

**IN THE SUPREME COURT OF OHIO**  
**Supreme Court Case Number 08-0525**

ORIGINAL

**STATE OF OHIO**

Appellee

v.

**PHILLIP L. JONES**

Appellant

On Appeal from the Summit  
County Court of Common Pleas  
Case No. 07 04 1294

**CAPITAL CASE**

**MERIT BRIEF OF APPELLEE**  
**STATE OF OHIO**

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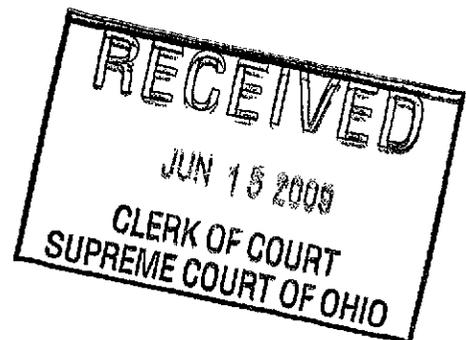
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## STATEMENT OF THE CASE

On December 17, 2007, Appellant, Phillip Jones, was found guilty by a jury of the following offenses: Aggravated Murder, in violation of R.C. 2903.01(B), a special felony with Death and Repeat Violent Offender specifications, Murder, with a Repeat Violent Offender specification, and two counts of Rape, in violation of R.C. 2907.02(A)(2), with Repeat Violent Offender specifications.

On January 11, 2008, following a mitigation hearing, the jury recommended that Jones be sentenced to death for the crime of Aggravated Murder. On February 4, 2008, the trial court accepted the jury's recommendation and sentenced Jones to death as punishment for the Aggravated Murder of Susan Christian Yates.

The trial court also sentenced Jones to ten years on both of the Rape charges, to be served consecutively to each other, and ten years on both of the Repeat Violent Offender specifications accompanying the Rape charges, to be served concurrently to each other, but consecutively to the sentences imposed on the Rape charges, for a total of thirty years. The trial court merged the defendant's conviction for Murder and the accompanying Repeat Violent Offender specification with his death sentence.

Jones now appeals his convictions and death sentence.

## STATEMENT OF THE FACTS

On April 23, 2007, the body of Susan Christian Yates was discovered by a jogger in the Mount Peace Cemetery. (T.p. 1333). Her body was located near a roadway in the Mount Peace Cemetery by the headstones. (T.p.p. 1507; 1558). A small plastic cross was placed over the decedent's eye. (T.p.p. 1522; 1568).

Susan Yates had been vaginally and anally raped and violently strangled. (T.p.p. 1601; 1615). The Appellant, Phillip Jones, was charged in conjunction with the rape and murder of Susan Yates. His semen was found on the decedent's skirt and in vaginal swabs taken from the victim. (T.p. 1836).

The decedent, Susan Christian Yates, was a high school graduate who went on to attend a few years of college. (T.p. 1316). She was the biological mother of two children, a son and a daughter, who were four and nine years old at the time that this case went to trial. Susan Yates had a brother and sister named Lois Christian. (T.p. 1314).

During trial, Lois Christian provided testimony about her sister's life. Lois Christian stated that Susan Yates had an ongoing problem with drugs. (T.p. 1317). Lois further attested that her sister Susan always carried a purse and that she kept a knife in her purse because of her life style. (T.p.p. 1319;1325).

The jogger who discovered the body, Richard Wisneski, attested that he called 911 from a nearby fast food restaurant. (T.p. 1336). Law enforcement officers responded to the call and a homicide investigation ensued. (T.p. 1339).

One of the first officers dispatched to the Mount Peace Cemetery was Akron Police Officer Deborah Stalnaker. (T.p. 1363). The officer spoke with Mr. Wisneski and went to the location where the body was discovered. (T.p. 1335).

Officer Stalnaker testified that she observed a female lying on the ground with a little green, glow-in-the-dark cross across her right eye. (T.p. 1335). The officer concluded that the woman was deceased and therefore called the detective bureau and secured the scene. (T.p.p. 1367-1368).

Akron Police Detective Terrence Hudnall, a sergeant in the crimes against persons unit, testified that he was called to the Mount Peace Cemetery in the early morning of April 23, 2007, after the body of Susan Yates was discovered. (T.p.p. 1861-62). Detective Hudnall was the supervisor on scene. (T.p.p. 1866; 1887). Detective Hudnall spoke with the officers who were already on location, viewed the body, and assisted in processing the scene. (T.p.p. 1866-1867).

While processing the scene, Detective Hudnall found two buttons in the roadway just east of the decedent's body. (T.p. 1868). These buttons were similar to buttons on the dress that the decedent was wearing. (T.p. 1869).

Akron Police Detective David Hayes also responded to the crime scene in his capacity as a member of the crime scene unit. (T.p. 1502). Detective Hayes provided testimony regarding the crime scene and the evidence that was collected.

Detective Hayes described how Susan Yates was found lying off the roadway near some grave markers with a plastic cross laying on her eye. (T.p.p. 1507-1508). He explained that law enforcement officers found a folding knife in the open position near the decedent's right hand. (T.p. 1509).

On April 23, 2007, Detective Donald Frost of the Akron Police Department went to the medical examiner's office to take photographs of the body and to collect evidence released from the medical examiner, including a duplicate plastic cross. (T.p.p. 1686-87; 1690).

Detective Frost also assisted in processing a vehicle which belonged to Phillip Jones. (T.p.p. 1690-1691). He attested that two stains were found in the interior of the vehicle from which swabs were taken and sent out for additional testing. (T.p.p. 1694-99; 1701-02).

Dave Laux, a forensic scientist employed at the Bureau of Criminal Identification and Investigation, tested the swabs that were taken from Appellant's automobile for seminal fluid and found none to be present. (T.p.p. 1760-1762). Laux also conducted tests of the fingernail clippings taken from the victim's hands during the autopsy. (T.p. 1763). The presumptive testing of the decedent's right hand indicated the presence of blood; however, there were no blood stains on her left hand. (T.p. 1764). The clippings from the decedent's right hand were sent to another forensic scientist for further testing. (T.p. 1764).

Laux also tested oral swabs taken from the victim's mouth during the autopsy and no seminal fluid was found. (T.p.p. 1765-1766). However, presumptive testing of vaginal swabs collected by the medical examiner indicated that seminal fluid might be present. (T.p. 1766).

A confirmatory test for the presence of semen demonstrated the presence of spermatozoa. (T.p.p. 1766-67). Laux determined that the sperm were deposited during a recent sexual encounter. (T.p. 1768). After determining that spermatozoa were present, the vaginal swab was submitted for additional DNA testing. (T.p. 1768).

Laux also conducted presumptive testing of the decedent's skirt. (T.p. 1774). This testing indicated the presence of blood and spermatozoa. (T.p.p. 1775-1776). A cutting from the skirt was submitted for additional testing.

Laux also ran presumptive tests of rectal swabs from the victim to test for the presence of seminal fluid. (T.p. 1769). Seminal fluid was not found in the rectal swabs taken from the decedent. (T.p. 1769).

Additionally, several pieces of evidence, including the knife and the plastic cross found on the decedent, were submitted to the Bureau of Criminal Identification and Investigation (BCII) for fingerprint analysis. Earl Gliem, a fingerprint expert employed by BCII, testified that he could not conduct a comparison of fingerprints take from the knife and/or the cross with known prints because there was insufficient ridge detail on the knife and no friction ridge detail on the cross. (T.p.p. 1811-14).

Stacy Violi, a forensic scientist employed at BCII in the serology and DNA division, testified that in the course of her employment she analyzes evidence submitted by law enforcement for the presence of body fluids, semen, blood, saliva, urine or feces and then subsequently conducts DNA testing on those items. (T.p.p. 1820-1822). Violi conducted the DNA analysis in this case. (T.p. 1824).

The results of the DNA testing were as follows: differential extraction of vaginal swabs and cuttings from the decedent's skirt were consistent with the victim and Phillip Jones; DNA profile from the swab of the decedent's right fingernail and a cutting from her skirt were consistent with the victim; and, a DNA profile from breast swabs of the decedent revealed a mixture of at least two individuals—the major contributor was an unknown male and the minor contributor was the victim. (T.p.p. 1834-1835). There was insufficient DNA extracted from the DNA profiles obtained from neck swabs of the decedent and from the plastic cross found on the decedent's right eye to make any kind of comparison. (T.p. 1835).

Violi attested that Phillip Jones cannot be excluded as the source of the semen on the vaginal swabs and cuttings from the skirt. (T.p. 1836). DNA belonging to the Appellant was found on the vaginal swab and on a cutting taken from the decedent's skirt. (T.p. 1853). Violi further attested that, based on the national database provided by the Federal Bureau of

Investigation, the expected frequency of the DNA profile identified in the sperm fraction of the victim's vaginal swabs and the cuttings from her skirt, are one in three sextillion, thirteen quintillion unrelated individuals. (T.p. 1837).

The following day, April 24, 2007, Police Detective Richard Morrison was notified that a female caller had contacted the authorities asking to speak to the detective assigned to the case. (T.p.p. 1397-1399). Detective Morrison was one of the detectives who investigated the death of Ms. Yates. (T.p. 1391).

Detective Morrison immediately responded to the residence of the female caller and spoke with a woman who was later identified as Delores Jones, the wife of the Appellant. (T.p.p. 1339-1440). The detective described Mrs. Jones as being hysterical and noted that she "kept running back and forth, looking at the window and pacing, making sure no one was coming. She was hyperventilating and basically hysterical with me." (T.p. 1400).

Detective Morrison attested that he asked Mrs. Jones, "Do you have something you need to tell me? You called me out." Mrs. Jones responded, "My husband is the one that killed that girl in the cemetery. (T. p.p. 1400-1402). Detective Morrison further testified that he had to tell Mrs. Jones to calm down and he inquired as to how she knew that her husband killed the woman in the cemetery. (T.p.p. 1401-1402). Mrs. Jones told the detective that Phillip had told her that the decedent's name was Susan. (T.p.p. 1401-1402). At that time, the victim's name had not been released and was known only to members of law enforcement. (T.p.p. 1402-1403). Detective Morrison described Mrs. Jones as being paranoid, upset, fearful, and hysterical. (T.p. 1403).

Mrs. Jones was then transported to the police station where she remained fearful. (T.p.p. 1402-1403). Specifically, Detective Morrison testified that Mrs. Jones remained afraid that

Phillip Jones, his family, or friends were going to come and find her. (T.p. 1403). Additionally, Detective Hudnall described Mrs. Jones as being visibly upset, definitely afraid, and almost hyperventilating at the police station. (T.p. 1873).

At the station, Mrs. Jones spoke with the detectives. Detective Hudnall showed Mrs. Jones a plastic cross, which she did not recognize at that time. (T.p. 1875). Mrs. Jones was afraid to return to her home and, therefore, the officers made arrangements for her to stay at the battered woman's shelter and transported her there. (T.p. 1875).

The following day, April 25, 2007, Detective Hudnall was contacted by Delores Jones who indicated that she needed some items from home. (T.p. 1875). Some members of law enforcement took her home so that she could retrieve some personal belongings and then returned her to the shelter. (T.p. 1877).

The next day, a very upset Delores Jones contacted Detective Hudnall and advised him that she found a plastic cross. (T.p. 1878). Detective Hudnall went to the shelter where Mrs. Jones gave him the plastic cross that she found in her jewelry box. (T.p. 1878).

After speaking with Mrs. Jones, law enforcement issued a "BOLO" (be on the look out) for Phillip Jones and he was arrested the same evening. 1423; 1407. Phillip Jones was arrested and transported to the Akron Police Department Detective Bureau for an interview. (Tr. Vol. X, p. 1408). At the time of his arrest, Jones had a scratch on his right shoulder. (Tr. Vol. X, p. 1408). In his wallet, Jones had a card which identified him as a minister, a metal cross, and a business card from Mount Peace Cemetery. (Tr. Vol. X, p.p. 1410-1411). Phillip Jones worked on the maintenance crew at Mount Peace Cemetery from approximately April 2006 to June 2006. (T.p. 1353).

Charletta Jeffries testified regarding the evening of April 24, 2007. She attested that Delores Jones came over to her house, upset, and said, "He did it, he did it." (T.p. 1434). She elaborated that that Mrs. Jones was upset and screaming. (T.p. 1436). She inquired as to whom she was referring and Mrs. Jones replied, "My husband, Phil." (T.p. 1436). When Ms. Jeffries further inquired as to what Phillip had done, Mrs. Jones replied, "Murdered the woman." (T.p. 1436). And, when Ms. Jeffries asked which woman Phillip had murdered, Mrs. Jones answered, "The woman that they found in the cemetery." (T.p. 1436). Ms. Jeffries attested that Mrs. Jones called the police and that an officer arrived within approximately ten minutes. (T.p.p. 1437, 1444).

Mrs. Jones also testified. Mrs. Jones averred that when she came home after working her shift until approximately 10:30 p.m. on the night of April 22, 2007, her husband Phillip Jones was not at home. (T.p.p. 1452-1453). Mrs. Jones unsuccessfully attempted to locate her husband and then went to the nursing home where her mother resides and spent the night. (T.p. 1453).

Mrs. Jones further testified that when she returned home at approximately seven or eight o'clock on the next morning, her husband, Phillip Jones, was home sleeping. (T.p. 1453). She noticed that he had a little scratch on his shoulder and his lip. (T.p. 1454). Mrs. Jones indicated that her husband's demeanor was different that day and that was unusually quiet. (T.p. 1454).

At approximately 4:00 p.m. on April 24, 2007, Mrs. Jones and Phillip Jones had a conversation based on a news broadcast. (T.p. 1457). This conversation caused Mrs. Jones to be fearful and, in a state of fear, drove to her friend Charletta's home. (T.p.p. 1458-1459). She told Charletta what Phillip had told her during the conversation and then the two women called the police. (T.p.p. 1459-1460). Shortly after they placed the call, Detective Morrison arrived. (T.p. 1461).

Mrs. Jones was taken to the police station where she spoke with the detectives. (T.p. 1462). She testified that one of the detectives showed her a plastic cross which she did not recognize at the time. (T.p. 1462). Mrs. Jones was scared and did not return to her home after giving her statement; instead, she went to the battered women's shelter, where she stayed for approximately ten days. (T.p.p. 1463-64; 1468).

On April 25, 2009, Mrs. Jones contacted the detectives and advised them that she needed some items from her home and the law enforcement officers took her there so she could retrieve some items to take to the shelter, including clothing and a jewelry box. (T.p.p. 1464, 1875).

On the following day, Mrs. Jones contacted the police after finding a plastic cross in her jewelry box which was similar to the one that the detective had shown her at the station. (T.p.p. 1463-1465). She explained that Phillip had given her the cross approximately one year prior and that it glowed in the dark. (T.p. 1467). She further averred that Phillip also had a cross just like it. (T.p.p. 1467-1468).

Doctor George Sterbenz, a medical examiner for the Summit County Medical Examiner's Office, testified regarding the autopsy of Susan Yates. Dr. Sterbenz attested that the decedent sustained external and internal neck injuries, fractures of the internal neck structures, and facial and eye petechia. (T.p. 1615). Susan Yates also suffered internal injuries to her anus and vagina, which are indicative of sexual assault with something long and rigid. (T. p. 1625).

Doctor opined that the cause of death was asphyxia by strangulation and that the manner of death was ruled a homicide. (T.p.p. 1630-1631). The doctor characterized the asphyxia in this case as a violent act, rather than a recreational act. (T.p. 1672).

Thea Johnson testified regarding an incident that occurred on April 16, 1990. Ms. Johnson averred that, on that evening, Phillip Jones came to her residence looking for her sister.

(T.p. 1907). Thea Johnson got in the vehicle that Phillip Jones was driving along with two of his friends. (T.p.p. 1907-1908). Phillip Jones dropped his friends off and then drove Thea to a wooded area near Elizabeth Park. (T.p. 1908).

Thea testified that Phillip Jones pulled the car over and moved closer to her. (T.p. 1908-1909). Thea tried to fight him off, but Phillip Jones put his hands around her neck. (T.p. 1908-1909). She testified that she cried and begged him not to hurt her. (T.p. 1909).

When Thea Johnson tried to escape, Phillip Jones pulled her out of the car and dragged into the wooded area. (T.p. 1909). While outside of the vehicle Phillip Jones physically attacked Thea Johnson and tore her clothing. (T.p. 1910). Phillip Jones attempted anal penetration. (T.p.p. 1912; 1914). Phillip Jones threatened to kill Thea Johnson if she said anything. (T.p. 1910).

Phillip Jones took Thea Johnson back to the vehicle where he beat, choked, and vaginally raped her. (T.p.p.1912, 1914). Phillip Jones threatened to kill Thea Johnson if she ever told anyone. (T.p. 1916).

Jones eventually took Thea Johnson home. (T.p. 1916). Johnson told family members about the incident and the police were called and Johnson went to the hospital. (Tr. 1916).

Jones was indicted regarding the incident. A plea negotiation was reached regarding the case with Thea Johnson whereby Phillip Jones pled guilty to two counts of attempted rape and served time in prison. (T.p.p. 1918; 1927).

During trial, Phillip Jones testified. He attested that, in the evening hours of April 22, 2007, he observed a female involved in an altercation with a male on Balch Street in Akron, Ohio. T.p. 1966). He pulled over to offer assistance to the female. (T.p. 1968). Once he pulled

over, he recognized the female as someone he knew only as Susan. (T.p. 1968). He broke up the fight and told Susan to get in his car.

He averred that, in the car, Susan used her knife to cut cocaine which she inserted into a cigarette. (T.p.p. 1969-1970). Jones stated that he drove Susan to the Channelwod area to see Deitra Snodgrass because he thought she might know someone from whom they could purchase crack. (T.p.p. 1970-1971). Jones testified that he and Susan went to Snodgrass' apartment and spoke with her; however, they left without any drugs. (T.p. 1972).

Jones testified that after leaving the apartment, he and Susan returned to the vehicle and purchased crack cocaine from someone on the street. (T.p. 1974). They then went to a local drive through to purchase beer and wine. (T.p. 1974). Jones explained that he then took Susan to Mount Peace Cemetery where Susan got out of the car and again used her knife to cut crack and make "crack cigarettes." (T.p. 1980).

According to Jones, he and Susan Yates engaged in consensual vaginal sex on a blanket that he removed from the trunk of his car. (T.p.p 1981-1984). Jones denied engaging in anal sex with Susan Yates. (T.p. 1984).

Jones averred that during this consensual sexual encounter, at her request, he restrained her breathing by putting his hands around her throat. (T.p. 1985). As he placed pressure on her neck, Jones heard a crackling or popping sound and then noticed that Susan was no longer moving. (T.p. 1986). Jones stopped having sex, noticed that the condom had burst, and attempted CPR on Susan Yates. (T.p. 1986). He knew that Susan Yates was dead. (T.p. 2079).

Jones explained that when his attempt at CPR was unsuccessful, he panicked, retrieved his blanket, and fled. (T.p. 1987).

The following day, Jones saw an article in the newspaper about Susan Yates being found at the cemetery. (T.p.p. 1989-1990). Jones stated that he had a conversation with his wife and that the two went for a walk. (T.p. 1990). Shortly after they returned home from the walk, he noticed that his wife had left. (T.p. 1991).

Jones attested that he was convicted of attempted rape with regard to Thea Johnson and that he served fourteen years and two months in prison. (T.p.p. 1952; 1957).

The defense also presented the testimony of Deitra Snodgrass, a life long friend of the defendant. Ms. Snodgrass attested that sometime in the spring of 2007, Phillip Jones and an African American woman who was wearing a jean outfit with a split skirt came to her Chanelwood apartment for a few minutes. (T.p. 2008). Snodgrass averred that the woman's face was swollen and bruised. (T.p. 2012).

Snodgrass was unable to recall the specific date on which Phillip and the female companion visited her home; however, she testified that a few days after the visit she read in the newspaper that Phillip had been arrested for murder. (T.p.p. 2010-2013). On cross-examination, Snodgrass stated that she didn't know if the woman who came to her apartment was Susan Yates. In fact, Snodgrass stated, "Honestly, I don't think it is her. I don't know." (T.p. 2027).

## PROPOSITION OF LAW I

**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.**

### LAW AND ARGUMENT

In his first proposition of law, Appellant contends that the trial court abused its discretion in permitting the State to utilize a demonstrative doll during its cross examination of Phillip Jones. The State disagrees.

A trial court may admit demonstrative evidence if (1) the evidence is relevant; (2) the evidence is "substantially similar" to the object or occurrence that it is intended to represent; and, (3) the evidence does not consume undue time, confuse the issues, or mislead the jury. *State v. Jackson* (1993), 86 Ohio App.3d 568, 570-71, 621 N.E.2d 710. A trial court maintains discretion to admit or exclude experimental or demonstrative evidence. See, *State v. Herring* (2002), 94 Ohio St.3d 246, 255, 762 N.E.2d 940. Therefore, a reviewing court will not overturn a trial court's decision absent an abuse of that discretion. *Id.*

Appellant first argues that the prosecution's use of the demonstrative doll placed too much emphasis on the cross-examination of the defendant to the exclusion of all of the other evidence introduced at trial. However, Appellant cites to no legal authority which would prohibit allowing demonstrative evidence where it might emphasize the testimony of one witness. Moreover, there is no evidence that the demonstrative doll caused the jury to focus its attention on the cross-examination of the Appellant to the exclusion of the evidence.

In the instant case the demonstrative evidence was relevant, substantially similar to the occurrence that it was intended to represent and did not consume undue time, confuse the issues

or mislead the jury. As such, the trial court did not abuse its discretion in allowing the prosecution to utilize a demonstrative doll.

Appellant further argues that if a party is surprised by the use of demonstrative evidence, allowing the introduction of the evidence can give rise to an abuse of discretion and cites to *Florin v. Whiston* (1993), 92 Ohio App.3d 419, 424. Appellant contends that trial counsel was surprised by the use of this evidence and that the court therefore erred in permitting the introduction of the demonstrative doll.

At the outset, the State notes that in *Florin*, the appellate court held that the trial court did not err in refusing to exclude testimony of a records custodian finding that the appellant did not suffer unfair surprise or prejudice from the introduction of the testimony. Moreover, *Florin* is factually distinguishable from the instant case in that the trial court was examining whether the appellant suffered any unfair surprise or prejudice by the introduction of testimony in a civil case. *Id.* at 424. The demonstrative evidence in the instant case does not involve the introduction of testimonial evidence in a civil case, but instead involves a demonstration of how the Appellant caused the death of Susan Yates.

With regard to the use of demonstrative evidence in this case, a review of the trial testimony shows that, during a break in the testimony, defense counsel objected to allowing the State to request that Mr. Jones perform any type of act on a demonstrative doll on the basis that the doll was not comparable in size to the decedent and that it was not alive. (T.p.p. 2002-2003). The prosecutor asserted that the doll was, in fact, approximately the same height and weight as Susan Yates. (T.p. 2003).

The defense did not, however, assert that it lacked awareness of the prosecution's intention of using a demonstrative doll. Nor did the defense assert that it was surprised that the

prosecutor was going to use a demonstrative aid during its cross examination of the defendant. Accordingly, contrary to the assertion of appellant in his brief, the record does not support a finding that the defense was surprised by the prosecution's use of the demonstrative doll.

The record further shows that a discussion regarding the use of the demonstrative doll occurred outside the presence of the jury after the prosecution requested that a rebuttal witness, Dr. Sterbenz, be permitted to attend trial during the cross examination of the defendant so that he could comment on Appellant's testimony. (T.p. 2002). The defense objected to the prosecutor's request and then further noted an objection to allowing the prosecution to use a demonstrative doll during its cross examination of Phillip Jones. (T.p.p. 2002-2003). The defense noted its objection to the demonstrative doll prior to the prosecution discussing it during this break in the testimony. As such, it is reasonable to assume that the defense had knowledge of the state's intention to use such a demonstrative aid.

After listening to the prosecution and the defense, the trial court judge ruled that it would not allow the expert witness in the court room during the cross examination of the defendant; however, it did permit the use of the demonstrative doll. (T.p.p. 2004-2005). The prosecutor explained that he was going to have Phillip Jones demonstrate what he did to Susan Yates using the demonstrative doll and that the prosecutor would then reenact the demonstration for the medical examiner on rebuttal. (T.p. 2005).

Defense counsel responded, "It destroys the cross-examination for our side, you Honor." (T.p. 2005). The Court stated, "You will do the best you can, and if he's not doing it right, they will make that clear. The defense will make that clear." (T.p. 2005).

In his brief, Appellant argues that the trial counsel's aforementioned response demonstrates that counsel was "surprised and felt his case was devastated by the use of the doll."

The State submits that trial counsel's statement does not indicate that he was surprised; instead, it merely demonstrates that trial counsel was aware that the use of a demonstrative doll would illustrate that Phillip Jones's testimony regarding the physical interaction between him Susan Yates was in contravention to the medical findings presented in this case.

The demonstrative doll was used during the prosecution's cross-examination of Phillip Jones over the renewed objection of defense counsel. (T.p. 2065). The prosecutor asked Mr. Jones to demonstrate the manner in which he grabbed Susan Yates by neck. (T.p.p. 2064-2065).

The transcript reflects that Phillip Jones demonstrated the way that he used both of his hands to apply steady pressure to the neck of Susan Yates. (T.p.p. 2065-2066). The record also shows that Jones indicated to the jury that at the time that he was applying pressure to Susan's neck, he was laying on top over her having sex. (T.p. 2066). It further appears from the record that Jones demonstrated that while he was applying pressure to Susan's neck, he was having sex and putting his weight on her with both arms, when he heard a popping sound emit from Susan's neck area and she ceased moving. (T.p.p. 2067-2068).

The demonstrative doll was also used during the rebuttal testimony of Dr. Sterbenz. The prosecutor replicated the actions of the defendant so that Dr. Sterbenz could offer his expert opinion as to whether such actions could hypothetically have resulted in the physical evidence found in this case. (T.p. 2103). Dr. Sterbenz testified that the scenario put before him would not result in an audible popping sound. (T.p. 2113). The doctor further opined that the physical evidence is unexplained by the hypothetical as placed. (T.p.p. 2107; 2115).

The prosecutor's use of the demonstrative doll was relevant, substantially similar to the occurrence that it was intended to represent and did not consume undue time, confuse the issues or mislead the jury. There is no evidence that the Appellant suffered undue surprise or prejudice

as a result of the use of the demonstrative doll. As such, the trial court did not abuse its discretion in allowing the use of a demonstrative doll. Appellant's first proposition of law is without merit.

## PROPOSITION OF LAW II

**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, EIGHT AND FOURTEEN AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 10 OF THE OHIO CONSTITUTION.**

### LAW AND ARGUMENT

In Appellant's second proposition of law, he argues that the trial court erred in admitting statements made by Delores Jones. Appellant contends that the statements made by Delores Jones to Charletta Jeffries and Detective Morrison were not excited utterances, violated the marital privilege, and violated his sixth amendment right to confrontation. The State disagrees.

The spousal privilege is a relic of the common law, where to promote marital peace a spouse was prohibited from testifying against the other spouse involving a confidential communication. However, the Supreme Court of Ohio has noted that, " \* \* \* [w]hen one spouse is willing to testify against the other in a criminal proceeding \* \* \* there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace." See, *State v. Mowery* (1982), 1 Ohio St.3d 192, 198, 438 N.E.2d 897, 902. (Citations omitted.) In *Mowery*, the Court narrowly applied the privilege set forth in R.C. 2945.42 and held that the privilege did not apply. *Id.* at 199.

In the instant case, prior to allowing Mrs. Jones to testify against her husband, the trial court considered Evid.R. 601(B), which deals with the competency of spousal testimony. Mrs. Jones affirmatively elected to do so pursuant to Evid.R. 601(B)(2). See, *State v. Adamson* (1995), 72 Ohio St.3d 431, 650 N.E.2d 875.

Due to the spousal privilege contained in R.C. 2945.42, Delores Jones did not testify as to any statements that Phillip Jones made to her during their relationship. Her statements were admitted through other witnesses; to wit: Ms. Jeffries and Detective Morrison.

Although the defendant's spouse cannot testify because of the marital privilege, this privilege does not prevent third parties from testifying where the spouse has given evidence of the defendant's statements to a third party. *Hanley v. State* (1896), 5 Ohio C.D., 12 Ohio C.C. 584, 1896WL 558.

In *Hanley*, the defendant was charged with bigamy and wrote a letter to his wife admitting to this charge. The wife gave the letters to the police and they were introduced into evidence. The court found that although this communication was privileged when it was made, after the communication got into the hands of a third party, "it is clear that the third party may, if he be a witness in the case, offer that communication." *Hanley* at \* 4.

The Fourth District Court of Appeals considered this issue and held that, "R.C. 2317.02(D) does not prevent the introduction of the privileged communication in evidence, but merely prevents either the husband or wife from going on the witness stand to divulge it. *State v. Grubb* (Dec. 12, 1985, Lawrence App. No. 1735, at \*4. Moreover, the Fourth District Court of Appeals held that once a spouse turned over confidential marital communications to a third party, "they lost their character as a confidential marital communications." *State v. Ward* (June 24, 1985), Vinton App. No. 413, at \*2.

Here, the defendant's statements to his wife are not hearsay and are admissible as an admission in this case pursuant to Evid.R. 801(D)(2). Moreover, the wife's statements are admissible as excited utterances. Evid.R. 803(2).

Evidence Rule 803(2) defines an 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.” The Ohio Supreme Court has held that “[t]here is no per se amount of time after which a statement can no longer be considered ... an excited utterance ... [provided the statement was] made while the declarant [was] still under the stress of the event and ... [it was] not [ ] a result of reflective thought.” *State v. Taylor* (1993), 66 Ohio St.3d 295, 303, 612 N.E.2d 316, 322.

A statement is admissible as an excited utterance if the following four conditions are satisfied: “(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 his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective,

“(b) that the statement or declaration, even if not strictly contemporaneous with its exciting 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.” (Emphasis omitted.) *State v. Wallace* (1988), 37 Ohio St.3d 87, 89, 524 N.E.2d 466, quoting *Potter v. Baker* (1955), 162 Ohio St. 488, 124 N.E.2d 140, paragraph two of the syllabus.

Moreover, “the admission of a declaration as an excited utterance is not precluded by questioning which: (1) is neither coercive nor leading, (2) facilitates the declarant’s expression of what is already the natural focus of the declarant’s thoughts, and (3) does not destroy the domination of the nervous excitement over the declarant’s reflective faculties.” *State v. Wallace* (1988), 37 Ohio St.3d 97, 93, 524 N.E.2d 466.

In the instant case, on April 24, 2007, Phillip and Delores Jones had a conversation based on something discussed on the news. (T.p. 1457). After this conversation, Mrs. Jones was scared. (T.p.p. 1457-1458). In a state of fear, Mrs. Jones walked to the store with Phillip, returned home, and drove to her friend Charletta’s home. (T.p.p. 1458-1459).

When Delores Jones arrived at her friend’s home, she told Ms. Jeffries what Phillip told her and they called the police. (T.p.p. 1459-1460). Charletta Jeffries attested that Delores Jones came over to her house, upset, and said, “He did it, he did it.” (T.p. 1434). Ms. Jeffries stated that Mrs. Jones was upset and was screaming. (T.p. 1436).

In order to ascertain what Mrs. Jones was upset about, Ms. Jeffries asked her friend several questions. Ms. Jeffries asked Mrs. Jones who she was referring and Ms. Jones replied, “My husband, Phil.” (T.p. 1436). Then, Ms. Jeffries inquired as to what Phil had done, to which Ms. Jones replied, “Murdered the woman.” (T.p. 1436). And, finally, when Ms. Jeffries asked which woman Phil had murdered, Mrs. Jones answered, “The woman that they found in the cemetery.” (T.p.p. 1436-1437). Ms. Jeffries attested that Mrs. Jones called the police and that an officer arrived within approximately ten minutes. (T.p.p. 1437, 1444).

Detective Richard Morrison described Mrs. Jones as hysterical when he arrived at the home of Charletta Jeffries. (T.p. 1400). He noted that Mrs. Jones was pacing and looking out the window to make sure that no one was coming. (T.p. 1400).

The detective asked Mrs. Jones if she had something she wanted to tell him since she had called and asked for him to come out. (T.p. 1400). Mrs. Jones responded, "My husband is the one that killed that girl in the cemetery. (T.p.p. 1400-1402).

Detective Morrison testified that he told Mrs. Jones to calm down and inquired as to how she knew that her husband killed the woman in the cemetery. (T.p.p. 1401-1402). Mrs. Jones told the detective that he told her the decedent's name was Susan. (T.p.p. 1401-1402). Detective Morrison described Mrs. Jones as being paranoid, upset, fearful, and hysterical. (T.p. 1403).

Mrs. Jones was transported to the police station, where she continued to demonstrate physical signs of fear. (T.p. 1402-1403). Detective Morrison testified that even at the police station Mrs. Jones remained afraid that Phillip Jones, his family, or friends were going to come and find her. (T.p. 1403). In addition, Detective Hudnall described Mrs. Jones as being visibly upset, definitely afraid, and almost hyperventilating. (T.p. 1873).

Mrs. Jones' statements relate to the startling event of having her husband confess to murdering a woman the night before. The statements were made while the declarant was under the stress of excitement caused by the event and were not the result of reflective thought.

Moreover, the questions asked by Ms. Jeffries and Detective Morrison were neither coercive nor leading. Instead, the questions merely facilitated the declarant's expression of what is already the natural focus of the declarant's thoughts and did not destroy the domination of the nervous excitement over the declarant's reflective faculties. As such, the statements were nontestimonial. Moreover, the record shows that after Mrs. Jones expressed her thoughts to Ms. Jeffries and Detective Morrison and was transported to the police station, she remained under the stress of excitement. As such, the statements were properly admitted as excited utterances.

Finally, Appellant contends that the statements Delores Jones made to Detective Morrison were testimonial and therefore violated Appellant's right to confrontation under *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354. The State argues that the holding in *Crawford* does not preclude the use of excited utterances; rather, it limits the use of testimonial statements of a witness who does not appear at trial. See, *State v. Florence*, Montgomery App. No. 20439, 2005-Ohio-4508, ¶ 38; see, also, *Akron v. Hutton*, Summit App. No. 22425, 2005-Ohio-3300, ¶ 16-17. Since the statements were nontestimonial, Appellant's right to confrontation was not violated.

The State contends that the trial court did not abuse its discretion in admitting statements Delores Jones made to Ms. Jeffries and Detective Morrison. Appellant's second proposition of law is without merit.

### PROPOSITION OF LAW III

**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.**

### LAW AND ARGUMENT

In his third proposition of law, Appellant argues that Delores Jones was prohibited from attesting that she received a plastic cross from Phillip. (T.p. 1467). Appellant cites to R.C. 2925.42; however, it appears that Appellant is actually referring to R.C. 2945.42, which prohibits a spouse from testifying "concerning a communication made by one to the other, or act done by either in the presence of the other \* \* \* ." R.C. 2945.42.

The State notes that Appellant did not raise an objection as to this issue at trial. (T.p. 1467). Nor did Appellant object when Detective Hudnall testified regarding obtaining the plastic cross from Mrs. Jones. (T.p. 1878).

The failure to object at trial on the basis of spousal privilege constitutes a waiver of this argument. See, e.g., *State v. Savage* (1987), 30 Ohio St.3d 1, 3-4, 506 N.E.2d 196. Appellant has failed to preserve this issue and his third proposition of law is, therefore, without merit.

## PROPOSITION OF LAW IV

**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.**

### LAW AND ARGUMENT

In his fourth proposition of law, Jones argues that he was denied a fair trial by the admission of other acts evidence, specifically all evidence concerning the violent sexual assault of Thea Johnson in 1990. The State disagrees.

In the instant case, the State filed notice of its intention to use other’s acts evidence. Jones moved to exclude this evidence. A hearing was held regarding the admissibility of the other acts evidence. At the hearing, the State presented the testimony of Thea Johnson. (T.p.p. 1110-1123). After the hearing, the Court ruled that it would permit the testimony of Johnson as a similar act. (T.p. 1127).

A trial court has broad discretion with respect to the admission of evidence. *State v. Maurer* (1984), 15 Ohio St.3d 239, 265, 473 N.E.2d 768, 791. “This includes the discretion ‘to determine whether to admit evidence of prior acts pursuant to Evid.R. 404(B).’ *State v. Patel*, 9th Dist. No. 24030, 2008-Ohio-4693, at ¶ 8.” *State v. Arnold*, 9<sup>th</sup> Dist. No. 24400, 2008-Ohio-2108 at ¶11 .

An appellate court will not disturb evidentiary rulings absent an abuse of discretion. *State v. Roberts* (2004), 156 OhioApp.3d, 352, 355-356, 805 N.E.2d 594, 2004-Ohio-962. 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 Ohio St.3d 217, 219, 450 N.E.2d 1140. When applying the abuse of discretion standard, a reviewing

court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748.

“The Supreme Court of Ohio has articulated two requirements for the admission of other acts evidence. First, substantial evidence must prove that the other acts were committed by the defendant as opposed to another person. Second, the other acts evidence must fall within one of the theories of admissibility enumerated in Evid.R. 404(B).” (Internal citations omitted.) *State v. Stephens*, 9th Dist. No. 23845, 2008-Ohio-890, at ¶ 14, citing *State v. Broom* (1988), 40 Ohio St.3d 277, 282. See also, *State v. Lowe* (1994), 69 Ohio St.3d 527, 530.

Evid.R. 404(B) states: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted 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.”

Here, Jones claimed that he accidentally caused the death of Susan Yates while engaging in rough sex. The State presented evidence that in 1990 Appellant pled guilty to and was convicted of attempted rape. Thea Johnson testified as to how Phillip Jones drove her to a wooded area where he beat, strangled, raped, and threatened to kill her in 1990. (T.p.p. 1907-1916).

The State contends that Jones’ prior act with regard to rape was relevant to show the absence of mistake or accident, motive, intent or purpose, opportunity, preparation or plan to commit the rape and aggravated murder of Susan Christian Yates. Moreover, the prior act evidence was relevant to show the identity of the person who committed the rape and aggravated murder of Susan Christian Yates through his scheme, plan or system. Although Phillip Jones

admitted to killing Susan Yates and engaging in vaginal sex with her, he denied engaging in anal penetration and other aspects of the assault.

Appellant also argues that the prior act lacks a temporal relationship with the instant case. However, he cites no law in support of the proposition that the time period that elapsed was too long of a period of time. Moreover, it is important to consider that Appellant was in prison for fourteen of the seventeen years that had elapsed.

Further, the jury is presumed to follow the trial court's instructions. *State v. Garner* (1995), 74 Ohio St.3d 49, 59. Here, the trial court instructed the jury that the jury was given a limiting instruction to explain that the evidence of this prior incident was admitted only for the purpose of considering whether that acts tended to show: (1) the absence of mistake or accident, motive, intent or purpose, opportunity, preparation or plan to commit the rape and aggravated murder of Susan Christian Yates; or, (2) the identity of the person who committed the rape and aggravated murder of Susan Christian Yates through his scheme, plan or system. (T.p. 2274-2275).

The trial court did not abuse its discretion in allowing the prior acts evidence. As such, Appellant's fourth proposition of law is without merit.

## PROPOSITION OF LAW V

### **PROSECUTORIAL MISCONDUCT DURING THE PENALTY PHASE OF APPELLANT JONES' 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.**

#### LAW AND ARGUMENT

In Appellant's fifth proposition of law, he argues that the prosecutor committed prosecutorial misconduct during the penalty phase of his trial by asking defense witness Joseph Dubina, an employee of the Akron Regional Adult Parole Authority, two questions regarding the commutation of the death penalty.

The standard for prosecutorial misconduct is whether the comments and/or questions were improper, and, if so, whether they prejudiced appellant's substantial rights. *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293, 300. Evid.R. 611(B) provides that "[c]ross-examination shall be permitted on all relevant matters and matters affecting credibility." Evid.R. 611(B). "The limitation of \* \* \* cross-examination lies within the sound discretion of the trial court, viewed in relation to the particular facts of the case. Such exercise of discretion will not be disturbed in the absence of a clear showing of an abuse of discretion." *State v. Acre* (1983), 6 Ohio St.3d 140, 145, 6 OBR 197, 201, 451 N.E.2d 802, 806.

Appellant presented the testimony of Mr. Dubina who testified regarding sentencing. (T.p.p. 2478-2488). On direct examination, Mr. Dubina attested that if Phillip Jones were sentenced to life with no parole, he would never get out of prison. (T.p.p. 2479-2480). In addition, defense counsel asked Mr. Dubina if he knew, "officially, in the last 15 years, has any governor pardoned anybody or let them off death row?" (T.p. 2482). Mr. Dubina attested in the last fifteen years he was not aware of the governor pardoning or commuting a death sentence. (T.p. 2482).

On cross-examination, the prosecutor asked Mr. Dubina some follow up questions regarding the commutation of a death sentence. (T.p. 2485). Specifically, she asked whether the governor could commute a death sentence and whether a death sentence would be commuted to a life sentence if the death penalty was no longer in existence due to a change in the law. (T.p.p. 2485-2486). The witness answered both questions in the affirmative. (T.p.p. 2485-2486).

In addition, the prosecutor asked Mr. Dubina if had was aware of a man who had been on death row named Spirko who had recently received a commuted sentence from the governor. (T.p. 2486). Mr. Dubina stated that he had not “officially heard or seen that” but acknowledged that the governor had the authority to make such a decision. (p. 2486).

The prosecutor’s query cannot be the basis for a claim of prosecutorial misconduct because the questions were proper subject for cross-examination. The prosecutor’s questions were directly related to testimony presented by the witness on direct examination. The record demonstrates that defense counsel asked the witness about the commutation of a death sentence on direct examination and that the witness stated that he was unaware of a death sentence having been commuted in the last fifteen years. The prosecutor’s question demonstrated that information provided by the witness was incorrect.

The trial court properly controlled the cross-examination of the witness and the prosecutor’s questions did not deny Appellant a fair trial. Accordingly, Appellant’s fifth proposition of law is without merit.

## PROPOSITION OF LAW VI

**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.**

### LAW AND ARGUMENT

In his sixth proposition of law, Appellant argues that the excusal of two potential jurors violated the standard set forth in *Wainwright v. Witt* (1985), 469 U.S. 412. The State disagrees.

Trial courts enjoy discretion in determining a juror's ability to be impartial. *State v. Williams* (1983), 6 Ohio St.3d 281, 452 N.E.2d 1323, 1331. A "ruling on a challenge for cause will not be disturbed on appeal unless it is manifestly arbitrary \* \* \* so as to constitute an abuse of discretion." *State v. Tyler* (1990), 50 Ohio St.3d 24, 31, 553 N.E.2d 576, 587. Accord *State v. Williams* (1997), 79 Ohio St.3d 1, 8, 679 N.E.2d 646, 654.

In *State v. Rogers* (1985), 17 Ohio St.3d 174, 478 N.E.2d 984, paragraph three of the syllabus, vacated and remanded on other grounds (1985), 474 U.S. 1002, 106 S.Ct. 518, 88 L.Ed.2d 452, the Supreme Court of Ohio held that "[t]he proper standard for determining when a prospective juror may be excluded for cause based on his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath. (*Wainwright v. Witt* [1985], [469 U.S. 412, 105 S.Ct. 844] 83 L.Ed.2d 841, followed.)"

The two jurors that the defendant claims should have been excused for cause were prospective jurors Pan and Powell. During voir dire, Pan stated, "I would like to against the death." (p. 115). Defense Counsel asked, "You would be against the death penalty?" Pan

answered, "Yes." (T.p. 115). The Court excused Juror Pan over defense counsel's objection. (T.p. 115).

Powell indicated on his questionnaire that he would be opposed to the death penalty with few exceptions. (T.p. 448). During voir dire, Powell explained that he could not impose the death penalty based on reasonable doubt; instead, he would require more such as videotaped evidence or a defendant admitting the crime and then asking for the death penalty. (T.p. 448-449). The other circumstance in which Powell felt he could impose the death penalty was if a family member was involved. (T.p. 449). The Court excused juror Powell over defense counsel's objection. (T.p. 452).

Given the responses of these prospective jurors, the trial court did not abuse its discretion by excusing either of these jurors. Although both jurors indicated an ability under the right circumstances to impose the death penalty, juror Pan stated that he was against the death penalty and juror Powell indicated he was against the death penalty except in very narrow circumstances. As such, their views on the death penalty would have prevented or substantially impaired their performance as jurors. See, e.g., *State v. Dunlap* (1995), 73 Ohio St.3d 308, 315, 652 N.E.2d 988, 995; *State v. Rogers* (1985), 17 Ohio St.3d 174, 17 OBR 414, 478 N.E.2d 984, paragraph three of the syllabus.

Under these circumstances, the trial court did not abuse its discretion in failing to excuse either prospective juror for cause. "[D]eference must be paid to the trial judge who sees and hears the juror." *Wainwright v. Witt* (1985), 469 U.S. 412, 426, 105 S.Ct. 844, 853. As such, Appellant's sixth proposition of law is without merit.

## PROPOSITION OF LAW VII

### **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.**

#### LAW AND ARGUMENT

In Appellant's seventh proposition of law, he argues that the prosecutor committed plain error in her opening statement during the penalty phase by appealing to the passions of the jury when she made the following statement: "What has been determined in the state of Ohio, as in some 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." (T.p. 2318-2319).

Appellant failed to object to this statement at trial and is therefore limited to raising plain error on appeal. In order to establish plain error, the party claiming plain error must show that an obvious error occurred which affected the outcome of the trial. See, *State v. Barnes* (2002), 94 Ohio St.3d 21, 27; 759 N.E.2d 1240.

In the instant case, Appellant cannot demonstrate plain error and further cannot demonstrate how any alleged error in the prosecutor's statement affected the outcome of the trial. The prosecutor's statements do not rise to the level of prosecutorial misconduct. The standard for prosecutorial misconduct is whether the comments and/or questions were improper, and, if so, whether they prejudiced appellant's substantial rights. *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293, 300.

In his brief, Appellant argues that the prosecutor "addressed the fears and the 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.” The State argues that the prosecutor’s statements were not intended to inflame the passion of the jury. Instead, the prosecutor’s statement correctly stated the law in Ohio in that the death penalty is appropriate in this case because the victim was raped and murdered.

The aforementioned statement does not give rise to the level of prosecutorial misconduct. Nor does the statement constitute plain error. As such, Appellant’s seventh proposition of law lacks merit.

## PROPOSITION OF LAW VIII

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

#### LAW AND ARGUMENT

In Appellant's eight proposition of law, he argues that, in this case, the death penalty is unreliable and inappropriate. The State disagrees.

When reviewing a case in which the defendant has been sentenced to death, the reviewing court must make two independent findings as set forth in R.C. 2929.05(A). The Court must first decide whether the aggravating factors outweigh the applicable mitigating factors. Then, the Court must decide whether the defendant's death sentence is excessive or disproportionate to other capital cases.

Appellant was convicted of aggravated murder and a death specification involving the homicide of Susan Yates. Appellant 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 Appellant of the Aggravating Circumstance, that being committing or attempting to commit or in fleeing immediately after committing or attempting to commit Rape, and found that Appellant was the principal offender in the commission of the Aggravated Murder of Susan Yates.

The coroner's report demonstrated that Susan Yates died as a result of asphyxia by strangulation and that she was sexually assaulted both vaginally and anally. During the guilt phase of the trial, Jones attested that he engaged in consensual vaginal intercourse with Susan Yates during which he strangled her, at her request, to enhance sexual gratification. He stated that he did not intend to kill her. Appellant also testified that he heard a popping sound, noticed

that Susan ceased moving, realized that Susan was dead, recovered his blanked, and then left the scene. Jones has a history of prior sexual offenses and incarcerations.

Against these aggravating factors, the Court must balance the mitigating factors set forth in R.C. 2929.04(B), which include the nature and circumstances of the offense, Jones' history, character, background, and the specific factors enumerated in R.C. 2929.04(B)(1) through (7).

With respect to the nature and circumstances of the offense, the State argues that the evidence does not support Appellant's contention that he accidentally killed Susan Yates during rough, consensual sex. As such, there is no mitigating evidence on Appellant's behalf as to the nature and circumstances of the offense. Susan Yates was violently raped, physically assaulted, strangled, and murdered in Mount Peace Cemetery.

Turning next to the specific factors set forth in R.C. 2929.04(B)(1), a number of witnesses testified on behalf of Jones during the penalty phase of the trial and Jones testified on his own behalf. The trial court found that the defense witnesses offered six factors, which include the following: (1) Phillip Jones is the youngest of eight children and was raised in a troubled family in which the older siblings were involved with drugs and conflicts with the law; (2) Jones was born with a lazy eye which resulted in teasing and humiliation by his siblings and peers; (3) Jones has a chronic history of behavioral and conduct problems, has been involved with the juvenile and adult prison systems, attempted suicide on two occasions, and has on at least one occasion been prescribed psychotropic medications; (4) Jones has a low average intellectual capacity and was in special education classes in school due to a learning disability; (5) Jones has been active in the church and obtained a ministers certification; and (6) Jones has two children who love him and believe that he is a good father.

Jones stated that he was sorry for what he did to Susan Yates and that he prays for her family and her children. (T.p. 2558).

Based on the foregoing, the aggravating circumstances that Jones was found guilty of committing at trial and which the State proceeded on at the penalty phase outweigh the mitigating factors Jones presented beyond a reasonable doubt.

Since the aggravating factors outweigh the applicable mitigating factors, the Court must also decide whether the defendant's death sentence is excessive or disproportionate to other capital cases.

The proportionality review mandated by R.C. 2929.05(A) is satisfied by a review of those cases already decided in which the death penalty has been imposed. *State v. Steffen* (1987), 31 Ohio St.3d 111, paragraph one of the syllabus, certiorari denied (1988), 485 U.S. 916, 99 L.Ed.2d 250.

The appellate courts have previously reviewed and affirmed death penalty cases wherein the death penalty was imposed for a single murder committed in connection with an underlying felony. *See, State v. Dennis* (May 18, 1996), Ninth Dist. App. No. 17156, unreported. As such, the death sentence imposed on Jones is not disproportionate to the death sentences imposed in other capital cases.

Appellant's eight proposition of law is without merit.

## PROPOSITION OF LAW IX

**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, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SECTIONS 5 AND 10, ARTICLE I OF THE OHIO CONSTITUTION AND OHIO REVISED CODE § 2929.05.**

### LAW AND ARGUMENT

In his ninth proposition of law, Appellant argues that the proportionality review that the court must conduct is flawed. The Supreme Court of Ohio has been presented with this issue a number of times and has consistently summarily overruled this issue based on precedent. See e.g., *State v. Group* (2002), 98 Ohio St.3d 248, 270-271, 781 N.E.2d 980, 1003.

Moreover, the Supreme Court has specifically held that a proportionality review needs to entail only those cases in which the death sentence has been imposed. *State v. Jackson* (2006), 107 Ohio St.3d 300, 315, 839 N.E.2d 362, 376; *State v. Steffen* (1987), 31 Ohio St.3d 111, 123-124, 31 OBR 273, 509 N.E.2d 383; *State v. Jordan*, 101 Ohio St.3d 216, 2004-Ohio-783, 804 N.E.2d 1, ¶ 86. As such, Appellant's ninth proposition of law is without merit.

## PROPOSITION OF LAW X

**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, FOURTEENTH; OHIO CONSTITUTION, ARTICLE I, §§ 2, 9, 10, AND 16. FURTHER OHIO'S DEATH PENALTY STATUTE VIOLATES THE UNITED STATES' OBLIGATIONS UNDER INTERNATIONAL LAW.**

### LAW AND ARGUMENT

In his final proposition of law, appellant challenges the constitutionality of Ohio's death-penalty statutory framework.

At the outset, the State contends that Appellant has waived these issues by not raising them at the trial court. *State v. Ferguson* (2006), 108 Ohio St.3d 451, 464. However, assuming that this issue is properly before the court, Appellant's argument must fail.

Legislative enactments enjoy a strong presumption of constitutionality and doubts as to the validity of a legislative enactment are to be resolved in favor of the statute. *State v. Gill* (1992), 63 Ohio St.3d 53, 55. Moreover, the Supreme Court of Ohio has consistently held that Ohio's death penalty scheme is constitutional. *State v. Jenkins* (1984), 15 Ohio St.3d 164, paragraph 1 of the syllabus, also see e.g., *State v. Awkal* (1996), 76 Ohio St.3d 324, 337-338, 473 N.E.2d 264, *State v. Garner* (1995), 74 Ohio St.3d 49, 65, 656 N.E.2d 623, 638. As such, Appellant's tenth proposition lacks merit.

Moreover, many of the ten arguments asserted by the Appellant have been considered and rejected by this Court. For example, in *Ferguson*, the Supreme Court of Ohio rejected the following arguments enumerated in Appellant's brief: (1) arbitrary and unusual punishment; (2) unreliability of sentencing procedures; subsection (3) burden on right to jury trial; (4) mandatory submission of reports; (5) aggregation of R.C. 2929.04(A)(7); (6) vagueness of statute;

(7) inadequate proportionality review; and, (9) subsection N (violates international law). *Ferguson* at 464-467. Because Appellant has duplicated arguments that have been considered and rejected by this Court, the State relies on the precedent set forth in *Ferguson* with respect to these arguments.

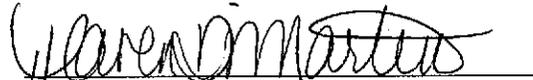
Appellant as failed to articulate any reason for which the Court should alter its prior decision and has failed to prove that Ohio's death penalty law is unconstitutional. The State respectfully requests that the court continue to adhere to that position. Appellant's tenth proposition of law lacks merit.

**CONCLUSION**

Pursuant to the argument offered, the State respectfully contends that the convictions and death sentence should be affirmed.

Respectfully submitted,

**SHERRI BEVAN WALSH**  
Prosecuting Attorney



**HEAVEN DIMARTINO**  
Assistant Prosecuting Attorney  
Appellate Division  
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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing Merit Brief was sent by regular U.S. Mail to Attorney Nathan A. Ray, 137 South Main Street, Suite 201, Akron, Ohio 44308 and Attorney Lawrence J. Whitney, 137 South Main Street, Suite 201, Akron, Ohio 44308, on this 12th day of June, 2009.



**HEAVEN DIMARTINO**  
Assistant Prosecuting Attorney  
Appellate Division

APPENDIX

COPY

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

2008 FEB -4 AM 7:48

SUMMIT COUNTY  
THE STATE OF OHIO 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

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 extend 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.

IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMMIT

THE STATE OF OHIO )

Case No. CR 07 04 1294

vs. )

PHILLIP L. JONES )  
PAGE TWO OF TWO )

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

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

R.C. § 2903.01

Baldwin's Ohio Revised Code Annotated Currentness  
Title XXIX. Crimes--Procedure (Refs & Annos)

■ Chapter 2903. Homicide and Assault

■ Homicide

■ **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.

CREDIT(S)

(2002 S 184, eff. 5-15-02; 1998 S 193, eff. 12-29-98; 1998 H 5, eff. 6-30-98; 1997 S 32, eff. 8-6-97; 1996 S 239, eff. 9-6-96; 1981 S 1, eff. 10-19-81; 1972 H 511)

R.C. § 2907.02

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2907. Sex Offenses (Refs & Annos)

Sexual Assaults

**2907.02 Rape; evidence; marriage or cohabitation not defenses to rape charges**

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A)(1)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in section 3719.41 of the Revised Code to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in section 2929.14 of the Revised Code that is not less than five years. Except as otherwise provided in this division, notwithstanding sections 2929.11 to 2929.14 of the Revised Code, an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code. If an offender is convicted of or pleads guilty to a violation of division (A)(1)(b) of this section, if the offender was less than sixteen years of age at the time the offender committed the violation of that division, and if the offender during or immediately after the commission of the offense did not cause serious physical harm to the victim, the victim was ten years of age or older at the time of the commission of the violation, and the offender has not previously been convicted of or pleaded guilty to a violation of this section or a substantially similar existing or former law of this state, another state, or the United States, the court shall not sentence the offender to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code, and instead the court shall sentence the offender as otherwise provided in this division. If an offender under division (A)(1)(b) of this section previously has been convicted of or pleaded guilty to violating

division (A)(1)(b) of this section or to violating an existing or former law of this state, another state, or the United States that is substantially similar to division (A)(1)(b) of this section, if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, or if the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to section 2971.03 of the Revised Code, the court may impose upon the offender a term of life without parole. If the court imposes a term of life without parole pursuant to this division, division (F) of section 2971.03 of the Revised Code applies, and the offender automatically is classified a tier III sex offender/child-victim offender, as described in that division.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

#### CREDIT(S)

(2007 S 10, eff. 1-1-08; 2006 S 260, eff. 1-2-07; 2002 H 485, eff. 6-13-02; 1997 H 32, eff. 3-10-98; 1995 S 2, eff. 7-1-96; 1993 S 31, eff. 9-27-93; 1985 H 475; 1982 H 269, § 4, S 199; 1975 S 144; 1972 H 511)

R.C. § 2929.04

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2929. Penalties and Sentencing (Refs & Annos)

Penalties for Murder

**2929.04 Criteria for imposing death or imprisonment for a capital offense**

(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 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.

(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.

CREDIT(S)

(2002 S 184, eff. 5-15-02; 1998 S 193, eff. 12-29-98; 1997 H 151, eff. 9-16-97; 1997 S 32, eff. 8-6-97; 1981 S 1, eff. 10-19-81; 1972 H 511)

R.C. § 2929.05

Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2929. Penalties and Sentencing (Refs & Annos)

Penalties for Murder

→2929.05 Appeals; procedures

(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.

CREDIT(S)

(1998 S 107, eff. 7-29-98; 1995 S 4, eff. 9-21-95; 1981 S 1, eff. 10-19-81)

R.C. § 2945.42

Baldwin's Ohio Revised Code Annotated Currentness

Appendix to Title XXIX Crimes--Procedure (Law Effective Prior to July 1, 1996) (Refs & Annos)

☐ Chapter 2945. Trial

☐ Witnesses

⇒ **2945.42 Competency of witnesses**

No person is disqualified as a witness in a criminal prosecution by reason of his interest in the prosecution as a party or otherwise, or by reason of his conviction of crime. Husband and wife are competent witnesses to testify in behalf of each other in all criminal prosecutions, and to testify against each other in all actions, prosecutions, and proceedings for personal injury of either by the other, bigamy, or failure to provide for, neglect of, or cruelty to their children under eighteen years of age or their physically or mentally handicapped child under twenty-one years of age. A spouse may testify against his spouse in a prosecution under sections 2903.11 to 2903.13, 2919.21, 2919.22, or 2919.25 of the Revised Code for cruelty to, neglect of, or abandonment of such spouse, in a prosecution against his spouse under section 2903.211, 2911.211, or 2919.27 of the Revised Code for the commission of the offense against the spouse who is testifying, or in a prosecution under section 2907.02 or 2907.12 of the Revised Code for the commission of rape or felonious sexual penetration against such spouse in a case in which the offense can be committed against a spouse. Such interest, conviction, or relationship may be shown for the purpose of affecting the credibility of such witness. 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 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 such spouse under such 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.

CREDIT(S)

(1992 H 536, eff. 11-5-92; 1985 H 475; 1980 H 920; 1975 H 1; 1971 S 312; 1953 H 1; GC 13444-2)

Evid. R. Rule 404

Baldwin's Ohio Revised Code Annotated Currentness  
Ohio Rules of Evidence (Refs & Annos)

Article IV. Relevancy and Its Limits

➔ **Evid R 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.

CREDIT(S)

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

Evid. R. Rule 601

Baldwin's Ohio Revised Code Annotated Currentness

Ohio Rules of Evidence (Refs & Annos)

■ Article VI. Witnesses

➔ **Evid R 601 General rule of competency**

Every person is competent to be a witness except:

(A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

(B) A spouse testifying against the other spouse charged with a crime except when either of the following applies:

(1) a crime against the testifying spouse or a child of either spouse is charged;

(2) the testifying spouse elects to testify.

(C) An officer, while on duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.

(D) A person giving expert testimony on the issue of liability in any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person by a physician or podiatrist, unless the person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state, and unless the person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school. This division shall not prohibit other medical professionals who otherwise are competent to testify under these rules from giving expert testimony on the appropriate standard of care in their own profession in any claim asserted in any civil action against a physician, podiatrist, medical professional, or hospital arising out of the diagnosis, care, or treatment of any person.

(E) As otherwise provided in these rules.

CREDIT(S)

(Adopted eff. 7-1-80; amended eff. 7-1-91)

Evid. R. Rule 611

Baldwin's Ohio Revised Code Annotated Currentness

Ohio Rules of Evidence (Refs & Annos)

▣ Article VI. Witnesses

➡ **Evid R 611 Mode and order of interrogation and presentation**

**(A) Control by court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

**(B) Scope of cross-examination.** Cross-examination shall be permitted on all relevant matters and matters affecting credibility.

**(C) Leading questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

CREDIT(S)

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

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)

Evid. R. Rule 803

Baldwin's Ohio Revised Code Annotated Currentness  
Ohio Rules of Evidence (Refs & Annos)

■ Article VIII. Hearsay

➔ **Evid R 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.

CREDIT(S)

(Adopted eff. 7-1-80; amended eff. 7-1-06, 7-1-07)