than twenty percent of Ohio's population, 106 or fifty-one percent of Ohio's death row inmates are African-American. *See*, Ohio Public Defender Commission Statistics, February 12, 2003; *see also*, The Report of the Ohio Commission on Racial Fairness, 1999. While three Caucasians were sentenced to death for killing African-Americans, forty-eight African-Americans sit on Ohio's death row for killing a Caucasian. Ohio Public Defender Commission Statistics, February 12, 2003. Ohio's statistical disparity is tragically consistent with national findings. The General Accounting Office found victim's race influential at all stages, with stronger evidence involving prosecutorial discretion in charging and trying cases. Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities, U.S. General Accounting Office, Report to Senate and House Committees on the Judiciary (February 1990).

Ohio courts have not evaluated the implications of these racial disparities. While the General Assembly established a disparity appeals practice in post-conviction that may encourage the Ohio Supreme Court to adopt a rule requiring tracking the offender's race, O.R.C. § 2953.21(A)(2), no rule has been adopted. Further, this practice does not track the victim's race and does not apply to crimes committed before July 1, 1996. In short, Ohio law fails to assure against race discrimination playing a role in capital sentencing.

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. *Commonwealth v. O'Neal*, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring); *Utah v. Pierre*, 572 P.2d 1338 (Utah 1977) (Maughan, J., concurring and dissenting). Moreover, where fundamental rights are involved personal liberties cannot be broadly stifled "when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479 (1960). To take a life by mandate, the State must show that it is the "least restrictive means" to a "compelling governmental end." *O'Neal II*, 339 N.E.2d at 678.

The death penalty is neither the least restrictive nor an effective means of deterrence. Both isolation of the offender and retribution can be effectively served by less restrictive means. Society's interests do not justify the death penalty.

## **2. Unreliable sentencing procedures.**

The Due Process and Equal Protection Clauses prohibit arbitrary and capricious procedures in the State's application of capital punishment. *Gregg v. Georgia*, 428 U.S. 153, 188, 193-95 (1976); *Furman*, 408 U.S. at 255, 274. Ohio's scheme does not meet those requirements. The statute does not require the State to prove the absence of any mitigating factors or that death is the only appropriate penalty.

The statutory scheme is unconstitutionally vague which leads to the arbitrary imposition of the death penalty. The language "that the aggravating circumstances ... outweigh the mitigating factors" invites arbitrary and capricious jury decisions. "Outweigh" preserves reliance on the lesser standard of proof by a preponderance of the evidence. The statute requires only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors. This creates an unacceptable risk of arbitrary or capricious sentencing.

Additionally, the mitigating circumstances are vague. The jury must be given "specific and detailed guidance" and be provided with "clear and objective standards" for their sentencing discretion to be adequately channeled. *Gregg; Godfrey v. Georgia*, 446 U.S. 420 (1980).

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor is within the individual decision-maker's discretion. *State v. Fox*, 69 Ohio St. 3d 183, 193, 631 N.E.2d 124, 132 (1994). Giving so much discretion to juries inevitably leads to arbitrary and capricious judgments. The Ohio open discretion scheme further risks that constitutionally relevant mitigating factors that must be considered as mitigating [youth or childhood abuse [*Eddings v. Oklahoma*, 455 U.S. 104 (1982)], mental disease or defect [*Penry v. Lynaugh*, 492 U.S. 302 (1989)], level of involvement in the crime [*Enmund v. Florida*, 458 U.S. 782 (1982)], or lack of criminal history [*Delo v. Lashley*, 507 U.S. 272 (1993)]] will not be factored into the sentencer's decision. While the federal constitution may allow states to shape consideration of mitigation, *see, Johnson v. Texas*, 509 U.S. 350 (1993), Ohio's capital scheme fails to provide adequate guidelines to sentencers, and fails to assure against arbitrary, capricious, and discriminatory results.

Empirical evidence is developing in Ohio and around the country that, under commonly used penalty phase jury instructions, juries do not understand their responsibilities and apply inaccurate standards for decision. *See, Cho, Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death*, 85 J. Crim. L. & Criminology 532, 549-557 (1994), and findings of Zeisel discussed in *Free v. Peters*, 12 F.3d 700 (7th Cir. 1993). This confusion violates the federal and state constitutions. Because of these deficiencies, Ohio's statutory scheme does not meet the requirements of *Furman* and its progeny.

**3. Defendant's right to a jury is burdened.**

The Ohio scheme is unconstitutional because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. A defendant who pleads guilty or no contest benefits from a trial judge's discretion to dismiss the specifications "in the interest of justice." Ohio R. Crim. P. 11(C)(3). Accordingly, the capital indictment may be dismissed regardless of mitigating circumstances. There is no corresponding provision for a capital defendant who elects to proceed to trial before a jury.

Justice Blackmun found this discrepancy to be constitutional error. *Lockett v. Ohio*, 438 U.S. 586, 617 (1978) (Blackmun, J., concurring). This disparity violated *United States v. Jackson*, 390 U.S. 570 (1968), and needlessly burdened the defendant's exercise of his right to a trial by jury. Since *Lockett*, this infirmity has not been cured and Ohio's statute remains unconstitutional.

**4. Mandatory submission of reports and evaluations.**

Ohio's capital statutes are unconstitutional because they require submission of the pre-sentence investigation report and the mental evaluation to the jury or judge once requested by a capital defendant. O.R.C. § 2929.03 (D)(1). This mandatory submission prevents defense counsel from giving effective assistance and prevents the defendant from effectively presenting his case in mitigation.

**5. O.R.C. § 2929.04 (A)(7) is constitutionally invalid when used to aggravate O.R.C. § 2903.01 (B) aggravated murder.**

"[T]o avoid [the] constitutional flaw of vagueness and over breadth under the Eighth Amendment, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of a defendant as compared to others found guilty of (aggravated) murder." *Zant v. Stephens*, 462

U.S. 862, 877 (1983). Ohio's statutory scheme fails to meet this constitutional requirement because O.R.C. § 2929.04(A)(7) fails to genuinely narrow the class of individuals eligible for the death penalty.

O.R.C. § 2903.01(B) defines the category of felony-murderers. If any factor listed in O.R.C. § 2929.04(A) is specified in the indictment and proved beyond a reasonable doubt the defendant becomes eligible for the death penalty. O.R.C. §§ 2929.02 (A) and 2929.03.

The scheme is unconstitutional because the O.R.C. § 2929.04 (A)(7) aggravating circumstance merely repeats, as an aggravating circumstance, factors that distinguish aggravated felony-murder from murder. O.R.C. § 2929.04(A)(7) repeats the definition of felony-murder as alleged, which automatically qualifies the defendant for the death penalty. O.R.C. § 2929.04(A)(7) does not reasonably justify the imposition of a more severe sentence on felony-murderers. But, the prosecuting attorney and the sentencing body are given unbounded discretion that maximizes the risk of arbitrary and capricious action and deprivation of a defendant's life without substantial justification. The aggravating circumstance must therefore fail. *Zant*, 462 U.S. at 877.

As compared to other aggravated murderers, the felony-murderer is treated more severely. Each O.R.C. § 2929.04 (A) circumstance, when used in connection with O.R.C. § 2903.01 (A), adds an additional measure of culpability to an offender such that society arguably should be permitted to punish him more severely with death. But the aggravated murder defendant alleged to have killed during the course of a felony is automatically eligible for the death penalty--not a single additional proof of fact is necessary.

The killer who kills with prior calculation and design is treated less severely, which is also nonsensical because his blameworthiness or moral guilt is higher, and the argued ability to

deter him less. From a retributive stance, this is the most culpable of mental states. Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 Hous. L. Rev. 356, 375 (1978).

Felony-murder also fails to reasonably justify the death sentence because this Court has interpreted O.R.C. § 2929.04 (A)(7) as not requiring that intent to commit a felony precede the murder. *State v. Williams*, 74 Ohio St. 3d 569, 660 N.E.2d 724, syl. 2 (1996). The asserted state interest in treating felony-murder as deserving of greater punishment is to deter the commission of felonies in which individuals may die. Generally courts have required that the killing result from an act done in furtherance of the felonious purpose. *Id.*, referencing the Model Penal Code. Without such a limitation, no state interest justifies a stiffer punishment. This Court has discarded the only arguable reasonable justification for the death sentence to be imposed on such individuals, a position that engenders constitutional violations. *Zant v. Stephens*, 462 U.S. 862 (1983). Further, this Court's current position is inconsistent with previous cases, thus creating the likelihood of arbitrary and inconsistent applications of the death penalty. See e.g., *State v. Rojas*, 64 Ohio St. 3d 131, 592 N.E.2d 1376 (1992).

Equal protection of the law requires that legislative classifications be supported by, at least, a reasonable relationship to legitimate State interests. *Skinner v. Oklahoma*, 316 U.S. 535 (1942). The State has arbitrarily selected one class of murderers who may be subjected to the death penalty automatically. This statutory scheme is inconsistent with the purported State interests. The most brutal, cold-blooded and premeditated murderers do not fall within the types of murder that are automatically eligible for the death penalty. There is no rational basis or any State interest for this distinction and its application is arbitrary and capricious.

6. **O.R.C. §§ 2929.03 (D)(1) and 2929.04 are unconstitutionally vague.**

O.R.C. § 2929.03 (D)(1)'s reference to "the nature and circumstances of the aggravating circumstance" incorporates the nature and circumstances of the offense into the factors to be weighed in favor of death. The nature and circumstances of an offense are, however, statutory mitigating factors under O.R.C. § 2929.04 (B). O.R.C. § 2929.03 (D)(1) makes Ohio's death penalty weighing scheme unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor as an aggravator.

To avoid arbitrariness in capital sentencing, states must limit and channel the sentencer's discretion with clear and specific guidance. *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). A vague aggravating circumstance fails to give that guidance. *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *vacated on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002), *Godfrey*, 446 U.S. at 428. Moreover, a vague aggravating circumstance is unconstitutional whether it is an eligibility or a selection factor. *Tuilaepa v. California*, 512 U.S. 967 (1994). The aggravating circumstances in O.R.C. § 2929.04(A)(1)-(8) are both.

O.R.C. § 2929.04 (B) tells the sentencer that the nature and circumstances of the offense are selection factors in mitigation. Moreover, because the nature and circumstances of the offense are listed only in O.R.C. § 2929.04(B), they must be weighed only as selection factors in mitigation. *See, State v. Wogenstahl*, 75 Ohio St. 3d 344, 356, 662 N.E.2d 311, 321-22 (1996). However, the clarity and specificity of O.R.C. § 2929.04(B) is eviscerated by O.R.C. § 2929.03 (D)(1); selection factors that are strictly mitigating become part and parcel of the aggravating circumstance.

Despite wide latitude, Ohio has carefully circumscribed its selection factors into mutually exclusive categories. *See*, O.R.C. § 2929.04 (A) and (B); *Wogenstahl*, 75 Ohio St. 3d at 356, 662 N.E.2d at 321-22. O.R.C. § 2929.03 (D)(1) makes O.R.C. § 2929.04(B) vague because it incorporates the nature and circumstances of an offense into the aggravating circumstances. The sentencer cannot reconcile this incorporation. As a result of O.R.C. § 2929.03 (D)(1), the “nature and circumstances” of any offense become “too vague” to guide the jury in its weighing or selection process. *See, Walton*, 497 U.S. at 654. O.R.C. § 2929.03(D)(1) therefore makes O.R.C. § 2929.04(B) unconstitutionally arbitrary.

O.R.C. § 2929.03 (D)(1) is also unconstitutional on its face because it makes the selection factors in aggravation in O.R.C. § 2929.04 (A)(1)-(8) “too vague.” *See, Walton*, 497 U.S. at 654. O.R.C. § 2929.04(A)(1)-(8) gives clear guidance as to the selection factors that may be weighed against the defendant’s mitigation. However, O.R.C. § 2929.03 (D)(1) eviscerates the narrowing achieved. By referring to the “nature and circumstances of the aggravating circumstance,” O.R.C. § 2929.03 (D)(1) gives the sentencer “open-ended discretion” to impose the death penalty. *See, Maynard*, 486 U.S. at 362. That reference allows the sentencer to impose death based on (A)(1)-(8) plus any other fact in evidence arising from the nature and circumstances of the offense that the sentencer considers aggravating. This eliminates the guided discretion provided by O.R.C. § 2929.04 (A). *See, Stringer v. Black*, 503 U.S. 222, 232 (1992).

#### **7. Proportionality and appropriateness review.**

Ohio Revised Code §§ 2929.021 and 2929.03 require data be reported to the courts of appeals and to the Supreme Court of Ohio. There are substantial doubts as to the adequacy of the information received after guilty pleas to lesser offenses or after charge reductions at trial. O.R.C. § 2929.021 requires only minimal information on these cases. Additional data is

necessary to make an adequate comparison in these cases. This prohibits adequate appellate review.

Adequate appellate review is a precondition to the constitutionality of a state death penalty system. *Zant*, 462 U.S. at 879; *Pulley v. Harris*, 465 U.S. 37 (1984). The standard for review is one of careful scrutiny. *Zant*, 462 U.S. at 884-85. Review must be based on a comparison of similar cases and ultimately must focus on the character of the individual and the circumstances of the crime. *Id.*

Ohio's statutes' failure to require the jury or three-judge panel recommending life imprisonment to identify the mitigating factors undercuts adequate appellate review. Without this information, no significant comparison of cases is possible. Without a significant comparison of cases, there can be no meaningful appellate review. *See, State v. Murphy*, 91 Ohio St. 3d 516, 562, 747 N.E.2d 765, 813 (2001) (Pfeifer, J., dissenting) ("When we compare a case in which the death penalty was imposed only to other cases in which the death penalty was imposed, we continually lower the bar of proportionality. The lowest common denominator becomes the standard.")

The comparison method is also constitutionally flawed. Review of cases where the death penalty was imposed satisfies the proportionality review required by O.R.C. § 2929.05 (A). *State v. Steffen*, 31 Ohio St. 3d 111, 509 N.E.2d 383, syl. 1 (1987). However, this prevents a fair proportionality review. There is no meaningful manner to distinguish capital defendants who deserve the death penalty from those who do not.

This Court's appropriateness analysis is also constitutionally infirm. O.R.C. § 2929.05 (A) requires appellate courts to determine the appropriateness of the death penalty in each case. The statute directs affirmance only where the court is persuaded that the aggravating circumstances

outweigh the mitigating factors and that death is the appropriate sentence. *Id.* This Court has not followed these dictates. The appropriateness review conducted is very cursory. It does not "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460 (1984).

The cursory appropriateness review also violates the capital defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The General Assembly provided capital appellants with the statutory right of proportionality review. When a state acts with significant discretion, it must act in accordance with the Due Process Clause. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). The review currently used violates this constitutional mandate. An insufficient proportionality review violates Gerald Hand's due process, liberty interest in O.R.C. § 2929.05.

**8. Lethal injection is cruel and unusual punishment.**

Ohio Revised Code § 2949.22 (B)(1) provides that death by lethal injection "shall be executed by causing the application to the person of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death[.]" This mode of punishment offends contemporary standards of decency. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). It also violates the United States' obligations under the International Convention on Civil and Political Rights (1992) (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1994) (CAT). Lethal injection causes unnecessary pain. *See*, Marian J. Borg and Michael Radelet, *Botched Lethal Injections*, 53 Capital Report, March/April 1998; Kathy Sawyer, *Protracted Execution In Texas Draws Criticism; Lethal Injection Delayed by Search for Vein*, Washington Post, March 14, 1985; *Killer Lends a Hand to Find Vein for Execution*, LA Times, August 20, 1986; *Killer's Drug Abuse Complicates Execution*, Chicago

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

Prisoners have been repeatedly stuck with a needle for almost an hour in an effort to find a vein suitable for use. Marian J. Borg and Michael Radelet, *Botched Lethal Injections*, 53 Capital Report, March/April 1998; *Murderer of Three Women is Executed in Texas*, NY Times, March 14, 1985; Kathy Sawyer, *Protracted Execution In Texas Draws Criticism; Lethal Injection Delayed by Search for Vein*, Washington Post, March 14, 1985; *Killer's Drug Abuse Complicates Execution*, Chicago Tribune, April 24, 1992; *Rector's Time Came, Painfully Late*, Arkansas Democrat Gazette, January 26, 1992. Prisoners have actually had to assist technicians in finding a vein suitable to use. *Killer Lends a Hand to Find Vein for Execution*, LA Times, August 20, 1986; *Moans Pierced Silence During Wait*, Arkansas Democrat Gazette, January 26, 1992. Equipment failures are not uncommon. *Murderer Executed After a Leaky Lethal Injection*, New York Times, December 14, 1988; Marian J. Borg and Michael Radelet, *Botched Lethal Injections*, 53 Capital Report, March/April 1998. Gasping and choking from the prisoner is not uncommon. Marian J. Borg and Michael Radelet, *Botched Lethal Injections*, 53 Capital Report, March/April 1998. Because the prisoner is restrained and paralyzed there may be no reaction to the pain felt, but death by lethal injection is not painless. Rather, it is cruel and

unusual punishment prohibited under the Eighth Amendment to the United States Constitution, the ICCPR, and the CAT.

## **9. Ohio's statutory death penalty scheme violates international law.**

International law binds each of the states that comprise the United States. Ohio is bound by international law whether found in treaty or in custom. Because the Ohio death penalty scheme violates international law, Hand's capital convictions and sentences cannot stand.

### **9.1 International law binds the State of Ohio.**

"International law is a part of our law[.]" *The Paquete Habana*, 175 U.S. 677, 700 (1900). A treaty made by the United States is the supreme law of the land. Article VI, United States Constitution. Where state law conflicts with international law, it is the state law that must yield. *See, Zschernig v. Miller*, 389 U.S. 429, 440 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947); *United States v. Pink*, 315 U.S. 203, 230 (1942); *Kansas v. Colorado*, 206 U.S. 46, 48 (1907); *The Paquete Habana*, 175 U.S. at 700; *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924). In fact, international law creates remediable rights for United States citizens. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980); *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal. 1987).

### **9.2 Ohio's obligations under international charters, treaties, and conventions.**

The United States' membership and participation in the United Nations (U.N.) and the Organization of American States (OAS) creates obligations in all fifty states. Through the U.N. Charter, the United States committed itself to promote and encourage respect for human rights and fundamental freedoms. Art. 1(3). The United States bound itself to promote human rights in cooperation with the United Nations. Art. 55-56. The United States again proclaimed the fundamental rights of the individual when it became a member of the OAS. OAS Charter, Art.3.

The U.N. has sought to achieve its goal of promoting human rights and fundamental freedoms through the creation of numerous treaties and conventions. The United States has ratified several of these including: the International Covenant on Civil and Political Rights (ICCPR) ratified in 1992, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ratified in 1994, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) ratified in 1994. Ratification of these treaties by the United States expressed its willingness to be bound by these treaties. Pursuant to the Supremacy Clause, the ICCPR, the ICERD, and the CAT are the supreme laws of the land. As such, the United States must fulfill the obligations incurred through ratification. President Clinton recently reiterated the United States' need to fulfill its obligations under these conventions when he issued Executive Order 13107. In pertinent part, the Executive Order states:

By the authority vested in me as President by the Constitution and the laws of the United States of America, and bearing in mind the obligations of the United States pursuant to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination on All Forms of Racial Discrimination (CERD), and other relevant treaties concerned with the protection and promotion of human rights to which the United States is now or may become a party in the future, it is hereby ordered as follows:

**Section 1. Implementation of Human Rights Obligations.**

(a) It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.

Ohio is not fulfilling the United States' obligations under these conventions. Rather, Ohio's death penalty scheme violates each convention's requirements and thus must yield to the requirements of international law. (*See*, discussion *infra*, Subsection 1).

**9.2.1 Ohio's statutory scheme violates the ICCPR's and ICERD's guarantees of equal protection and due process.**

Both the ICCPR, ratified in 1992, and the ICERD, ratified in 1994, guarantee equal protection of the law. ICCPR Art. 2(1), 3, 14, 26; ICERD Art. 5(a). The ICCPR further guarantees due process via Articles 9 and 14, which includes numerous considerations: a fair hearing (Art. 14(1)), an independent and impartial tribunal (Art. 14(1)), the presumption of innocence (Art. 14(2)), adequate time and facilities for the preparation of a defense (Art. 14(3)(a)), legal assistance (Art. 14(3)(d)), the opportunity to call and question witnesses (Art. 14(3)(e)), the protection against self-incrimination (Art. 14(3)(g)), and the protection against double jeopardy (Art. 14(7)). However, Ohio's statutory scheme fails to provide equal protection and due process to capital defendants as contemplated by the ICCPR and the ICERD.

Ohio's statutory scheme denies equal protection and due process in several ways. It allows for arbitrary and unequal treatment in punishment. (*See*, discussion *infra*, § 1). Ohio's sentencing procedures are unreliable. (*See*, discussion *infra*, § 2). Ohio's statutory scheme fails to provide individualized sentencing. (*See*, discussion *infra*, § 1, 2). Ohio's statutory scheme burdens a defendant's right to a jury. (*See*, discussion *infra*, § 3). Ohio's requirement of mandatory submission of reports and evaluations precludes effective assistance of counsel. (*See*, discussion *infra*, § 4). O.R.C. § 2929.04 (B)(7) arbitrarily selects certain defendants who may be automatically eligible for death upon conviction. (*See*, discussion *infra*, § 5). Ohio's proportionality and appropriateness review is wholly inadequate. (*See*, discussion *infra*, § 7). As a result, Ohio's statutory scheme violates the ICCPR's and the ICERD's guarantees of equal

protection and due process. This is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

### **9.2.2 Ohio's statutory scheme violates the ICCPR's protection against arbitrary execution.**

The ICCPR speaks explicitly to the use of the death penalty. The ICCPR guarantees the right to life and provides that there shall be no arbitrary deprivation of life. Art. 6(1). It allows the imposition of the death penalty only for the most serious offenses. Art. 6(2). Juveniles and pregnant women are protected from the death penalty. Art. 6(5). Moreover, the ICCPR contemplates the abolition of the death penalty. Art. 6(6).

However, several aspects of Ohio's statutory scheme allow for the arbitrary deprivation of life. Punishment is arbitrary and unequal. (*See*, discussion *infra*, § 1). Ohio's sentencing procedures are unreliable. (*See*, discussion *infra*, § 2). Ohio's statutory scheme lacks individualized sentencing. (*See*, discussion *infra*, § 1, 2). The (A)(7) aggravator maximizes the risk of arbitrary and capricious action by singling one class of murders who may be eligible automatically for the death penalty. (*See*, discussion *infra*, § 5). The vagueness of O.R.C. §§ 2929.03 (D)(1) and 2929.04 similarly render sentencing arbitrary and unreliable. (*See*, discussion *infra*, § 6). Ohio's proportionality and appropriateness review fails to distinguish those who deserve death from those who do not. (*See*, discussion *infra*, § 7). As a result, executions in Ohio result in the arbitrary deprivation of life and thus violate the ICCPR's death penalty protections. This is a direct violation of international law and a violation of the Supremacy Clause of the United States Constitution.

### **9.2.3 Ohio's statutory scheme violates the ICERD's protections against race discrimination.**

The ICERD, speaking to racial discrimination, requires that each state take affirmative steps to end race discrimination at all levels. Art. 2. It requires specific action and does not

allow states to sit idly by when confronted with practices that are racially discriminatory. However, Ohio's statutory scheme imposes the death penalty in a racially discriminatory manner. (*See*, discussion *infra*, § 1). A scheme that sentences blacks and those who kill white victims more frequently and which disproportionately places African-Americans on death row is in clear violation of the ICERD. Ohio's failure to rectify this discrimination is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

**9.2.4 Ohio's statutory scheme violates the ICCPR's and the CAT's prohibitions against cruel, inhuman or degrading punishment.**

The ICCPR prohibits subjecting any person to torture or to cruel, inhuman or degrading treatment or punishment. Art. 7. Similarly, the CAT requires that states take action to prevent torture, which includes any act by which severe mental or physical pain is intentionally inflicted on a person for the purpose of punishing him for an act committed. *See*, Art. 1-2. As administered, Ohio's death penalty inflicts unnecessary pain and suffering, *see*, discussion *infra*, § I, in violation of both the ICCPR and the CAT. Thus, there is a violation of international law and the Supremacy Clause of the United States Constitution.

**9.2.5 Ohio's obligations under the ICCPR, the ICERD, and the CAT are not limited by the reservations and conditions placed on these conventions by the Senate.**

While conditions, reservations, and understandings accompanied the United States' ratification of the ICCPR, the ICERD, and the CAT, those conditions, reservations, and understandings cannot stand for two reasons. Article 2 § 2 of the United States Constitution provides for the advice and consent of two-thirds of the Senate when a treaty is adopted. However, the United States Constitution makes no provision for the Senate to modify, condition, or make reservations to treaties. The Senate is not given the power to determine what aspects of a treaty the United States will and will not follow. Their role is to simply advise and consent.

Thus, the Senate's inclusion of conditions and reservations in treaties goes beyond that role of advice and consent. The Senate picks and chooses which items of a treaty will bind the United States and which will not. This is the equivalent of the line-item veto, which is unconstitutional. *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). The United States Supreme Court specifically spoke to the enumeration of the president's powers in the Constitution in finding that the president did not possess the power to issue line item vetoes. *Id.* If it is not listed, then the President lacks the power to do it. *See, Id.* Similarly, the Constitution does not give the power to the Senate to make conditions and reservations, picking and choosing what aspects of a treaty will become law. Thus the Senate lacks the power to do just that. Therefore, any conditions or reservations made by the Senate are unconstitutional. *See, Id.*

The Vienna Convention on the Law of Treaties further restricts the Senate's imposition of reservations. It allows reservations unless: they are prohibited by the treaty, the treaty provides that only specified reservations, not including the reservation in question, may be made, or the reservation is incompatible with the object and purpose of the treaty. Art. 19(a)-(c). The ICCPR specifically precludes derogation of Articles 6-8, 11, 15-16, and 18. Pursuant to the Vienna Convention, the United States' reservations to these articles are invalid under the language of the treaty. *See, Id.* Further, it is the purpose of the ICCPR to protect the right to life and any reservation inconsistent with that purpose violates the Vienna Convention. Thus, United States reservations cannot stand under the Vienna Convention as well.

**9.2.6 Ohio's obligations under the ICCPR are not limited by the Senate's declaration that it is not self-executing.**

The Senate indicated that the ICCPR is not self-executing. However, the question of whether a treaty is self-executing is left to the judiciary. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985) [Restatement (Second) of Foreign Relations Law of the

United States, Sec. 154(1) (1965)]. It is the function of the courts to say what the law is. *See, Marbury v. Madison*, 5 U.S. 137 (1803).

Further, requiring the passage of legislation to implement a treaty necessarily implicates the participation of the House of Representatives. By requiring legislation to implement a treaty, the House can effectively veto a treaty by refusing to pass the necessary legislation. However, Article 2, § 2 excludes the House of Representatives from the treaty process. Therefore, declaring a treaty to be not self-executing gives power to the House of Representatives not contemplated by the United States Constitution. Thus, any declaration that a treaty is not self-executing is unconstitutional. *See, Clinton*, 524 U.S. at 438.

### **9.3 Ohio's obligations under customary international law.**

International law is not merely discerned in treaties, conventions and covenants. International law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law." *United States v. Smith*, 18 U.S. 153, 160-61 (1820). Regardless of the source "international law is a part of our law[.]" *The Paquete Habana*, 75 U.S. at 700.

The judiciary and commentators recognize the Universal Declaration of Human Rights (DHR) as binding international law. The DHR "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community." *Filartiga*, 630 F.2d at 883 (internal citations omitted); *see also*, William A. Schabas, *The Death Penalty as Cruel Treatment and Torture* (1996).

The DHR guarantees equal protection and due process (Art. 1, 2, 7, 11), recognizes the right to life (Art. 3), prohibits the use of torture or cruel, inhuman or degrading punishment (Art. 5) and is largely reminiscent of the ICCPR. Each of the guarantees found in the DHR are

violated by Ohio's statutory scheme. (*See*, discussion *infra*, §§ 1-8). Thus, Ohio's statutory scheme violates customary international law as codified in the DHR and cannot stand.

However, the DHR is not alone in its codification of customary international law. *Smith* directs courts to look to "the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law" in ascertaining international law. 18 U.S. at 160-61. Ohio should be cognizant of the fact that its statutory scheme violates numerous declarations and conventions drafted and adopted by the United Nations and the OAS, which may, because of the sheer number of countries that subscribe to them, codify customary international law. *See, Id.* Included among these are:

1. The American Convention on Human Rights, drafted by the OAS and entered into force in 1978. It provides numerous human rights guarantees, including: equal protection (Art. 1, 24), the right to life, [Art. 4(1)], prohibition against arbitrary deprivation of life [Art. 4(1)], imposition of the death penalty only for the most serious crimes [Art. 4(2)], no re-establishment of the death penalty once abolished [Art. 4(3)], prohibits torture, cruel, inhuman or degrading punishment [Art. 5(2)], and guarantees the right to a fair trial (Art. 8).
2. The United Nations Declaration on the Elimination of All Forms of Racial Discrimination proclaimed by U.N. General Assembly resolution 1904 (XVIII) in 1963. It prohibits racial discrimination and requires that states take affirmative action in ending racial discrimination.
3. The American Declaration of the Rights and Duties of Man adopted by the Ninth International Conference of American States in 1948. It includes numerous human rights guarantees: the right to life (Art. 1), equality before the law (Art. 2), the right to a fair trial (Art. 16), and due process (Art. 26).

4. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the U.N. General Assembly in Resolution 3452 (XXX) in 1975. It prohibits torture, defined to include severe mental or physical pain intentionally inflicted by or at the instigation of a public official for a purpose including punishing him for an act he has committed, and requires that the states take action to prevent such actions. Art. 1, 4.

5. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty adopted by the U.N. Economic and Social Council in Resolution 1984/50 in 1984. It provides numerous protections to those facing the death penalty, including: permitting capital punishment for only the most serious crimes, with the scope not going beyond intentional crimes with lethal or other extremely grave consequences (1), requiring that guilt be proved so as to leave no room for an alternative explanation of the facts (4), due process, and the carrying out of the death penalty so as to inflict the minimum possible suffering (9).

6. The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, adopted and proclaimed by the U.N. General Assembly in Resolution 44/128 in 1989. This prohibits execution (Art. 1(1)) and requires that states abolish the death penalty (Art. 1(2)).

These documents are drafted by the people *Smith* contemplates and are subscribed to by a substantial segment of the world. As such they are binding on the United States as customary international law. A comparison of the §§ 1-9 clearly demonstrates that Ohio's statutory scheme is in violation of customary international law.

## 10. Conclusion.

Ohio's death penalty scheme fails to ensure that arbitrary and discriminatory imposition of the death penalty will not occur. The procedures actually promote the imposition of the death

penalty and, thus, are constitutionally intolerable. Ohio Revised Code §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution and international law. Mr. Jones' death sentence must be vacated.<sup>1</sup>

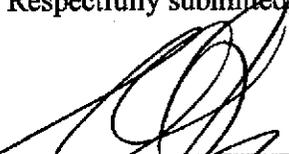
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<sup>1</sup> In *State v. Jenkins*, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), this Court upheld this death penalty statute and this Court may, therefore, reject this claim on its merits if it disagrees with Appellant's federal constitutional arguments. *State v. Poindexter*, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).

**CONCLUSION**

For all the reasons set forth above, Appellant PHILLIP JONES, requests that his conviction and/or sentence herein be reversed, and that he be granted all other and further relief to which he is entitled herein.

Respectfully submitted,



---

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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing has been mailed by regular U.S. Mail this <sup>2</sup>~~26~~ day of January, to Sherri Bevan Walsh, Prosecuting Attorney, 53 University Avenue, Akron, Ohio 44308.



---

NATHANAEL A. BAY  
LAWRENCE J. WHITNEY  
Attorneys for Appellant

**APPENDIX**

---

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee

-vs-

PHILLIP L. JONES

Appellant

\* CASE NO. **08-0525**

\* On Appeal from the Summit County  
Common Pleas Court,  
\* Case No. 2007 04 1294

\* CAPITAL CASE  
\*

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NOTICE OF APPEAL OF APPELLANT PHILLIP L. JONES

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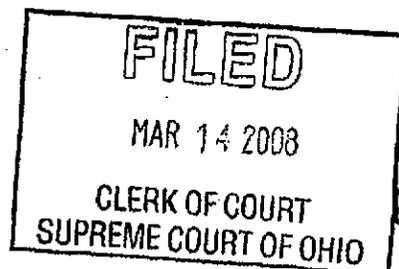
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COUNSEL FOR APPELLANT

SHERRI BEVAN WALSH  
Summit County Prosecutor  
53 University Avenue  
Akron, Ohio 44308  
330-643-2788

COUNSEL FOR APPELLEE



NOTICE OF APPEAL OF APPELLANT PHILLIP L. JONES

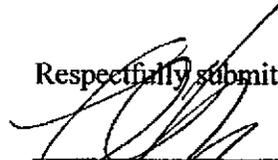
Appellant, PHILLIP L. JONES, hereby gives notice of appeal to the Supreme Court of Ohio from the Judgment of the Summit County Court of Common Pleas, entered in Case No. 2007 04 1294, on February 4, 2008.

Appellant JONES, in his direct appeal of right, appeals both the conviction and sentence in this matter.



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Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been mailed by regular U.S. Mail this 11<sup>th</sup> day of March, 2008, to the Summit County Prosecutor's Office, 53 University Avenue, Akron, Ohio 44308.



NATHAN A. RAY  
LAWRENCE J. WHITNEY  
Counsel for Appellant

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COPY

DANIEL M. HOPKINSON  
**IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT**

2008 FEB -4 AM 7:48

SUMMIT COUNTY  
THE STATE OF OHIO  
DEPT. OF COURTS

Case No. CR 07 04 1294

vs.

PHILLIP L. JONES  
PAGE ONE OF TWO

**JOURNAL ENTRY**

THIS DAY, to-wit: The 30<sup>th</sup> day of January, A.D., 2008, now comes the Prosecuting Attorney on behalf of the State of Ohio, the Defendant, PHILLIP L. JONES, having previously pled NOT GUILTY to the charges to the original indictment on May 9, 2007, and pled NOT GUILTY to the Specifications contained in the Supplement One to Indictment on October 24, 2007; being in Court with counsel, KERRY O'BRIEN and DONALD HICKS, for sentencing hearing pursuant to O.R.C. 2929.19. The Defendant was afforded all rights pursuant to Crim. R. 32. The Court has considered the record, oral statements, as well as the principles and purposes of sentencing under O.R.C. 2929.11, and the seriousness and recidivism factors under O.R.C. 2929.12.

The Court finds that the Defendant heretofore on December 17, 2007 was found GUILTY by a Jury of AGGRAVATED MURDER, as contained in Count One (1) of the Indictment, with DEATH SPECIFICATION ONE TO COUNT ONE of the Supplement One to Indictment, and with REPEAT VIOLENT OFFENDER SPECIFICATION TWO TO COUNT ONE of the Supplement One to Indictment; GUILTY of the crime of MURDER, as contained in Count Two (2) of the Indictment, with REPEAT VIOLENT OFFENDER SPECIFICATION ONE TO COUNT TWO of the Supplement One to Indictment; and GUILTY of the crime of RAPE, as contained in Counts Three (3) and Four (4) of the Indictment, with REPEAT VIOLENT OFFENDER SPECIFICATION ONE TO COUNT THREE of the Supplement One to Indictment, and REPEAT VIOLENT OFFENDER SPECIFICATION ONE TO COUNT FOUR of the Supplement One to Indictment, which offenses occurred after July 1, 1996, and the Court found the Defendant guilty of same.

Thereupon, on January 11, 2008, the Jury having unanimously found by proof beyond a reasonable doubt that the aggravating circumstance the Defendant was found Guilty of committing outweighed the mitigating factors as to the charge of AGGRAVATED MURDER, as to the death of Susan Christian Yates, as contained in Count One (1) of the Indictment, with DEATH SPECIFICATION ONE TO COUNT ONE. Based on the above findings, the Jury recommended "Death" for the Defendant on Count One (1) of the Indictment.

Thereupon, the Court inquired of the said Defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

IT IS THEREFORE ORDERED AND ADJUDGED BY THIS COURT that the Defendant, PHILLIP L. JONES, be committed to the Ohio Department of Rehabilitation and Correction for punishment of the crime of AGGRAVATED MURDER, as to the death of Susan Christian Yates, as contained in Count One (1) of the Indictment, Ohio Revised Code Section 2903.01(B), a special felony, with Specification One to Count One **the sentence is DEATH**; that he serve a period of Ten (10) Years for REPEAT VIOLENT OFFENDER SPECIFICATION ONE TO COUNT THREE, and Ten (10) Years for REPEAT VIOLENT OFFENDER SPECIFICATION ONE TO COUNT FOUR, and that he serve Ten (10) Years for punishment of the crime of RAPE, on each of two (2) counts, Ohio

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Revised Code Section 2907.02(A)(2), felonies of the first (1<sup>st</sup>) degree, and that the said Defendant pay the costs of this prosecution for which execution is hereby awarded; said monies to be paid to the Summit County Clerk of Courts, 205 South High Street, Akron, Ohio 44308-1662.

IT IS FURTHER ORDERED that the Court, pursuant to Section 2941.25(A), Ohio Revised Code, declines to sentence said Defendant on the charge of MURDER, as contained in Count Two (2) of the Indictment, with REPEAT VIOLENT OFFENDER SPECIFICATION ONE TO COUNT TWO, Ohio Revised Code Section 2903.02(B), a special felony, for the reason that said offense is merged with the charge of AGGRAVATED MURDER, as contained in Count One (1). Thereupon, the Court was precluded from imposing a sentence on the REPEAT VIOLENT OFFENDER SPECIFICATION TWO TO COUNT ONE pursuant to Revised Code 2929.14(D)(2).

IT IS FURTHER ORDERED that the sentence imposed in Counts Three (3) and Four (4) be served CONSECUTIVELY with each other.

IT IS FURTHER ORDERED that the sentence imposed on each of the two (2) REPEAT VIOLENT OFFENDER SPECIFICATIONS be served CONCURRENTLY with each other, but CONSECUTIVELY with the sentence imposed in Counts Three (3) and Four (4), for a total of thirty (30) years.

Pursuant to R.C. 2967.28, after release from prison, the Defendant is ordered subject to post-release control to the extent the parole board may determine, as provided by law. The Defendant is further Ordered to pay all prosecution costs, including any fees permitted, pursuant to O.R.C. 2929.18(A)(4).

IT IS FURTHER ORDERED that credit for time served is to be calculated by the Adult Probation Department, and will be forthcoming in a subsequent journal entry.

Upon consideration of the factors set forth in R.C. 2950.09(B)(2) and the evidence presented herein, the Court FINDS by clear and convincing evidence that the Defendant engaged in acts which indicate the Defendant is a TIER III SEX OFFENDER, subject to community notification.

Pursuant to R.C. 2950.09(C), the Court therefore DETERMINES and ADJUDICATES that the Defendant is a TIER III SEX OFFENDER, and all parties stipulate to the Defendant being a TIER III SEX OFFENDER, subject to community notification.

Defendant is required to register in person with the sheriff of the county in which the Defendant establishes residency within 3 days of coming into that county. The Defendant is also required to register in person with the sheriff of the county in which the Defendant establishes a place of education or employment immediately upon coming into that county. If the Defendant establishes a place of education or place of employment in another state but maintains a residence here, the Defendant is also required to register in person with the sheriff or other appropriate official in that other state immediately upon coming into that state.

After the initial date of registration, the Defendant is required to periodically verify his residence address, place of employment and/or place of education at the county sheriff's office no earlier than 10 days prior to Defendant's verification date.

If the Defendant changes residence address, place of employment, and/or place of education, the Defendant shall provide written notice in person of that change to the sheriff with whom the Defendant most recently registered, and to the sheriff in the county in which the Defendant intends to reside, or establish a place of employment, and/or place of education at least 20 days prior to any change and no later than 3 days after change of employment.

The Defendant shall provide written notice in person, within 3 days, of any change in vehicle information, email addresses, internet identifiers, or telephone numbers registered to or used by the Defendant, to the sheriff with whom the Defendant has most recently registered.

The Defendant is required to fulfill these requirements for life with in-person verification every 90 days.

Failure to register, failure to verify residence at the specified times or failure to provide notice of a change in residence address or other required information as described above will result in criminal prosecution.

COPY

IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT

THE STATE OF OHIO )  
 )  
 vs. )  
 )  
 PHILLIP L. JONES )  
 PAGE TWO OF TWO )

Case No. CR 07 04 1294

JOURNAL ENTRY

You have the right, under R.C. 2950.031 or 2950.032 to challenge your Tier classification for an offense committed prior to January 1, 2008. In order to challenge your classification, a petition must be filed within 60 days of this Notice.

The Official in charge of the Defendant's correctional facility, or designee thereof, is hereby ORDERED to enter the within determination in the Defendant's institutional record and IS FURTHER ORDERED to cause a DNA specimen to be collected in accordance with R.C. 2901.07, to collect all items set forth in R.C. 2950.03(C), and forward them to the Bureau of Criminal Identification, and to Notify the Defendant of all applicable Registration duties as set forth in R.C. 2950.03.

THEREUPON, the Court informed the Defendant of his right to appeal pursuant to Rule 32A2, Criminal Rules of Procedure, Ohio Supreme Court, at which time the Defendant expresses his intent to appeal, and further, the Court appoints Attorney LAWRENCE WHITNEY and Attorney NATHAN RAY to represent the Defendant for purposes of appeal, as the Defendant is in indigent circumstances, and unable to employ counsel.

IT IS FURTHER ORDERED that the Defendant is to be conveyed by the Sheriff of Summit County, Ohio, within Five (5) Days to the CORRECTIONAL RECEPTION CENTER at Orient, Ohio, for immediate transport to the SOUTHERN OHIO CORRECTIONAL FACILITY as Lucasville, Ohio, and that he be there safely kept until the 30<sup>th</sup> day of January, 2009, on which day, within an enclosure, inside the walls of said SOUTHERN OHIO CORRECTIONAL FACILITY, prepared for that purpose, according to law, the said Defendant PHILLIP L. JONES, shall be administered a lethal injection by the Warden of the said SOUTHERN OHIO CORRECTIONAL FACILITY, or in the case of the Warden's death or inability, or absence, by a Deputy Warden of said Institution; that the said Warden or his duly authorized Deputy, shall administered a lethal injection until the Defendant, PHILLIP L. JONES, is DEAD.

APPROVED:  
January 30, 2008  
jam

  
MARY F. SPICER, Judge  
Court of Common Pleas  
Summit County, Ohio

**COPY**

172

cc: **Prosecutor Becky Doherty/Brian LoPrinzi**  
**Criminal Assignment**  
**Attorney Kerry O'Brien #15**  
**Attorney Donald Hicks #46**  
**Attorney Nathan Ray #5**  
**Attorney Lawrence Whitney #5**  
**Adult Probation Department**  
**Court Convey**  
**Registrar's Office**  
**SCJ, Barb Perkins**

000000

COPY

DANIEL M. HERRIGAN

2008 JAN 30 PM 1:45

SUMMIT COUNTY  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

STATE OF OHIO

Plaintiff

-vs-

PHILLIP L. JONES

Defendant

CASE NO. CR 2007 04 1294

JUDGE SPICER

OPINION OF THE COURT  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
REGARDING IMPOSITION  
OF DEATH PENALTY

On December 17, 2007, Defendant Phillip L. Jones was convicted of Aggravated Murder and the Death Specification involving the killing of Susan Christian Yates. Thereafter, the jury proceeded to the Mitigation or Sentencing Phase on Count I, the Aggravated Murder. For purposes of this opinion, the Defendant was convicted of purposely causing the death of Susan Yates while committing or attempting to commit or while fleeing immediately after committing or attempting to commit Rape. In addition, the jury convicted the Defendant of the Aggravating Circumstance, that being committing or attempting to commit or in fleeing immediately after committing or attempting to commit Rape, and found Defendant was the principal offender in the commission of the Aggravated Murder.

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As per the Aggravating Circumstance:

(1) The Aggravated Murder was committed while Defendant was committing or attempting to commit, or fleeing immediately after committing or attempting to commit Rape, and Defendant was the principal offender in the commission of the Aggravated Murder of Susan Christian Yates.

On the 22<sup>nd</sup> day of April, 2007, in Akron Summit County, Ohio, the Defendant drove Susan Yates to Mt. Peace Cemetery, a place where he previously worked and where his father is buried. He then engaged in sexual conduct, namely: vaginal and anal intercourse. Defendant testified that the vaginal intercourse was consensual, during which Susan Yates requested he strangle her for the purpose of enhancing her sexual gratification. He admitted to complying with her request, but without intent to kill. The cause of death was Asphyxia by Strangulation.

The coroner's report revealed:

The evidence of Asphyxia by Strangulation:

- A. Dermal abrasions of neck, complex.
- B. Contusion of deep neck structures.
- C. Fractures of the hyoid bone and thyroid cartilage.
- D. Facial conjunctival and scleral petechial.

The evidence of Sexual Assault:

- A. Contusion of the perivaginal, perianal and perirectal soft tissues.
- B. Deep pelvic perineal musculature contusion.
- C. Foreign body recovered from fecal material of rectum.

There was blunt force trauma of the head:

- A. Abrasion and contusion of the face and tongue.
- B. Scalp contusions, multifocal.
- C. Subdural hemorrhage, small and subarachnoid hemorrhage, mild.

There was blunt force trauma of the torso and extremities with multifocal abrasions and contusions.

The Defendant fled thereafter, leaving the body in the cemetery until reported by a jogger in the early morning of April 23, 2007. The autopsy evidence revealed a forceful, brutal, violent rape and strangulation of Susan Christian Yates. In addition to the fresh wounds, the clothes, including bra, were torn. Buttons were scattered and recovered and her neck chain was broken.

Pursuant to 2929.64(B) the jury, having found the Defendant guilty of the Aggravated Murder while committing and fleeing immediately after committing a Rape, of which Defendant was the principal offender, made the recommendation of Death, having found the Aggravating Circumstance of the Rape outweighing any mitigating factors offered as present in this case.

The defense offered the following factors as acting in mitigation of the death sentence at the Mitigation or Sentence Hearing:

(1) The Defendant is the youngest of eight (8) children raised in a troubled family. The parents were engaged in domestic violence, the mother having left and the Defendant cared for by close relatives for a substantial period of time. The parents divorced, but later remarried. Defendant's father died in 2006. In spite of the difficulties at home, Defendant remained close to both parents and took his father's death hard.

The Defendant's older siblings were involved with drugs and conflicts with the law, all of which Defendant observed and was exposed to in his formative years.

(2) Defendant was born with a "lazy eye" and early on, suffered humiliation and teasing by his siblings as well as peers. In his early teens, effort was made to correct the condition, which proved to be helpful, but not totally corrective.

(3) Defendant has a history of behavioral and conduct problems starting in early childhood and following him into adulthood. He has been involved with the juvenile and adult prison systems.

At age 7 or 8, Defendant swallowed gasoline in a suicidal attempt and attempted to hang himself while committed to the Department of Youth Services.

Throughout his placements and incarcerations he has received psychiatric evaluations and on occasion, prescribed psychotropic medications.

(4) The Defendant's intellectual capacity is that of low average capacity. While in grade school, he was considered to have a learning disability and attended Special Ed classes. He was a behavior problem throughout and ultimately dropped out.

(5) As a child, the Defendant was brought up in the church and has continued that interest to date. Several pastors testified that the Defendant, until his incarceration, was engaged and involved in church attendance. He continues that interest while incarcerated and obtained his ministers certification from Universal Life Church Modesto, California through mail correspondence. His sister and ministers testified as to Defendant's desire to help others and presently attest to his offers to extend his ministerial services to others both in and out of jail.

(6) The Defendant's two children, ages 16 and 18 years, believe Defendant to be a good father, who communicated with them, even throughout his 14 years in prison. The children's mother reported that the Defendant sent money from his prison earnings to assist with their support. The children, their mother, Defendant's mother and family note Defendant's good qualities and love him.

The Court, having conducted its own independent analysis as to whether the aggravating circumstance in this case outweigh the mitigating factors beyond a reasonable doubt, finds that the mitigating factors considered are clearly outweighed by the aggravating circumstance by proof beyond a reasonable doubt.

The Legislature of the State of Ohio has seen fit to make certain felony murders aggravated circumstances, thereby rendering the possibility of a death sentence to anyone who commits an aggravated murder during the commission of these felonies. In this case, the underlying felony is Rape. The aggravation herein is heightened by the vicious, violent and forceful nature of the sexual conduct involved.

On the other hand, the mitigating factors of Defendant's history, from childhood on, including his chronic behavioral problems, diagnosis and treatment, religious pursuits and remorse do not justify nor excuse the criminal conduct exhibited by the Defendant in this case.

In conclusion, the Defendant knew right from wrong then and now. He is not considered to be mentally ill or mentally retarded. Throughout his history, he has been diagnosed as an Antisocial Personality Disorder with Mood Disorder NOS, and history of Alcohol and Cannabis Abuse. He has a history of prior sexual offenses and multiple incarcerations.

COPY

Therefore, upon consideration of the relevant evidence raised at trial, the relevant testimony, other evidence, the unsworn statement of the Defendant, the arguments of counsel, it is the judgment of this Court that the aggravated circumstance in Count I does outweigh the mitigating factors by proof beyond a reasonable doubt.

1/30/08  
DATE

Mary F. Spicer  
JUDGE MARY F. SPICER

I hereby certify that a copy of the foregoing opinion was hand delivered to Attorney Becky Doherty, Attorney Brian Loprenzi, Attorney Kerry M. O'Brien and Attorney Donald R. Hicks this 30th day of January, 2008.

Mary F. Spicer  
JUDGE MARY F. SPICER

I also hereby certify that a copy of the foregoing opinion was duly mailed by ordinary U.S. Mail to the Clerk of Courts of the Supreme Court of Ohio, 65 S. Front Street, Columbus, OH 43215, this 30th day of January, 2008.

Mary F. Spicer  
JUDGE MARY F. SPICER

MFS:lcb  
07-1294-Opinion

## **2925.42 Criminal forfeiture of property relating to felony drug abuse offense.**

(A) If a person is convicted of or pleads guilty to a felony drug abuse offense, or a juvenile is found by a juvenile court to be a delinquent child for an act that, if committed by an adult, would be a felony drug abuse offense, and derives profits or other proceeds from the offense or act, the court that imposes sentence or an order of disposition upon the offender or delinquent child, in lieu of any fine that the court is otherwise authorized or required to impose, may impose upon the offender or delinquent child a fine of not more than twice the gross profits or other proceeds so derived.

(B) Notwithstanding any contrary provision of section 3719.21 of the Revised Code, all fines imposed pursuant to this section shall be paid by the clerk of the court to the county, municipal corporation, township, park district, as created pursuant to section 511.18 or 1545.01 of the Revised Code, or state law enforcement agencies in this state that were primarily responsible for or involved in making the arrest of, and in prosecuting, the offender. However, no fine so imposed shall be paid to a law enforcement agency unless the agency has adopted a written internal control policy under division (F) (2) of section 2925.03 of the Revised Code that addresses the use of the fine moneys that it receives under this division and division (F)(1) of section 2925.03 of the Revised Code. The fines imposed and paid pursuant to this division shall be used by the law enforcement agencies to subsidize their efforts pertaining to drug offenses, in accordance with the written internal control policy adopted by the recipient agency under division (F)(2) of section 2925.03 of the Revised Code.

(C) As used in this section:

(1) "Law enforcement agencies" includes, but is not limited to, the state board of pharmacy and the office of a prosecutor.

(2) "Prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

Effective Date: 01-01-2002; 07-01-2007

000313

[Next Part>>](#)

Evid. R. Rule 801

Baldwin's Ohio Revised Code Annotated [Currentness](#)

Ohio Rules of Evidence (Refs & Annos)

\*[Article VIII. Hearsay](#)

➔[Evid R 801 Definitions](#)

The following definitions apply under this article:

**(A) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

**(B) Declarant.** A "declarant" is a person who makes a statement.

**(C) Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

**(D) Statements which are not hearsay.** A statement is not hearsay if:

**(1) Prior statement by witness.** The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with declarant's testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification.

**(2) Admission by party-opponent.** The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

CREDIT(S)

(Adopted eff. 7-1-80; amended eff. 7-1-07)

STAFF NOTES

**1980:**

The ultimate determination of whether statements or conduct are admissible or not for hearsay purposes is substantially the same as prior Ohio law, with two notable exceptions. There are in this rule significant departures as to definition and characterization of statements and conduct as hearsay.

000314

**RULE 803. Hearsay Exceptions; Availability of Declarant Immaterial**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then existing, mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of entry in record kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

**(8) Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

**(9) Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirement of law

**(10) Absence of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 901(B)(10) or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

**(11) Records of religious organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

**(12) Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

**(13) Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

**(14) Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

**(15) Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned Treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation concerning personal or family history.** Reputation among members of the declarant's family by blood, adoption, or marriage or among the declarant's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of the declarant's personal or family history.

(20) **Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) **Reputation as to character.** Reputation of a person's character among the person's associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgment as to personal, family, or general history, or boundaries.** Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

#### **Staff Note (July 1, 2006 Amendment)**

The 2006 amendment adds a new hearsay exception for statements in reliable learned treatises that are relied on by expert witnesses on direct examination or are

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## **2945.59 Proof of defendant's motive.**

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

Effective Date: 10-01-1953

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**RULE 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes**

**(A) Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, subject to the following exceptions:

**(1) Character of accused.** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

**(2) Character of victim.** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible; however, in prosecutions for rape, gross sexual imposition, and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable.

**(3) Character of witness.** Evidence of the character of a witness on the issue of credibility is admissible as provided in Rules 607, 608, and 609.

**(B) Other crimes, wrongs or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[Effective: July 1, 1980; amended effectively July 1, 2007.]

**RULE 52. Harmless Error and Plain Error**

**(A) Harmless error.** Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

**(B) Plain error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

[Effective: July 1, 1973.]

## **2929.06 Resentencing hearing.**

(A) If a sentence of death imposed upon an offender is set aside, nullified, or vacated because the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by section 2929.05 of the Revised Code, is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, is set aside, nullified, or vacated pursuant to division (C) of section 2929.05 of the Revised Code, or is set aside, nullified, or vacated because a court has determined that the offender is mentally retarded under standards set forth in decisions of the supreme court of this state or the United States supreme court, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall impose upon the offender a sentence of life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of section 2929.03 of the Revised Code, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section, the court shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 or under section 2909.24 of the Revised Code at the time the offender committed the offense for which the sentence of death was imposed. Nothing in this division regarding the resentencing of an offender shall affect the operation of section 2971.03 of the Revised Code.

(B) Whenever any court of this state or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because of error that occurred in the sentencing phase of the trial and if division (A) of this section does not apply, the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing. If the offender was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing. At the hearing, the court or panel shall follow the procedure set forth in division (D) of section 2929.03 of the Revised Code in determining whether to impose upon the offender a sentence of death, a sentence of life imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment. If, pursuant to that procedure, the court or panel determines that it will impose a sentence other than a sentence of death, the court or panel shall impose upon the offender one of the sentences of life imprisonment that could have been imposed at the time the offender committed the offense for which the sentence of death was imposed, determined as specified in this division, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of section 2929.03 of the Revised Code, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section, the court or panel shall

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impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court or panel shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 or under section 2909.24 of the Revised Code at the time the offender committed the offense for which the sentence of death was imposed.

(C) If a sentence of life imprisonment without parole imposed upon an offender pursuant to section 2929.021 or 2929.03 of the Revised Code is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of life imprisonment without parole that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, the trial court that sentenced the offender shall conduct a hearing to resentence the offender to life imprisonment with parole eligibility after serving twenty-five full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(D) Nothing in this section limits or restricts the rights of the state to appeal any order setting aside, nullifying, or vacating a conviction or sentence of death, when an appeal of that nature otherwise would be available.

(E) This section, as amended by H.B. 184 of the 125th general assembly, shall apply to all offenders who have been sentenced to death for an aggravated murder that was committed on or after October 19, 1981, or for terrorism that was committed on or after May 15, 2002. This section, as amended by H.B. 184 of the 125th general assembly, shall apply equally to all such offenders sentenced to death prior to, on, or after March 23, 2005, including offenders who, on March 23, 2005, are challenging their sentence of death and offenders whose sentence of death has been set aside, nullified, or vacated by any court of this state or any federal court but who, as of March 23, 2005, have not yet been resentenced.

Effective Date: 07-29-1998; 03-23-2005; 2007 SB10 01-01-2008

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## **2929.05 Supreme court review upon appeal of sentence of death.**

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall review upon appeal the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They also shall review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

A court of appeals that reviews a case in which the sentence of death is imposed for an offense committed before January 1, 1995, shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

(B) The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed and, except as otherwise provided in this section, shall conduct the review in accordance with the Rules of Appellate Procedure.

(C) At any time after a sentence of death is imposed pursuant to section 2929.022 or 2929.03 of the Revised Code, the court of common pleas that sentenced the offender shall vacate the sentence if the offender did not present evidence at trial that the offender was not eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced and if the offender shows by a preponderance of the evidence that the offender was less than eighteen years of age at the time of the commission of the aggravated murder for which the offender was sentenced. The court is not required to hold a hearing on a motion filed pursuant to this division unless the court finds, based on the motion and any supporting information submitted by the defendant, any information submitted by the prosecuting attorney, and the record in the case, including any previous hearings and orders, probable cause to believe that the defendant was not eighteen years of age or older at the time of the commission of the aggravated murder for which the defendant was sentenced to death.

Effective Date: 07-29-1998

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## **2929.021 Notice to supreme court of indictment charging aggravated murder with aggravating circumstances.**

(A) If an indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the clerk of the court in which the indictment is filed, within fifteen days after the day on which it is filed, shall file a notice with the supreme court indicating that the indictment was filed. The notice shall be in the form prescribed by the clerk of the supreme court and shall contain, for each charge of aggravated murder with a specification, at least the following information pertaining to the charge:

- (1) The name of the person charged in the indictment or count in the indictment with aggravated murder with a specification;
- (2) The docket number or numbers of the case or cases arising out of the charge, if available;
- (3) The court in which the case or cases will be heard;
- (4) The date on which the indictment was filed.

(B) If the indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the defendant pleads guilty or no contest to any offense in the case or if the indictment or any count in the indictment is dismissed, the clerk of the court in which the plea is entered or the indictment or count is dismissed shall file a notice with the supreme court indicating what action was taken in the case. The notice shall be filed within fifteen days after the plea is entered or the indictment or count is dismissed, shall be in the form prescribed by the clerk of the supreme court, and shall contain at least the following information:

- (1) The name of the person who entered the guilty or no contest plea or who is named in the indictment or count that is dismissed;
- (2) The docket numbers of the cases in which the guilty or no contest plea is entered or in which the indictment or count is dismissed;
- (3) The sentence imposed on the offender in each case.

Effective Date: 10-19-1981

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## **2929.03 Imposition of sentence for aggravated murder.**

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

(1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:

(a) Life imprisonment without parole;

(b) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(c) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(d) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(e) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (A)(1)(a) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be served pursuant to that section.

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

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

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more

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specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 of the Revised Code, the trial court shall impose sentence on the offender as follows:

(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose one of the following sentences on the offender:

(i) Life imprisonment without parole;

(ii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(iii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iv) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(v) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (C)(1)(a)(i) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

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

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

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

(ii) Except as provided in division (C)(2)(a)(iii) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of death or life imprisonment

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without parole on the offender pursuant to division (C)(2)(a)(i) of this section, the penalty to be imposed on the offender shall be an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.

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

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

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

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

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

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The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

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

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

(b) Except as provided in division (D)(2)(c) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the jury does not recommend a sentence of life imprisonment without parole pursuant to division (D)(2)(a) of this section, to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.

(c) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, life imprisonment with parole eligibility after serving thirty full years of imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment imposed as described in division (D)(2)(b) of this section or a sentence of life imprisonment without parole imposed under division (D)(2)(c) of this section, the sentence shall be served pursuant to section 2971.03 of the Revised Code. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

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

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

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

(i) Life imprisonment without parole;

(ii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(iv) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (D)(3)(a)(i) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

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

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

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

(a) Life Imprisonment without parole;

(b) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

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(d) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (E)(2)(a) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

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

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

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

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

Effective Date: 01-01-1997; 03-23-2005; 2007 SB10 01-01-2008

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## **2903.01 Aggravated murder.**

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

(1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.

(2) It is the offender's specific purpose to kill a law enforcement officer.

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(G) As used in this section:

(1) "Detention" has the same meaning as in section 2921.01 of the Revised Code.

(2) "Law enforcement officer" has the same meaning as in section 2911.01 of the Revised Code.

Effective Date: 05-15-2002

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## **2929.02 Murder penalties.**

(A) Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022, 2929.03, and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B)(1) Except as otherwise provided in division (B)(2) or (3) of this section, whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life.

(2) Except as otherwise provided in division (B)(3) of this section, if a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code, the victim of the offense was less than thirteen years of age, and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the court shall impose an indefinite prison term of thirty years to life pursuant to division (B) (3) of section 2971.03 of the Revised Code.

(3) If a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code and also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information that charged the murder, the court shall impose upon the offender a term of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(4) In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

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

(D)(1) In addition to any other sanctions imposed for a violation of section 2903.01 or 2903.02 of the Revised Code, if the offender used a motor vehicle as the means to commit the violation, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(2) As used in division (D) of this section, "motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

Effective Date: 07-29-1998; 04-04-2007; 2007 SB10 01-01-2008

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## **2929.022 Sentencing hearing - determining existence of aggravating circumstance.**

(A) If an indictment or count in an indictment charging a defendant with aggravated murder contains a specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, the defendant may elect to have the panel of three judges, if the defendant waives trial by jury, or the trial judge, if the defendant is tried by jury, determine the existence of that aggravating circumstance at the sentencing hearing held pursuant to divisions (C) and (D) of section 2929.03 of the Revised Code.

(1) If the defendant does not elect to have the existence of the aggravating circumstance determined at the sentencing hearing, the defendant shall be tried on the charge of aggravated murder, on the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, and on any other specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code in a single trial as in any other criminal case in which a person is charged with aggravated murder and specifications.

(2) If the defendant does elect to have the existence of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code determined at the sentencing hearing, then, following a verdict of guilty of the charge of aggravated murder, the panel of three judges or the trial judge shall:

(a) Hold a sentencing hearing pursuant to division (B) of this section, unless required to do otherwise under division (A)(2)(b) of this section;

(b) If the offender raises the matter of age at trial pursuant to section 2929.023 of the Revised Code and is not found at trial to have been eighteen years of age or older at the time of the commission of the offense, conduct a hearing to determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. After conducting the hearing, the panel or judge shall proceed as follows:

(i) If that aggravating circumstance is proven beyond a reasonable doubt or if the defendant at trial was convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence according to division (E) of section 2929.03 of the Revised Code.

(ii) If that aggravating circumstance is not proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance, except as otherwise provided in this division, the panel or judge shall impose sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender. If that aggravating circumstance is not proven beyond a reasonable doubt, the defendant at trial was not convicted of any other specification of an aggravating circumstance, the victim of the aggravated murder was less than thirteen years of age, and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the panel or judge shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

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(B) At the sentencing hearing, the panel of judges, if the defendant was tried by a panel of three judges, or the trial judge, if the defendant was tried by jury, shall, when required pursuant to division (A)(2) of this section, first determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. If the panel of judges or the trial judge determines that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt or if they do not determine that the specification is proven beyond a reasonable doubt but the defendant at trial was convicted of a specification of any other aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge and trial jury shall impose sentence on the offender pursuant to division (D) of section 2929.03 and section 2929.04 of the Revised Code. If the panel of judges or the trial judge does not determine that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge shall terminate the sentencing hearing and impose sentence on the offender as follows:

(1) Subject to division (B)(2) of this section, the panel or judge shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the victim of the aggravated murder was less than thirteen years of age and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the panel or judge shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

Effective Date: 10-19-1981; 2007 SB10 01-01-2008

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## **2929.023 Raising the matter of age at trial.**

A person charged with aggravated murder and one or more specifications of an aggravating circumstance may, at trial, raise the matter of his age at the time of the alleged commission of the offense and may present evidence at trial that he was not eighteen years of age or older at the time of the alleged commission of the offense. The burdens of raising the matter of age, and of going forward with the evidence relating to the matter of age, are upon the defendant. After a defendant has raised the matter of age at trial, the prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the defendant was eighteen years of age or older at the time of the alleged commission of the offense.

Effective Date: 10-19-1981

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## **2929.04 Death penalty or imprisonment - aggravating and mitigating factors.**

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

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

(2) The offense was committed for hire.

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

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

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

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

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

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

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the

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commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

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

(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

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

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

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(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

Effective Date: 05-15-2002

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## **2953.21 Post conviction relief petition.**

(A)(1)(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, and any person who has been convicted of a criminal offense that is a felony, who is an inmate, and for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A) (1) of this section shall be filed no later than one hundred eighty days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than one hundred eighty days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence

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imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of the court. The clerk of the court in which the petition is filed immediately shall forward a copy of the petition to the prosecuting attorney of that county.

(C) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(F) At any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings. The petitioner may amend the petition with leave of court at any time thereafter.

(G) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (E) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. The court also may make supplementary orders to the relief granted, concerning such matters as arraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded

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from an appellate court pursuant to a request under division (E) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(H) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(I)(1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (I)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (I)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (I) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (I)(2) of this section.

(J) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

Effective Date: 10-29-2003; 07-11-2006

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