ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
Plaintiff - Appellee,	:	**CASE NO. 09-0739**
v.	:	
Hersie R. Wesson,	:	
Defendant - Appellant.	:	**CAPITAL CASE**

MERIT BRIEF OF APPELLANT, HERSIE WESSON

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Overview of Case

The defendant-appellant Hersie R. Wesson was charged with killing Emil Varhola and attempting to kill his wife Mary Varhola. The incident occurred after Emil allowed Wesson into Varhola residence. The prosecution charged the conduct occurred as Wesson attempted to steal a gun. Wesson did not contest that he killed Emil and attempted to kill Mary. His original statements alleged self-defense.

The state charged Wesson with three alternative theories of Aggravated Murder. Count One charged prior calculation and design, R.C.§2903.01(A). Count Two charged felony-murder, R.C.§2903.01(B). Count Three charged that the killing occurred while Wesson was under detention as he was on postrelease control, R.C.§2903.01(D).

The contention here is that the Wesson may only be convicted of murder, R.C.§2903.02, rather than aggravated murder. Therefore, the capital specifications are inapplicable. This argument is based upon the following. The panel dismissed Count One at the Rule 29 hearing because the state had failed to prove prior calculation and design. The Count Two felony-murder charge fails because the state failed to include the *mens rea* of recklessness in the indictment as is required by State v. Colon. It is the allegation that the homicide occurred during the commission of an Aggravated Robbery that elevated the murder into an aggravated murder. Without a valid indictment in regards to the robbery charges, Wesson may only sustain a conviction of murder.

Finally, Count Three fails because the state failed to prove that the homicide occurred while Wesson was sentenced to postrelease control. The sentencing journey of the underlying felony failed to properly give notice to Wesson that he was facing a mandatory term of postrelease control rather that a discretionary term. Therefore, the detention was invalid.

STATEMENT OF THE CASE

On March 13, 2008, a Summit County Grand Jury capitally indicted the defendant-appellant Hersie Wesson for the killing of Emil Vahola and attempting to kill the decedent's wife, Mary Varhola, in their home on February 25, 2008. The original indictment included ten counts. Three additional charges were added in a supplemental indictment. The charges included the following thirteen counts. Count One charged Wesson with Aggravated Murder in violation of R.C. § 2903.01(A), prior calculation and design. This count also included three capital specifications; (1) R.C. §2929.04(A)(4)(b) Detention; (2) R.C. §2929.04(A)(5), Course of Conduct; and (3) R.C. §2929.04(A)(7), Felony Murder.

Counts Two and Three charged Wesson with an alternative theories of the homicide, in violation of R.C. §Aggravated Murder 2903.01(B) (felony-murder) and (D) (commission of the offense while under detention). The same capital specifications were included on these two counts.

The grand jury also returned charges of Attempted Aggravated Murder in violation of R.C. §2903.01(A)/2903.02 in Counts Four, Five and Six; Aggravated Robbery in violation of R.C. §2911.01(A)(1) in Counts Seven and Eight and Thirteen; Having Weapons While Under Disability in violation of R.C. § 2923.14 in Count Nine; Tampering With Evidence in violation of R.C. §2921.12(A)(1) in Count Ten; and Attempted Murder in violation of R.C. §2903.02(A)/2923.02 in counts Eleven and Twelve. The trial court arraigned Wesson on the supplemental indictment of counts Eleven, Twelve and Thirteen on May 16, 2008.

On May 16, 2008, the trial court held a motion to suppress the appellant's statements. The trial court overruled the motion.

The appellant Wesson waived his right to a jury trial on January 6, 2009. On January 7, 2009, Wesson filed an amended jury waiver.

A trial to a three-judge panel began on January 15, 2009. The panel dismissed Count One, Aggravated Murder with prior calculation and design pursuant to a defense motion to dismiss at the close of the states case. Counts Four, Five Six and Eight were also dismissed. On January 20, 2009, the panel reached its verdict. The panel found the Wesson guilty of two counts of Aggravated Murder (Counts Two and Three) and the three death penalty specifications attached to each of those counts.

On March 3, 2009, the court merged the two counts of Aggravated Murder. The state elected to proceed on Count Two for purposes of sentencing (felony-murder).

The penalty phase of trial began on March 6, 2009. The panel returned a verdict of death on March 18, 2009. The panel also sentenced Wesson to serve a terms of nine years for Count Seven, (Aggravated Robbery), four years for Having a Weapon While Under a Disability for Count Nine, four years for Count Ten, Tampering with Evidence, and nine years for Count Eleven, Attempted Murder. Counts Twelve and Thirteen were merged into counts Eleven and Seven, respectfully. The sentencing opinion was filed on March 18, 2009.

The appellant filed a timely Notice of Appeal on April 22, 2009. This Brief on the Merits follows.

STATEMENT OF THE FACTS

The state accused the appellant Hersie Wesson of killing Emil Varhola and attempting to kill his wife Mary Varhola on February 25, 2008. Mary survived that attack. Wesson was later arrested at a friend's house. He was taken to the police station where he waived Miranda rights. Wesson admitted the assault. He told the police officers that he was invited into the Varhola home as he had been numerous times on previous occasions. According to his statement, Emil attacked him after Wesson had engaged in voluntary sex with Mary and had made a comment about her breasts.

Wesson attempted to retract the statement. He admitted that he had made up the sexual aspect of his statement because he was intoxicated and scared. The trial court would not allow admission of the retraction as Wesson himself chose not to testify.

Mary Varhola's Statements

Mary Varhola gave several statements to police and testified via video deposition at trial. Mrs. Varhola was unclear in her recollection of the events of the attack. She was confused about the date (T. 291), the time of day (T. 236-39), how Wesson came to be in her home (T. 226, 295-97), and what happened during the crime (T. 295-97).

Mary, 78 years of age, testified that Wesson attacked her in her home. Wesson wanted Emil's gun. She told him she did not know its location. (T. 230, 234)

Mary did not know Wesson's name prior to the homicide. She said her husband was 81 years of age. His health required him to use an oxygen tank. (T. 236)

On the day in question, while in her kitchen, she heard a noise sounding like a whistle coming out of her husband's windpipe. When she calmed herself, she turned around and saw

Wesson going through her husband's pockets and taking out his wallet. (T. 239) She recognized Wesson as a person who came to see her husband occasionally. Emil always gave him money. (T. 239)

When Wesson saw her, he grabbed her hair. He kicked her and stabbed her numerous times. (T. 247, 253) She did hit him with her cane. He stopped when she told him she did not know the location of the requested gun. (T. 248)

After the assault stopped, Mary heard Wesson tip-toe upstairs to, in her opinion, to look for the gun. (T. 269)

Joseph Horak of the Akron Police Department answered a call to go to the Varhola residence. He saw through the window that an elderly woman was on her knees clutching the phone. He had his partner called EMS. Mary managed to open the door for the officers. (T. 102-103) The officers found Emil lying on the kitchen floor. (T. 108)

Officer Justin Ingham aided in the search for Wesson. At one of the homes where police officers sought Wesson, Ingham was directed to a bedroom by a female. Wesson was lying on a bed. Wesson ignored the officers' orders. The officers rolled him over and hand-cuffed him. (T. 151-152) Officer Ingham noticed blood on Wesson's shoes. Wesson was still wearing his shoes when arrested in the bed. (T.153) Ingham thought that Wesson was pretending to be intoxicated. (T. 183)

Coroner Testimony

Dr. Dorothy Dean, the Summit County Coroner, testified that Emil had been stabbed numerous times, including a deep cut to the cartoid artery and jugular vein. (T. 473) He also suffered severe stab wounds to his back. (T. 476, 481) The stab wounds were the cause of death.

Although Emil Varhola did have an implanted pacemaker, there were no defects in that mechanism. (T. 490) The injuries occurred while Emil was alive. (T. 509)

Detective Kevin Kabella and Detective Horan testified that they interviewed Wesson at the police station after having given Wesson his Miranda rights. (T. 542) Wesson admitted the stabbings, but told the officers that he had acted in self-defense. (T. 598)

Wesson told the officer that he had been drinking all day, including moonshine and Busch beer. (T. 617-618) Kabella and Haran did not think Wesson appeared intoxicated. (T. 543-545) Detective Kabella did note that Wesson did have alcohol on his breath. (T. 553)

Penalty Phase

Hersie Wesson provided an unsworn statement. Wesson admitted that he went to the Varholas' house February 25, 2008. He and his girlfriend had been fighting. As the result, she locked him out of the residence. Wesson wanted to wait for her until she came home. (Mit. T. 169) Because it was February, he needed someplace warm, so he went to the Varholas' house, hoping to wait inside. (Mit. T. 169-70) He knew Mr. Varhola, having stopped to talk with him from time to time as he cut through the Varholas' yard on his way to the bus. (Mit. T. 168) Wesson had only been inside once before. (Mit. T. 167). That time, Mr. Varhola came to the door with a small handgun, which he promptly pocketed when he saw that it was Wesson. (Mit. T. 167-68).

On the day of the homicide, Wesson went inside the residence. He and Mr. Varhola had coffee. (Mit. T. 179) After his drink, Wesson went upstairs to use the restroom. (Mit. T. 179) When Wesson came downstairs, he noticed the gun cabinet in the Varholas' living room. Mr. Varhola showed him the collection of guns and Wesson examined one of the rifles. (Mit. T.

170-710)

Wesson said that the original purpose for to the Varholas' house was to wait for his girlfriend. (Mit. T. 170, 180) He admitted to stabbing the Varholas. (Mit. T. 172) Wesson told the police that he took a rifle and a tea cup out of the house and left them in the bushes in the Varholas' yard. (Mit. T. 175-76)

Wesson's sister, Yvette Eugenyah Wesson, told the panel of Wesson's difficult childhood. Their mother was an alcoholic and drank during her pregnancies. (Mit.T. 29) Wesson was given alcohol by his mother at a very early age to assist him in sleeping. She, the older sister, remembered fearing that he had died because had once drank a whole bottle of alcohol. He was placed in a closet with pillows and blankets when the parents were out with friends. (Mit. T. 30)

Wesson had a speech impediment. It was so bad that it sometimes took him an half an hour to ask for a glass of water. (Mit. T. 34) His father could not accept that his son had the stuttering problem and often made fun of his son and deny he was his father. (Mit. T. 35) Wesson was whopped with razor straps, slats under a bed, electric cords and switches with knots in them, often because of the stuttering problem. (Mit. T. 35)

Dr. Jeffrey Smalldon, a forensic neuropsychologist, testified that Wesson was hesitant to participate in testing. He did not want to be found mentally retarded. (Mit. T. 94) Although his mother drank during her pregnancy with Wesson, Dr. Smalldon could not develop a fetal alcohol syndrome assessment. (Mit. T. 98) The stuttering and impulsivity was consistent with such a diagnosis. (Mit. T. 100) Wesson, having been exposed to violence all his life, learned that violence could be an acceptable means for resolving conflicts. (Mit. T. 103, 142)

Dr. Smalldon explained that because of the violence which Wesson knew as a child, he became a heightened risk at an older age. He had watched murder, a stabbing of his father and other acts of violence as a child. (Mit. T. 106, 111)

Wesson was a poor student who only completed the seventh grade. The stuttering caused him to drop out. (Mit. T. 108) Wesson had a full scale IQ of 76, which falls in the borderline class. Dr. Smalldon diagnosed Wesson with borderline intellectual functioning. (Mit. T. 129)

Wesson also suffered numerous injuries to the head. (Mit. T. 111-112) Although even small injuries could cause problems, Wesson's failure to participate in testing prevented Dr. Smalldon from providing and opinion in this area. The limited testing conducted was consistent with a brain injury. (Mit. T. 113-114, 118, 120)

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

ARGUMENT

Proposition of Law I:

> **An indictment which fails to set forth each and every element of the charged offense, including the *mens rea* , is in violation of the Due Process Clause of both the State and Federal Constitution.**

The indictment charged Hersie Wesson with Aggravated Robbery in violation of R.C. §2911.01(A) (Counts Seven and Thirteen). Count Two alleged Aggravated Murder during the course of an Aggravated Robbery. The indictment also included Aggravated Robbery as the basis for a felony-murder specification in violation of R.C. §2929.04(A)(7) for both capital counts, Two and Three. The problem is, the indictment failed to include the *mens rea* element of reckless in any of the above counts as it required by both State v. Colon I and II. Therefore, the convictions and the relevant specifications are void.

Under the Due Process Clause of the Fourteenth Amendment, a defendant in a criminal case is protected against conviction except upon proof beyond a reasonable doubt of every element necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364 (1970); Davis v. United States, 160 U.S. 469, 487-88 (1895). Thus, in order for a conviction to withstand Due Process scrutiny, a defendant must be charged in an indictment which includes each and every essential element of the offense within the specific charge, and the state must prove each of these elements beyond a reasonable doubt.

This Court also requires stringent adherence to Ohio's constitutional right to a grand jury and notice. In State v. Colon I, 2008 Ohio 1624, 118 Ohio St. 3d 26, this Court noted that the

Aggravated Robbery statute does not specify a particular degree of culpability for the act of 'inflict[ing], attempt[ing] to inflict, or threaten [ing] to inflict physical harm,' nor does the statute plainly indicate that strict liability is the mental standard. As a result, [pursuant to R.C. 2901.21(B),] the state was required to prove, beyond a reasonable doubt, that the defendant recklessly inflicted, attempted to inflict, or threatened to inflict physical harm. Id., p.14.

In the present case, the indictment was constitutionally deficient in numerous aspects. The panel convicted the appellant in Counts Two of Aggravated Murder in relevant part:

> . . . while committing or attempting to commit, or fleeing immediately after comittiing or attempting to commit aggravated robbery, in violation of Section 2903.01(B) of the Revised Code.

This charge made no reference to a particular statutory provision in relation to the aggravated robbery charge. Specification Three to the principal charge repeated the above language, in addition to alleged Wesson to be the principal offender of the Aggravated Murder.

Count Three in the indictment alleged that Hersie Wesson committed the Aggravated Murder while under detention after having been found guilty of a felony. Specification Three to this Count repeated the same language of the felony-murder specification of Count Two.

Count Seven alleged the charge of Aggravated Robbery. The charge alleged in relevant part that Wesson:

> . . . in attempting or committing a theft offense . . . or in fleeing immediately after the attempt or offense, have a deadly weapon, to wit: a knife, on or about the offender's person or under the offender's control and either displayed the weapon, brandish it, indicate the offender possesses it, or use it, in violation of Section 2911.01(A)(1) of the Revised Code . . .

Count Thirteen includes language almost identical to the Count Seven Charge. Ultimately, Count Thirteen merged into Count Seven.

Unlike the capital count and the felony-murder specifications, Counts Seven and Thirteen included a direct reference to the Aggravated Robbery statute. It is a moot point whether reference to the statute cures the failure to list the elements specifically, as the statute itself does not include the reckless *mens rea*. State v. Colon, 119 Ohio St.3d 204, 2008 Ohio 3749 (Colon II)

R.C. §2911.01 reads as follows:

§ 2911.01. Aggravated robbery

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

(3) Inflict, or attempt to inflict, serious physical harm on another.

There is no mention of the mens rea required.

In Colon I, this Court held the error to constitute structural error. This was because there was no evidence to show that the defendant had notice that recklessness was an element of the crime of robbery, nor was there evidence that the state argued that the defendant's conduct was reckless. Id. at p. 30. Further, the trial court did not include recklessness as an element of the crime when it instructed the jury. Id. at p. 31. In closing argument, the prosecuting attorney treated robbery as a strict-liability offense. Id.

Although there was obviously no jury instruction here, the other aspects of the Colon I

reasoning apply. There is no discussion in the record regarding the element of recklessness. Neither the defense nor the prosecution argued the element. There is no reference to the recklessness aspect of the offense by the three-judge panel when rendering its verdict on the relevant charges.

Apprendi Principle

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the United States Supreme Court held that the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees require that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. Apprendi at 476, citing Jones v. United States, 526 U.S. 227 (1999). The Fourteenth Amendment commands the same answer when a state statute is involved. The historical foundation for these principles extends down centuries into the common law. While judges in this country have long exercised discretion in sentencing, such discretion is bound by the range of sentencing options prescribed by the legislature. Apprendi, supra.

In Harris v. United States, 536 U.S. 545 (2002), the United States Supreme Court again noted that:

> *A crime was not alleged, and a criminal prosecution not complete,* ***unless the indictment and the jury verdict included all of the facts to which the legislature had attached the maximum punishment.*** Any "fact that . . . exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone" the Court concluded, would have been, under the prevailing historical practice, an element of an aggravated offense.

Id., *quoting* from Apprendi, 530 U.S. at 483. (emphasis added)

Deficient Indictment Results in Void Convictions

In the present case, the indictment did not include all the elements necessary to constitute the offense to which the legislature had attached the maximum punishment. The failure of the indictment to include an essential element of the offense should void the charge. For example, in United States v. Hooker, 841 F.2d 1225 (4th Cir. 1988) (en banc), where an indictment cited the statute defining the federal RICO offense but failed to allege an essential element, that the enterprise had an effect on interstate commerce, the Fourth Circuit rejected the argument of the Government that it was enough that the defendant had actual notice of this element of the offense.

> In the present case, the defendant somehow acquired notice of the nature of the offense [including the element not alleged]. But even if we were to assume that this notice emanated from the indictment (as assumption not justified under the authorities in our opinion) we would still be left with a document which did not contain any part of one element of the offense, and thus did not satisfy the Fourth Amendment requirement that all elements of the offense have been considered and found by the grand jury. . . .

Hooker, 841 F.2d at 1230. The absence of the allegation of one of the elements in an indictment citing the applicable statute was held to require vacating the conviction. "Neither instructions nor a petit jury verdict can satisfy after the fact the Fifth Amendment right to be tried upon charges found by a grand jury." Id. at 1232. Although the right to a grand jury is not as of yet applicable to the states, the rationale is sound and should be applied to Ohio's independent right to a grand jury.

The Fourth Circuit reached the same conclusion in another case decided the same day in a case where the indictment cited the statutes making it a crime to possess and distribute cocaine

but failed to allege the scienter element (that the defendants acted "knowingly and intentionally").

United States v. Pupo, 841 F.2d 1235, 1239 (4th Cir. 1988) (en banc).

> [T]he district court . . . held that scienter was adequately charged if the indictment also cited the statute itself. That position is contrary to our own precedents as well as the law in the majority of the circuits. . . . We hold that a mere citation to the applicable statute does not give the defendant notice of the nature of the offense. An indictment that must rely on a statutory citation does not "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *Hamling v. United States*, 418 U.S. 87, 117, 41 L.Ed.2d 590, 94 S.Ct. 2887 (1974). Furthermore, a statutory citation does not ensure that the grand jury has considered and found all essential elements of the offense charged. It therefore fails to satisfy the Fifth Amendment guarantee that no person be held to answer for an infamous crime unless on indictment of a grand jury.

Pupo, 841 F. 2d at 1239. That same result was reached by a number of other federal circuits based on the same rationale that a mere citation to the statute fails to show that the grand jury considered and found the element of the offense not explicitly alleged in the indictment. *See*, United States v. Spinner, 180 F.3d 514, 516 (3d Cir. 1999) (failure to explicitly allege the element of effect on interstate commerce):

> [N]otice alone cannot form a sufficient basis to validate a jurisdictionally deficient indictment. In *United States v. Hooker*, 841 F.2d 1225 (4th Cir. 1988) (en banc), the Fourth Circuit Court of Appeals held that "an effect on interstate commerce" was an essential element of a RICO offense without which an indictment was insufficient. It further held that notice alone was insufficient to validate the indictment. "The inclusion of all of the elements . . . derives from the Fifth Amendment, which requires that the grand jury have considered and found all elements to be present." *Id.* at 1230.

Spinner, 180 F.3d at 516.

> Du Bo's conviction requires reversal because his indictment fails to ensure that he was prosecuted only "on the basis of the facts presented to the grand jury . . . ." *United States v. Rosi*, 27 F.3d 409, 414 (9th Cir. 1994). At common law, "the most valuable function of grand jury was . . . to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible

> testimony . . . ." *Hale v. Henkel*, 201 U.S. 43, 59, 50 L.Ed. 652, 26 S.Ct. 370 (1906). . . . Failing to enforce this requirement would allow a court to "guess at what was in the minds of the grand jury at the time they returned the indictment . . . ." *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979) (citing *Russell v. United States*, 369 U.S. 749, 770, 8 L.Ed.2d 240, 82 S.Ct. 1038 (1962)). Such guessing would "deprive the defendant of a basic protection that the grand jury was designed to secure," by allowing a defendant to be convicted "on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him." *Id.* (citing *Russell*, 369 U.S. at 770). We may only guess whether the grand jury received evidence of, and actually passed on, Du Bo's intent. We may never know if the grand jury would have been willing to ascribe criminal intent to Du Bo. *See Stirone v. United States*, 361 U.S. 212, 217, 4 L.Ed.2d 252, 80 S.Ct. 270 (1960) (no court may "know" what the grand jury "would have been willing to charge"). Refusing to reverse in such a situation would impermissibly allow conviction on a charge never considered by the grand jury. *See id.* at 219; *United States v. Miller*, 471 U.S. 130, 139-140, 85 L.Ed.2d 99, 105 S.Ct. 1811 (1985).

United States v. Du Bo, 186 F.3d 1177, 1179-1180 (9th Cir. 1999). *See* United States v. Zannger, 848 F.2d 923, 925 (8th Cir. 1988).

Ohio Grand Jury Requirement

Ohio has provided an independent and distinct right requiring the grand jury to find probable cause on each and every element of an offense charged. In State v. Headley (1983), 6 Ohio St.3d 475, the Ohio Supreme Court ruled:

> Section 10 of Article I of the Ohio Constitution provides that "...no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury..." This provision guarantees the accused that the essential facts constituting the offense for which he is tried will be found in the indictment of the grand jury. (Citations omitted)

Headley, 6 Ohio St.3d at 477 (emphasis added)

The Headley case cited the general precedent from its earlier reasoning in State v. Wozniak (1961), 172 Ohio St. 515. This Court held here that:

> Where one of the vital elements identifying the crime is omitted from the indictment, it is defective and cannot be cured by the court as such procedure

> would permit the court to convict the accused on a charge essentially different from that found by the grand jury.

Wozniak, 172 Ohio St. at 520.

Once a state has established a liberty interest, as Ohio has with its constitutional grand jury protections, it cannot be ignored. In Hicks v. Oklahoma, 447 U.S. 343, 346 (1980), the United States Supreme Court held as much. Specifically, Hicks found that where a state has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. Thus, the failure to abide by Ohio's substantive right to have a grand jury determine the essential elements of an offense is a violation of federal due process in addition to the Ohio Constitution.

In this case, there is no evidence the grand jury at any time considered the intent element in determining the relevant charges. Therefore, the convictions and sentence of death in this matter are in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Section 10, Art. I of the Ohio Constitution.

Proposition of Law II:

> **Where a defendant is found guilty for having committed an offense while under postrelease control, the conviction is invalid where the sentencing entry placing the defendant on postrelease control failed to follow the mandates of R.C. §2967.28(B).**

In Count Three of the Indictment, the state charged Wesson with Aggravated Murder in violation of R.C. §2903.01(D) (while on detention). Specifically, this count charged that Wesson:

> did purposely cause the death of Emil Varhola while under detention as result of being found guilty of or having pleaded guilty to a felony or having broke that detention. . .

The state introduced evidence that Wesson had been convicted of burglary, R.C. §2911.12(A)(1). This was a second degree felony. States Exhibit 100. According to Julie Clark, his parole officer, Wesson's postrelease control began on May 4, 2007 and was to be completed on May 3, 2010. (T. 452) State's Exhibit 100.

However, the sentencing entry placing Wesson on postrelease control was invalid. R.C. §2967.28(B) mandates the a second degree felony sentence include a *mandatory* term of postrelease control. The judge sentencing Wesson for his burglary conviction, while placing Wesson on postrelease control, failed to place in the journal entry that the postrelease control was mandatory. The failure of the sentencing entry to include a mandatory term of postrelease control in the sentencing entry invalidate the effect of the sentence and requires a new sentencing hearing.

Court Speaks Though Entries

As a general rule, a court speaks only through its journal. Kaine v. Marion Prison Warden (2000), 88 Ohio St.3d 454, 455, 2000 Ohio 381; Schenley v. Kauth (1953), 160 Ohio St. 109, paragraph one of the syllabus ("A court of record speaks only through its journal and not by oral pronouncement or mere written minute or memorandum"). "Were the rule otherwise it would provide a wide field for controversy as to what the court actually decided." Indus. Comm. v. Musselli (1921), 102 Ohio St. 10, 15.

Thus, court sentencing Wesson for his burglary conviction failed to notify him that the postrelease control portion of his sentence was mandatory.

Non-Compliant Sentencing Entry Voids Sentence

In State v. Jordon, (2004) 104 Ohio St.3d 21, 2004-Ohio-6085, this Court held that:

> Because a trial court has a statutory duty to provide notice of postrelease control at the sentencing hearing, any sentence imposed without such notification is contrary to law. As a general rule, if an appellate court determines that a sentence is clearly and convincingly contrary to law, it may remand for resentencing. See R.C. 2953.08(G)(2). Furthermore, where a sentence is void because it does not contain a statutorily mandated term, the proper remedy is, likewise, to resentence the defendant. See State v. Beasley (1984), 14 Ohio St.3d 74.

Id. paragraph one of the syllabus.

> When a trial court fails to notify an offender of postrelease control at his sentencing hearing, the sentence must be vacated and the matter remanded to the trial court for resentencing.

Id. paragraph two of the syllabus.

Present Case

The indictment in Count Three alleged under R.C. 2903.01(D) that Mr. Wesson killed

victim "while under detention as a result of having been found guilty of or having pleaded guilty to a felony or while having broke that detention." Specification One to Count Two also alleges that Wesson was under detention at the time.

The basis for the detention allegation was because Wesson had been sentenced to post-release control to be for a burglary conviction. The sentencing entry, States Exhibit 100, reads:

> After release from prison, the Defendant is ordered subject to post release control to the extent that the parole board may determine by law.

The burglary to which Wesson was sentenced was a second degree felony. R.C. §2967.28(B) requires *mandatory* post-release control for second degree felonies. The entry in Wesson's case does not designate that post-release control is mandatory. This voids the sentencing entry. In State v. Clark, 119 Ohio St.3d 239, 246, 2008 Ohio 3748, this Court specifically held that when a sentence includes mandatory postrelease control, the trial judge must inform the defendant of that fact in the plea colloquy or the plea will be vacated.

As the original sentencing occurred before the enactment of R.C. §2929.191 in 2006, there is no remedy available other than a new sentencing hearing. This Court addressed this issue in State v. Singleton, 2009 Ohio 6434.

> [P1] The question we confront in this case is whether the de novo sentencing procedures detailed in decisions of this court or the remedial procedures set forth in R.C. 2929.191 (see Appendix for the text of R.C. 2929.191), which became effective July 11, 2006, should be used by trial courts to properly sentence an offender when correcting a failure to properly impose postrelease control. The answer to this question is that in the absence of a statutory remedy, our caselaw provides a constitutional remedial procedure for trial courts to follow in correcting a court's failure to properly impose postrelease control prior to July 11, 2006; with the enactment of R.C. 2929.191, however, which became effective July 11, 2006, the legislature has promulgated a statutory remedy for trial courts to use to correct an error in imposing postrelease control. Accordingly, for sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease

> control, trial courts shall conduct a de novo sentencing hearing in accordance with decisions of the Supreme Court of Ohio. However, for criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191.

As Wesson's burglary sentence was filed in 2003, he must be resentenced before his postrelease control is valid. *See also* State v. Sarkozy (2008), 117 Ohio St.3d 86, 2008 Ohio 509.

Sufficiency Standard

Under the Due Process Clause of the Fourteenth Amendment, a defendant in a criminal case is protected against conviction except upon proof beyond a reasonable doubt of every element necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364 (1970); Davis v. United States, 160 U.S. 469, 487-88 (1895). The United States Supreme Court set forth the standard for sufficiency review in Jackson v. Virginia (1979), 443 U.S. 307. Here, because Wesson's entry placing him on postrelease control was invalid, the state failed to prove that he committed the homicide while under detention.

Proposition of Law III:

> **Where a defendants right to present a defense is arbitrarily infringed by a state rule of evidence, the former prevails. Therefore, a trial court must preclude essential defense evidence based solely on state rules of evidence.**

Defense counsel recorded an interview with Hersie Wesson retracting his statement made to the Akron police. The defense sought to introduce the evidence through a state witness. The court sustained a prosecution objection. Although the rules of evidence may support the ruling, the court erred by failing to consider the defendants right to present a defense when precluding the evidence.

In the interview, Wesson admitted that he had lied in his interview to Detectives at the time of his arrest. Wesson admitted that he lied because he was scared and intoxicated. He never had engaged in sex with Mary Varhola. He did not break into the house the night of February 25, 2008. He had been at the house on two prior occasions. The Varhola's had been nice to him on these occasions. Wesson knew that Emil Varhola owned a .25 caliber hand gun. He assumed that Emil possessed it on the day in question. He admitted that he had taken the rifle and placed it outside of the house. He took it outside because Emil had shown him the weapon and Wesson knew that his fingerprints would be present. Wesson denied going through Emil's wallet or taking any item other than the gun and the cup. Defense Exhibit E.

The court denied the defendant the ability to place the interview into evidence based on its interpretation of the Ohio Rules of Evidence.

Right to Present Complete Defense

The phrase "right to present a defense" is a talisman for the Sixth Amendment right to compulsory process (even though the original cases were necessarily 14th Am. "due process" cases. In his concurring opinion in California v. Green, 399 U.S. 149, 176, (1970), Justice Harlan indicated that the compulsory process and confrontation clauses of the Sixth Amendment "constitutionalize the right to a defense as we know it." Additionally, in Washington v. Texas, 388 U.S. 14 (1967) the Court said, "The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present the defense."

The United States Supreme Court has long held that an accused's right to "establish a defense" is a "fundamental element of due process." Washington v. Texas, *supra*. In Washington, the Court was called upon for the first time "to decide whether the right of an accused to have compulsory process for obtaining witnesses in his favor, guaranteed in federal trials by the Sixth Amendment, is so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment." Id. at 17-18.

Relying on In re Oliver, the Court observed that, among other things, an accused's right 'to offer testimony' is a basic component of his right to offer a defense. Id. at 18 (quoting In re Oliver, 333 U.S. 257, 273 (1948)). The Court therefore concluded that "[t]he right to offer testimony of witnesses and to compel their attendance [] is in plain terms the right to present a defense" because "[j]ust as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense." Id. at 19. It is then up to the jury to "decide where the truth lies." Id.

The Court spoke again on the constitutional significance of allowing a defendant to

present testimony in connection with his defense in Crane v. Kentucky, 476 U.S. 683 (1986). Specifically, in Crane, the Court held that the exclusion of testimony surrounding the circumstances of a defendant's confession deprived the defendant of his fundamental right, whether under the Due Process Clause of the Fourteenth Amendment or under the Compulsory Process or Confrontation Clauses of the Sixth Amendment, to present a defense. Id. at 690-91. The Court reasoned that the opportunity to be heard "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." Id. As a result, the Court concluded that the "exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" Id. at 690-91 (quoting United States v. Cronic, 466 U.S. 648, 656 (1984)).

"[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." United States v. Scheffer, 523 U.S. 303, 308. This latitude, however, has limits. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, supra at 690. This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" Scheffer, supra, at 308.

In sum, where a defendant's federal right is limited by a state evidentiary rule, the evidentiary rule must fall. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004). Holmes v. South Carolina 547 U.S. 319 (2006). Here, the failure to allow the defense to place

into evidence a statement made by Wesson in November of 2008 violated his right to present a defense.

Here, the failure to present the interview deprived the defendant from attempting to lessen the effect of the prosecution attack of him for the story. The defense provided the interview to the police detectives according to the docket on November 21, 2008. This was two months before trial. The obvious prejudicial effect of the original statement was understandably attacked by the prosecution during trial and arguments in both phases. The sooner Wesson was able to establish his acknowledgment of the falsity of the statement, the more defense counsel could deflect or lessen the testimony and argument designed to repudiate it by the prosecution. This unfair prejudice of the ruling effected both phases of trial. State v. Thompson, (1987) 33 Ohio St.3d 1.

Proposition of Law IV:

> **When a capital defendant waives his right to a jury trial, Revised Code §2945.06 requires that the presiding judge of the court rather than the case itself select the other members of a three judge panel to hear and decide a capital murder trial.**

The empaneling of the three-judge panel in Wesson's case failed to comport with Ohio law. The presiding judge of the Summit County Common Pleas Court did not select the panel members as is required by statute. Rather, the judge who was originally assigned to preside over the potential jury trial selected the other two judges of the panel. This process violated the Ohio statute which dictates that the presiding judge of the county common pleas court select the panel members.

Ohio Revised Code §2945.06 set forth the law concerning a jury waiver and three-judge panels:

> If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court.

Under this section, the "judge presiding at the time in the trial" refers to the judge initially assigned to the case. O.R.C. §2945.06. However, the other two judges are "to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court." Id.

There is a difference between the judge presiding of the trial and the presiding judge. In every case there is a judge presiding over that particular case. Without an assigned judge, a

defendant would be unable to have his case heard or to accept his waiver of a jury. Thus, if "presiding judge" refers to the assigned judge, the statute does not make sense. If he or she always has the power to assign the other judges, there is no need to delegate that duty to "the presiding judge or chief justice of that court" and certainly no need to get assignments from the chief justice of the Supreme Court.

Present Case

On January 6, 2009, Petitioner signed a jury waiver. The waiver included the language:

> I, HERSIE WESSON, consent to be tried by a Court to be composed of three judges, consisting of Thomas A. Teodosio, presiding at this time, and two other judges to be designated by the Chief Justice.

On January 7, 2009, the trial judge filed an amended waiver, which included the language:

> I, HERSIE WESSON, consent to be tried by a Court to be composed of three judges, consisting of Thomas A. Teodosio, presiding at this time, and two other judges to be designated pursuant to law.

On January 7, 2009, in open court, the judge, Wesson's attorneys and the prosecution discussed the jury waiver and the assignment of judges to the panel. Defense counsel indicated that the Judge informed them of his initial error in relying on the Chief Justice for assignment. His research indicated that it was within his own power to assign other judges to the panel. "Yeah. As a presiding judge, I can do that. The only time a supreme court would be involved is if I need an outside judge." (T. 2-3) The judge then read the amended waiver. Wesson and his counsel signed it.

Following the execution of the document, the judge reviewed his actions, "I wanted to make sure that Mr. Wesson knew that I, as the presiding judge, would be appointed two common

pleas judges and not the Chief Justice. Okay. Are we clear?" (T. 5). On January 12, 2009, Judges Gippin and Burnham-Unruh were selected to be the other two for the panel. This was memorialized in an entry.

The trial court, in an order dated January 8, 2009, relied on State v. Eley, 77 Ohio St. 3d 174 (1996), to determine who would assign the remaining judges. In Eley, the Ohio Supreme Court ruled that "R.C. 2945.06 provides that the three-judge panel is to be composed of three judges: the judge presiding at the time in the trial of criminal cases and two judges to be designated by that judge or by the presiding judge or chief justice of that court." Eley, 77 Ohio St. 3d at 184. This was a misstatement of law.

Judge Teodosio was not the presiding judge of the Summit County Court of Common Pleas when Petitioner was indicted, or when the jury waiver was filed and the judges selected for the panel. Because Judge Teodosio was not the presiding judge for the Summit County Court of Common Pleas, he did not have the authority to select the judges who would serve him on the panel. The panel was assembled contrary to law.

When a three-judge panel is assemble improperly, the "trial court lacks jurisdiction to try the defendant with a jury." State v. Pless, 74 Ohio St. 3d 333, 339 (1996). O.R.C. §2945.05 grants a defendant the right to waive a jury. This Court requires "strict compliance" with the requirements of a valid jury waiver. Pless, 74 Ohio St. 3d at 339. O.R.C. §2945.05 outlines the general rules for waiving a jury and requires strict compliance. Absent strict compliance, a trial court may not try a defendant without a jury. State v. Dallman, 70 Ohio St.3d 261, 262, 638 N.E. 2d 563, 565 (1994).

But unlike Pless, the court did not fail to comply with O.R.C. §2945.05. Here, the

violation was of O.R.C. §2945.06. "R.C. 2945.05 and 2945.06 must consequently be construed *in pari materia.*" State ex. Rel. Collins v. Leonard, 80 Ohio St. 3d 477, 478, 687 N.E.2d 443, 443 (1997). Judge Teodosio was not the presiding judge for Summit County. His decision to select the other judges himself did not comply strictly with the statute; the panel he selected did not have authority to hear the case.

"[T]he error at issue here...is not one that challenges subject matter jurisdiction, but rather challenges the authority of the trial court to act within its subject matter jurisdiction as required by a particular statute." State v. Jackson, 2008 Ohio 6938, ¶11 (Summit Cty. Ct. App. December 31, 2008). In failing to comply with O.R.C. §2945.06, the panel did not have authority to hear Wesson's case. The question is not the subject matter jurisdiction of this court, but the panel's authority to rule in the Wesson's case. A panel lacking authority cannot proceed to a valid judgment. State v. Swiger, 125 Ohio App.3d 456, 463 (1998) citing Morrison v. Bestler, 239 Va 166, 387 S.E.2d 753, 755 (1990). A judgment from a panel assembled by a court acting beyond its statutory authority is voidable. Swiger, 125 Ohi App. 3d at 465, 708 N.E.2d at 1039.

"The right to a jury is fundamental." Haliym v. Mitchell, 492 F3d 680, 698 (6th Cir. 2007) citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968). The Fourteenth Amendment guarantees the right of a jury trial in criminal cases. Duncan, 391 U.S. at 149. Wesson improperly waived his right to a jury.

Federal Due Process Violation

It is well-settled that "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution, and, in particular, in accord with the Due Process Clause." This is all the more important when

an individual's life is at stake in the proceeding. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five justices recognizing a distinct, continuing, "life" interest protected by the Due Process Clause in capital cases). All measures must be taken to prevent arbitrary, cruel, and unusual results in a capital trial. See Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). Because death is different, additional requirements follow a waiver of the right to a jury in a death penalty case to maintain a defendant's right to due process. O.R.C. §2945.06. The court's improper assignment of judges to the panel did not follow those requirements. When the panel heard the case, it was not in accordance with the statute designed to guarantee the defendant's Fourteenth Amendment rights.

Proposition of Law V:

> **Where the presumption against the waiver of Miranda protections is not overcome by the totality of the circumstances of the waiver, any resultant statement by a defendant must be suppressed.**

Police interrogation of a suspect in custody threatens the Fifth Amendment privilege against self-incrimination by providing officers with an opportunity to 1) actively compel confessions through overtly coercive interrogation or 2) passively compel confessions by exposing suspects to the "inherently coercive" environment created by custodial interrogation. New York v. Quarles, 467 U.S. 649, 654 (1984). The procedural safeguards to establish a prophylactic procedural mechanism to safeguard against coercion during custodial interrogation were established in Miranda v. Arizona, 384 U.S. 436 (1966). Although the warnings provided do not need to be provided verbatim, the failure to substantively convey the rights to a defendant before questioning will result in the suppression of any subsequent statement.

Such rights may be waived by a defendant. Before the prosecution may introduce an incriminating statement of a defendant, it must prove that the accused voluntarily, knowingly and intelligently waived his Miranda rights. Miranda at 457. To determine the validity of Miranda waiver, courts must analyze the totality of the circumstances. To determine the voluntariness of a waiver, it is necessary to look at the totality of the circumstances, *see* Arizona v. Fulminante, 499 U.S. 279, 285, (1991) including "the tactics used by the police, the details of the interrogation, and any characteristics of the accused that might cause his will easily to be overborne." United States v. Rohrbach, 813 F.2d 142, 144 (8th Cir. 1987); *see also* United States v. Jackson, 918 F.2d 236, 241 (1st Cir. 1990). Though courts must presume that a defendant did

not waive his rights, see Jackson, 918 F.2d at 241, the government may prove a waiver by a preponderance of the evidence. *See* Colorado v. Connelly, 479 U.S. 157 (1986).

In the present case, the prosecution did not overcome the presumption against the waiver. It is not contested that the waiver was provided. The defendant's interview with detectives was taped. However, the combination of the lack of sleep, the alcohol, the coercive nature of the setting and defendant's lack of education combined to render the waiver invalid.

Suppression Hearing Testimony

Hersie Wesson testified in his suppression hearing. Wesson testified he consumed a great amount of alcohol on February 25, 2008. He ate nothing on the day. (T. 50) He drank a fifth of Morgan David wine, or Grape Mad Dog on a friend's back porch. That occurred at about 2 to 2:45 pm. Wesson drank two tall 24 ounce cans of Bud Ice. This occurred at 4:00 (T. 51-52, 56, 58) He then drank six or seven more beers, with the total maximum being ten. (T. 53) One of these beers was a small can of beer at the Varhola's. He bought another tall Bud Ice from a Circle K. He drank this about 9:00 pm. He then bought more alcohol in the form of beer from a drive thru and had another 4-5 at his friends house. This drinking started at approximately 9:45 pm over the next hour and a half. (T. 73) He went to bed about 11:00 pm.

Wesson had a history of drinking about three times per week. (T.53) The last thing he remembered before being arrested and taken to the police station was laying down at about 11:00 the night before. (T. 56)

Wesson could only remember "bits and pieces" of the questioning at the police station. (T. 77) He did not remember being read his Miranda rights. (T. 78, 80, 89) He remembered talking to the detectives, but did not remember the subject matter because of his intoxication. (T.

89) He remembered being in a room with two white men while being chained to a desk. Wesson was seated, but falling of the chair. (T. 90) One of the men was talking to him. Wesson did not remember where the other man was during the questioning. (T. 90) The men tried to bully Wesson. He did not remember if the men offered him anything to eat or how long the interview lasted. (T. 92)

Doctor Robert Belloto testified that he had a Ph.D in pharmacy. He has testified in field about 60 times. (T.15) Dr. Belloto testified that alcohol is a Central Nervous System depressant. This means the alcohol will slow ones reactions and dulls ones thinking skills. One will lose their critical thinking. (T. 18)

Dr. Belloto was asked a hypothetical question. He was asked to estimate the alcohol level of a man who stood about 5'7", 150 lbs, had been a chronic drinker, if not alcoholic for a long time, started to drink in early afternoon and drank til about 11:00 pm. This man consumed a bottle of Morgan David wine, seven or eight beers, went to sleep about 3:00 am before being awakened and question at about 4:00 am. Dr. Belloto estimate that the man's alcohol level would be between .1 and .24. (T. 26) .08 is the legal limit in Ohio. The doctor thought that he would be in the middle range, or approximately at .17. (T. 29)

This estimate was based on the calculated elimination rate. (T. 27) Dr. Belloto noted that a chronic alcoholic eliminated alcohol slower than at non-drinker would.(T. 33)

State Witnesses

Justin Ingham of the Akron Police Department testified that on the day of the homicide, Wesson was located in the South Arlington residence laying on a bed at 3:30 am.(T. 110) When the door opened, Wesson peaked, he opened his eyes and just shut them and just laid there. (T.

99) he had his clothes and shoes on. Wesson did not respond to verbal commands. The officers then sat Wesson up in his bed. (T. 100) Ingham thought Wesson was "playing opossum."

Officer Ingham said that they took Wesson's shoes off. Wesson seemed to walk without difficulty. Ingham did not smell any alcohol. (T. 102) Wesson did not speak to the officer. He did not know if Wesson's eyes were bloodshot. (T. 106) The officer took Wesson's shoes but did not look into the room for beer cans or a six-pack of beer. (T. 109)

Steve Perch, a toxicologist from the Summit County Medical Examiner's Office, testified that one with a .08 level who had developed a tolerance to alcohol could do the same tasks as a non-drunk person could do. (T. 119-120) On cross-examination, he altered that testimony by stating that a chronic alcoholic has a different degree of impairment that a social drinker. (T. 125)

Darell Parnell of the Akron Police Department testified that he took a penile swab of the suspect. (T. 132) A tape of an interview was played. The interview was taken at 9:36 am on February 26, 2008.

Kevin Keballar, a detective with the Akron Police Department, testified that he interviewed Wesson about 4:00 am on February 26, 2008. He interviewed Wesson with Detective Harrah for about forty-five minutes. (T. 145) The detective believed that Wesson was focused. He responded appropriately to Miranda warnings. He did not appear to be intoxicated. (T. 144)

Wesson was seated at a stainless steel table with a fixed seat on either side of it. Wesson was handcuffed to the table. Detective Harrah and the witness were the only two in the room with Wesson. (T. 147, 158) Kellabar did see a beer can in the room. (T. 150) It was not taken

into evidence. (T. 150) He did not notice Wesson slurring his speech, but acknowledged that their conversation was limited. The officers did not interview Wesson at the place he was arrested. (T. 155)

The officers knew that they were going to arrest Wesson at the house. Wesson was held by an officer as he was taken to the paddy wagon. This was standard procedure. (T. 156)

Frank Harrah, a detective with the Akron Police Department, conducted the interview of Wesson. The interview was conducted for about 45 minutes. Prior to the interview, Detective Harrah read Wesson his Miranda rights. (T. 159) Wesson did not request an attorney during this time. (T. 160) He did not appear to be intoxicated at the time he waived his Miranda rights. (T. 161) The answers provided were appropriate for the questions. (T. 165)

Det. Harrah acknowledged that Wesson told him that he had drunk moonshine and beer prior to the interview. (T. 166) The interview was recorded. State's Exhibits 1 and 2.

Miranda Requirements

The Supreme Court decision in Miranda v. Arizona, 384 U.S. 436 (1966), created a presumption of a coercive atmosphere in custodial interrogation. The Court decided that where there is custodial interrogation and government involvement, there is a conclusive presumption. As a result, any statement that a suspect in that environment gives is presumed to be coerced. Any statement that is coerced cannot then be used against that suspect.

That presumption of coerciveness is only overcome if two requirements are met. First, a suspect must be apprized of certain rights. Then the suspect must issue a valid waiver of those rights. If both of those requirements are not met, any statement or confession from a suspect in custodial interrogation is presumed coerced in violation of the suspect's rights. In Miranda, the

Court twice referred to the rights afforded a suspect in custodial interrogation.

In the present case the totality of the circumstances, the alcohol, the interrogation room, the handcuffing to the table, and the 4:00 am interrogation rendered the waiver invalid. Wesson's prior record reflected his lack of education and intellect. The state scene witnesses all testified that Wesson did not appear intoxicated. But the presumption is that the waiver was invalid. The combination of factors rendered the waiver invalid. State v. Edwards (1976), 49 Ohio St.2d 31. The fact that the appellant did not appear intoxicated is insufficient proof of his knowing intelligent and voluntary waiver of his Fifth Amendment protections.

The statements taken by police in the case at bar are in violation of the defendant's Fifth, Sixth and Fourteenth Amendment rights under the Ohio and United States Constitutions. The admission into evidence of said statements would violate the guarantees contained in the case of Miranda v. Arizona (1966), 384 U.S. 436.

Proposition of Law VI:

Tampering with Evidence, R.C. §2921.12 and Aggravated Robbery, R.C. §2911.01 are allied offenses pursuant to R.C. §2945.21 where the underlying theft offense and the making the element unavailable constitute the same animus.

The indictment in Count Ten charged Wesson with Tampering with Evidence, R.C. §2921.12. The tampering of the evidence consisted of Wesson carrying the gun that was the theft element of the aggravated robbery and a cup outside of the house. They were placed under a bush. Wesson's animus for taking the items from the house was the same as the animus for

making these items unavailable to the prosecution. Thus, the convictions must be merged.

R.C. §2945.21 implements the protections of the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States and Section 10, Article I of the Ohio Constitution and prohibits a second punishment for the same offense. State v. Brown, 119 Ohio St.3d 447, 2008 Ohio 4569.

In State v. Brown, supra, this Court held that where a criminal "statute sets forth two means of committing the same offense both of which serve the same purpose-preventing physical harm to persons-we conclude that the General Assembly did not intend them to be separately punishable when the offenses result from a single act undertaken with a single animus."

The Brown Court explained:

> "In State v. Botta (1971), 27 Ohio St.2d 196, 201, 56 O.O.2d 119, 271 N.E.2d 776, we acknowledged that R.C. 2941.25 is a legislative attempt to codify the judicial doctrine of merger, i.e., the principle that 'a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime.' See also State v. Roberts (1980), 62 Ohio St.2d 170, 172-173, 16 O.O.3d 201, 405 N.E.2d 247; State v. Thomas (1980), 61 Ohio St.2d 254; State v. Logan (1979), 60 Ohio St.2d 126, 14 O.O.3d 373, 397 N.E.2d 1345. Therefore, the proper disposition of matters involving allied offenses of similar import committed with a single animus is to merge the crimes into a single conviction."

Present Case

In Wesson's case, the convictions of Tampering with Evidence and Aggravated Robbery must be merged because the animus for the theft of the items and the animus for making the items unavailable to the police were identical.

Tampering with evidence is defined in R.C. §2921.12 as follows:

A) No person, knowing that an official proceeding or investigation is in progress, or

is about to be or likely to be instituted, shall do any of the following:

(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;

Theft is an element of aggravated robbery. Theft is defined under R.C. §2913.02 as

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat;

(5) By intimidation.

Allied Offenses Analysis

In State v. Cabrellas, 118 Ohio St.3d 54, 2008 Ohio 1625, this Court clarified that its holding in State v. Rance (1999), 85 Ohio St.3d 632, 1999 Ohio 291, does not require a "strict textual comparison under R.C. 2941.25(A). This Court noted that "in determining whether offenses are allied offenses of similar import under R.C. §2941.25(A), Rance requires courts to compare the elements of offenses in the abstract, i.e., without considering the evidence in the case, but does not require an exact alignment of elements." The decision also stated that "if in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import." Cabrales, supra at p. 26.

Proposition of Law VII:

> **Victim-impact statements made by or on behalf of family members of the decedent at the time of sentencing are limited in nature and may not address the families characterization of and opinions about the crime, the defendant and the appropriate sentence.**

Prior to trial, defense counsel filed a motion to prohibit victim impact evidence during the mitigation phase. On June 27, 2008, the trial court granted the motion. Nevertheless, the state did produce witnesses prior to the court's filing of its 2929.03(F) opinion who provided victim-impact statements. While the United States Constitution permits limited comments on behalf of the family of the victim, these comments may not address the families characterization of and opinions about the crime, the defendant and the appropriate sentence.

Three family members of the victim did address areas that are prohibited by due process and the Eighth Amendment. Although the statements did address areas that are now permitted by the United States Supreme Court, the statements all addressed matters that are expressly prohibited. The cumulative nature of the statements require a new sentencing hearing.

Limited Area of Allowable Subject Matter for Family Statements to Sentencing Body

The United States Constitution does not prohibit victim-impact evidence per se in capital cases. Payne v. Tennessee (1991), 501 U.S. 808, 111 S.Ct. 2597. The Supreme Court held that victim-impact evidence did not overstep the bounds of the Fourteenth Amendment unless the evidence introduced "is so unduly prejudicial that it renders the trial fundamentally unfair." ... The Court also reasoned that, in the same way that defendant is permitted to introduce relevant mitigating evidence, the State may allow the prosecutor to "argue to the jury the human cost of the crime of which the defendant stands convicted." Id., 111 S.Ct. at 2608-2609. This includes

evidence and argument relating to the victim's personal characteristics and impact of the death on his family are legitimate means of informing the sentencer about the specific harm caused by the defendant's acts. Payne, 501 U.S. at 825.

While Payne overruled much of the earlier case of Booth v. Maryland, 482 U.S. 496 (1987), Payne did not overrule the provisions in Booth holding that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence are inadmissible and violative of the Eighth Amendment. Payne, 501 U.S. at 830, 111 S.Ct. at 2611, (note 2). ("This case presents no challenge to the Court's holding in Booth v. Maryland that a sentencing authority should not receive a third category of information concerning a victim's family members' characterization of and opinions about the crime, the defendant and the appropriate sentence." Id. at 830, 835 n.1. See Black v. Collins, 962 F.2d 394, 408 (5th Cir. 1992); Parker v. Bowersox, 188 F.3d 923, 931 (8th Cir. 1999).

In State v. Post, (1987) 32 Ohio St. 3d 280, this Court originally held that there was a statutory prohibition against the use victim-impact in Ohio, apart from any constitutional prohibition. Although Post has not been specifically overruled, this Court has softened the restriction against such testimony. Victim-impact evidence is now permitted in this state where it elicits the effect that the victim's death has had on family members. State v. Fautenberry (1995), 72 Ohio St.3d 435, 439; State v. Smith (2002), 97 Ohio St.3d 367, 372.

The family's statements in the present case went far beyond the effect that the offense had upon the victim's family and into area's prohibited by Payne and Booth. A victim's advocate read a statement on behalf of the Mary Jo Varhola, the victim's wife. It was noted that Emil had given the defendant money for a bus and paid him money for doing work that had not been

completed. (Verdict hrg, T. 11) The statement also noted that "I feel Mr. Wesson should get the death penalty. This was a horrible crime and I don't ever want him to be able to hurt anyone again." (T. 12)

As noted above, comments that reflect an opinion about the crime, the defendant and the appropriate sentence were not overruled by Payne. Consistently, this Court has held that "[e]xpressions of opinion by a witness as to the appropriateness of a particular sentence in a capital case violate" a defendant's rights. State v. Huertas (1990), 51 Ohio St.3d 22 syllabus. The same principle applies to family representatives who express opinions about the penalty at sentencing hearings. See State v. Goodwin (1999), 84 Ohio St.3d 331, 343; State v. Fautenberry (1995), 72 Ohio St.3d 435, 438-439.

Paul Varhola, the son of the victim, also commented on the heinous nature of the crime. He stated:

> And for this individual to come into the home and do what he did, and be so brutal - - yes, he did go to the bathroom, but it was only afterward. He used it after he did this horrible crime to wash the blood and that off his hands and off his face in order to leave. (T. 15)

Paul Varhola also urged the sentencing court to protect the elderly because, "we're all getting older, too. And I just hope that this case brings attention to the problems that society has that maybe we can prevent somebody else from going through the same problems that our family has had to endure." (T. 17) The above comments were outside the sphere allowed by Payne.

The most vitriolic statements were made by the third family member, the nephew of the Varholas, Dennis Woods. Among his comments were the following:

1. He [Emil] even showed compassion toward Hersie R. Wesson, who repaid the kindness

by stabbing him five times, including three in the back. In one savage instant Hersie R. Wesson not only took away Emil Varhola's life, but he also killed his dreams and everything that he had worked a lifetime to achieve. (T. 21)

2. Aunt Mary was stabbed by Hersie R. Wesson seven times, including one in the heart. She survived only because Hersie R. Wesson left her for dead. (T. 21)

3. In my opinion, this entire trial has been about the web of lies that Hersie Wesson has created. Against the backdrop of overwhelming testimony to the contrary, he insists on perpetuating his lies of self-defense. Hersie Wesson has stolen weeks and months of time from everyone associated with these proceedings because he cannot admit the truth and cannot take responsibility for his actions. (T. 23)

4. In summary, the worst scum of any society are those that prey on the weak and defenseless. Hersie R. Wesson is such an individual. (T. 25)

5. Only a pathetic coward with no respect for human life would violently attack such people. (T. 26)

6. Hersie R. Wesson is a menace to society and can never be given the opportunity to kill or maim again. The factual statements contained in my impact statement and the facts presented over this lengthy court proceeding have proved beyond a shadow of a doubt that justice can only be served if Hersie R. Wesson is sentenced to death. (T. 26)

It is understood that "where such opinion is expressed to the judge only, as was the case here, it is not reversible error unless there is some indication that the judge actually considered it in sentencing the defendant to death." State v. Franklin, 97 Ohio St.3d 1, 2002-Ohio-5304, at ¶¶88, citing State v. Fautenberry (1995), 72 Ohio St.3d 435, 438-439. It would be difficult for a judge at such a hearing to inform the victim's family that they could provide statements but that the court would not consider them for determining the appropriate sentence. The entire purpose of a victim-impact statement is that they are made for the court to consider them at sentencing. Here, although the court did not specifically address the statements in its opinion, the court had reversed itself on the admission of the allowance of the statements. This alone would be an

indication of a willingness on the part of the panel to consider the family's heartfelt emotions.

In Payne v. Tennessee, the Supreme Court stressed that, "[a]s a general matter ... victim impact evidence is not offered to encourage comparative judgments [between different victims]." 501 U.S. at 823. The danger of allowing such is that the statements may evolve into a non-statutory aggravating factor. That is precisely what happened here.

Proposition of Law VIII:

The failure to raise and preserve meritorious issues during the culpability phase results in the denial of a defendant's right to effective assistance of counsel.

In the present case, counsel failed to in his duty to represent the appellant in accordance with the professional norm. The list below does not include the arguments addressed elsewhere in this brief.

1. Counsel failed to object to the improper indictment which did not include the *mens rea* for Aggravated Robbery. This defect appeared in Count Two, R.C. §2903.01(B) and the R.C. §2929.04(A)(7) specification to Counts Two and Three. The defect also occurred in the principal charges of Aggravated Robbery in Counts Seven and Thirteen. See Proposition I.
2. Counsel failed to argue the inadequate proof that Wesson was under detention at the time of the homicide. Proposition II.
3. Counsel failed to object to the erroneous jury waiver, which permitted the hearing judge rather than the presiding judge of the court to select the two remaining panel members. See Proposition IV.
4. Failed to argue that Tampering with Evidence, Count Ten, should be merged with Count Seven, Aggravated Robbery. Proposition of Law VI.
5. Counsel failed to object to the introduction of victim-impact statements to the three judge panel prior to the panels writing of the R.C. §2929.03(F) opinion in violation of State v. Post (1987), 32 Ohio St.3d 380 and Booth v. Maryland, 482

U.S. 496. Proposition of Law VII..

Effectiveness Standard

The United States Supreme Court set forth the minimum standard for effective assistance in Strickland v. Washington (1984), 466 U.S. 68. A two-step test was announced. First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense. This latter test requires that counsel's errors were so serious as to deprive the defendant of a fair trial.

Proposition of Law IX:

The death penalty may not be sustained where the cumulative errors that occurred in the trial deprived the defendant of a fair consideration of the appropriateness of the death penalty.

The combination of errors by the trial court, the prosecution and the ineffectiveness of the defense counsel deprived the appellant of a fair trial. The errors, if not individually, combined to cause the trial to be constitutionally infirm. State v. DeMarco (1987), 31 Ohio St.3d 191. These errors, as addressed in the Propositions of Law in this brief, combined to violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Wesson incorporates the other Propositions of Law into this argument. In particular, the failure of the state to properly present the indictment to the grand jury (Proposition of Law I) and to try him for having committed the offense while under detention (Proposition of Law II) allowed the case to proceed to the penalty stage where the law permitted only a conviction of Murder in violation of R.C. §2903.02.

Proposition of Law X:

> **O.R.C. § 2929.04(A)(7) is unconstitutional where the same acts which constitute the charge of aggravated murder are also used to narrow the class of death eligible defendants.**

In Count Two, the count the prosecution elected to proceed with into the penalty phase, the State convicted Wesson of Aggravated Murder under R.C. 2903.01(B) (felony-murder). The underlying felony was Aggravated Robbery. He was also convicted of an aggravating circumstance which specified that Wesson committed aggravated felony-murder while engaged in the commission of that same Aggravated Robbery. R.C. 2929.04(A)(7); R.C. 2911.01. The only additional element in the specification was that Wesson was the principal offender in the Aggravated Murder. This additional factor does not meet the constitutional narrowing requirement.

Count Two charges that the Wesson appellant trespassed into the residence of the victim,

> . . . while committing or attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery, in violation of Section 2903.01(B) of the Revised Code.

Specification Three to this count reads as follows in relevant part:

> . . . that Aggravated Murder was committed while HERSIE R.WESSON was committing or attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery, and HERSIE R. WESSON was the principal offender in the commission of aggravated murder. . .

The problem here is that the acts and facts underlying the specification encompass the same exact acts and facts as does the Aggravated Murder. A murder committed for the purpose of facilitating a theft will constitute felony murder in every case. There is no additional act

required by the actor to raise the offense to a capital crime. In other words, a homicide, committed without prior calculation and design, is murder under R.C. §2903.02. If it is done while facilitating a robbery, the act is raised to aggravated murder. In Wesson's case, the same act which bumped the charge from murder to aggravated murder, additionally raised the charges to a capital offense. There is no true narrowing of the class of eligible defendants as is constitutionally required.

Constitutional Narrowing Requirment

Under the Eighth Amendment, states must adopt procedural protections that "assure consistency, fairness, and rationality in the evenhanded operation of the state law ... to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed ..." Proffitt v. Florida, 428 U.S. 242, 260 (1976) (Joint Opinion of Stewart, Powell and Stevens, JJ.) (citation omitted), and "promote the evenhanded, rational, and consistent imposition of the death sentences under law." Jurek v. Texas, 428 U.S. 262, 276 (1976) (Joint Opinion of Steward, Powell and Stevens, JJ.) (citation omitted).

Central to this jurisprudence is the "constitutionally necessary narrowing function" of any death penalty scheme. Pulley v. Harris, 465 U.S. 37, 50 (1984). As the United States Supreme Court has stated: "Our precedents make clear that a State's capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty.'" Arave v. Creech, 507 U.S. Ct. 463 (1993), quoting Zant v. Stephens, 462 U.S. 862, 877 (1983); Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) (discussing narrowing requirement); Barclay v. Florida, 463 U.S. 939, 960 (1983) (Stevens, J., concurring) ("[W]e have stressed the necessity of 'genuinely narrowing the class of persons eligible for the death penalty.'"); Walton v. Arizona, 497 U.S. 639, 110 S.

Ct. at 3060-3061 (1990) (Scalia, J., concurring).

In Lowenfield v. Phelps, 484 U.S. at 244 the Court stressed the dual function of "genuine narrowing:"

> To pass constitutional muster, a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

"When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so." Arave v. Creech, supra. at 473, citing Lewis v. Jeffers, 497 U.S. 764, 776 (1990) and Godfrey v. Georgia, 446 U.S. 420, 433 (1980).

"Genuine narrowing" serves its Eighth Amendment purpose by reducing the opportunities for the "freakish" and "wanton" imposition of the death penalty in two ways. First, "narrowing" limits the class of murderers for whom the death sentence can be considered. By restricting eligibility, it assures that the death penalty cannot be imposed indiscriminately. See, e.g., Walton v. Arizona, 110 S. Ct. at 3090 (Stevens, J., dissenting) ("The risk of arbitrariness condemned in Furman is a function of the size of the class of convicted persons or eligible for the death penalty.") Second, "narrowing" limits the death penalty to those murderers whose culpability makes the death penalty particularly appropriate, insuring rationality by avoiding purely arbitrary sentencing. Not all murderers may be sentenced to death, and those who receive the death penalty must be rationally distinguishable from those who do not on grounds that reflect their respective degrees of culpability.

This Court has also acknowledged the constitutional requirement of narrowing in State v.

Henderson (1988) 39 Ohio St.3d 24, 28-29. There the court found the 1981 statute constitutional, "the Ohio General Assembly has complied with *Zant*, supra, by narrowing the class of death-eligible aggravated murders."

The use of aggravated robbery as an aggravating circumstance is inadequate for narrowing. Had Wesson been found of a prior calculation and design killing, bootstrapping would not be a problem. There, the aggravated robbery would have raised what was already an aggravated murder into the capital realm. Wesson was acquitted of Count One, which alleged prior calculation and design.

Furthermore, the Ohio statute as a whole does not satisfy the narrowing requirement under Lowenfield because it fails to narrow the class of death eligible defendants at either the guilt or penalty phase. Lowenfield, 484 U.S. at 246. The narrowing function can be provided at the guilt phase if the legislature narrows the definition of capital offenses. Id. However, the Ohio legislature has not defined capital offenses. Unlike the statute in Lowenfield, where a finding of guilty of first degree murder makes a defendant death eligible; in Ohio a jury finding that a defendant is guilty of aggravated murder does not make that person death eligible. An Ohio jury must also find the defendant guilty of an aggravating circumstance in R.C. 2929.04(A). Therefore, Ohio does not narrow at the guilt phase.

The second option is to "provide for narrowing by jury findings of aggravating circumstances at the penalty phase." Id. However, Ohio does not require proof of the aggravating circumstances at the penalty phase. The evidence supporting the aggravating circumstance is introduced at the guilt phase and the jury finding is made at the guilt phase. Therefore, the Ohio statute in relation to Aggravated Robbery as an element fails to narrow at the

penalty phase as well. No effective narrowing is performed when a capital defendant is indicted for felony-murder with the felony-murder specification.

The Supreme Court has summarized this requirement as follows:

> To pass constitutional muster, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); cf. *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. *Id.*, at 162-164 (reviewing Georgia sentencing scheme); *Proffitt v. Florida*, 428 U.S. 242, 247-250, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976) (reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. *Zant*, *supra*, 462 U.S., at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").

As noted above, this Court has also acknowledged the constitutional requirement of narrowing in State v. Henderson (1988) 39 Ohio St.3d 24, 28-29. There this Court found the 1981 statute constitutional; "the Ohio General Assembly has complied with Zant, supra, by narrowing the class of death-eligible aggravated murders."

The aggravating circumstance in this case was rendered meaningless, because the aggravated murder statute is essentially the same. Once the panel found Wesson guilty of aggravated murder, they did not even need to think about the aggravating circumstance, because it exactly mirrored the charge.

In finding the statue constitutional in Henderson, this Court relied on the analysis set forth by the United States Supreme Court in Lowenfield, *supra*:

> First, the legislature may broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. Second, the legislature may itself narrow the definition of capital offenses so that the jury finding at the guilt phase responds to this concern.

At the time Henderson was decided, the Ohio statute was narrowly defined so that the jury finding of aggravated murder and the additional required finding of the aggravating circumstance met constitutional safeguards. But now, the legislature has "broadly defined the capital offenses," that is, that numerous additional aggravating factors have been added to the statute, but has provided for no narrowing by jury findings of aggravating circumstances. The current statutory scenario is constitutionally inadequate.

Proposition of Law XI:

The death penalty cannot be upheld where the reviewing court fails to follow the statutory provisions regarding the proportionality review of the defendant's sentence.

The state of Ohio's purported proportionality review is best summarized by the dissent of Justice Paul Pfeifer, one of the authors of Ohio's death penalty statute, in State v. Murphy, (2001) 91 Ohio St.3d 516, 563-564. Justice Pfeiffer called Ohio's failure to properly address the proportionality statute as "ethically indefensible."

> We are required by statute to conduct a proportionality review in which we "consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases." R.C. 2929.05(A). This court has construed this language to limit review to similar cases in which the death penalty was imposed. State v. Steffen (1987), 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph one of the syllabus. However, the "similar cases" language of R.C. 2929.05(A) is ambiguous. A narrow interpretation, such as this court's current one, is a possibility. Another is that "similar cases" refers more broadly to all factually similar cases, whether or not a capital specification was charged or proved.
>
> In my view, Murphy should be compared to the universe of all Ohio cases in which a person was killed during the course of a robbery, not just to cases in which a person was killed during the course of a robbery and in which a sentence of death was imposed. When we compare a case in which the death penalty was imposed only to other cases in which the death penalty was imposed, we continually lower the bar of proportionality. The lowest common denominator becomes the standard. *This result is ethically indefensible.* (Emphasis added)

Murphy, 91 Ohio St.3d at 563-564.

This issue may yet receive federal scrutiny. In turning down a certiorari request in Walker v. Georgia, 555 U.S. ___, 129 S. Ct 453, 455 (2008), Justice Stevens noted his displeasure of the perfunctory nature of Georgia's proportionality review:

Rather than perform a thorough proportionality review to mitigate the heightened

> risks of arbitrariness and discrimination in this case, the Georgia Supreme Court carried out an utterly perfunctory review. Its undertaking consisted of a single paragraph, only the final sentence of which considered whether imposition of the death penalty in this case was proportionate as compared to the sentences imposed for similar offenses. And even then the court stated its review in the most conclusory terms: "The cases cited in the Appendix support our conclusion that [petitioner's] punishment is not disproportionate in that each involved a deliberate plan to kill and killing for the purpose of receiving something of monetary value." *Id.*, at 782, 653 S. E. 2d, at 447–448. The appendix consists of a string citation of 21 cases in which the jury imposed a death sentence; it makes no reference to the facts of those cases or to the aggravating circumstances found by the jury. Had the Georgia Supreme Court looked outside the universe of cases in which the jury imposed a death sentence, it would have found numerous cases involving offenses very similar to petitioner's in which the jury imposed a sentence of life imprisonment.

Ohio's proportionality statute, R.C. §2929.05, mandated the Ohio Supreme Court to conduct a proportionality review with, as Justice Pfeiffer wrote, the entire universe of similarly charged defendants, not just those who actually receive the death penalty. Because the latter standard is being implemented, there is no review being carried out as was intended by the state's legislature. Not surprisingly, the Ohio Supreme Court has never reversed a sentence of death because it was disproportionate. There is always a similarly convicted defendant who has received the death penalty. If one other person has received the penalty of death, then the sentence is proportional.

It is understood that there is no federal constitutional right to a proportionality review of one's sentence of death. Pulley v. Harris, 465 U.S. 37 (1984). Thus, the question here is whether the Ohio statute has created a liberty interest for the defendant that the state may not ignore. The answer here is unequivocally "yes." The failure of the Ohio courts to protect this interest is violative of federal due process.

In addition, R.C. §2929.05 plays an essential part in the narrowing requirement of Ohio's statutory scheme. Ohio's narrowing is not simply limited to the designation of aggravators pursuant to R.C. §2929.04(A). The legislature include the proportionality statute to further narrow the death-eligible defendants. The failure of the Ohio Supreme Court to carry-out the scheme renders the statutory framework unconstitutional. Zant v. Stephens, 462 U. S. 862, 877 (1983).

When the Ohio Legislature reenacted the death penalty, it required the appellate courts of Ohio to conduct a proportionality review of any death sentence that it reviews. R.C. §2929.05. (attached hereto). R.C. §2929.05(A) provides that Ohio Appellate courts shall make a de novo review of all the evidence and facts in the case to determine if the sentence of death is appropriate: "In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in other cases." The statute mandates that Ohio appellate courts perform a cross-case proportionality review to determine appropriateness and excessiveness in the sentence. Cross-case proportionality review is an additional safeguard against the arbitrary and capricious sentencing condemned in Furman v. Georgia, 408 U.S. 238 (1972).

To ensure that the courts had a sufficient body of data by which to conduct a proportionality review, the Legislature created an information-gathering system for capital cases. O.R.C. § 2929.021 R.C. §2929.03(G), and §2929.05(A). The trial courts in Ohio have consistently ignored the dictates of these Legislative mandates, thereby creating a proportionality system that is arbitrarily and capriciously implemented such that it is tilted toward death.

The Ohio Legislature has insisted that prior, to any individual being executed a

proportionality review, *made in the context of a defined data base*, must be undertaken. O.R.C. § 2929.05(A). Such a proportionality review is the 'scheme' to 'provide adequate standards to guide the decision' of the appellate and Supreme courts' upholding and ultimately affirming the imposition of a death sentence. This proportionality scheme serves to limit the appellate and Supreme courts' discretion, to guide the court in upholding and giving effect to the ultimate sentence. In this regard, if any state court acts with significant discretion in affording a Appellant his statutory rights, it must also act in accordance with the Due Process Clause of the United States Constitution. See Evitts v. Lucey, 469 U.S. 387 (1985); Goldberg v. Kelly, 397 U.S. 254 (1970). Without honest comparative proportionality review, there is absolutely no guarantee that similarly situated defendants, charged and convicted for similar crimes, will not be treated differently. Without honest comparative proportionality review there is an abuse of discretion, because the courts' discretion must be guided by the Legislatively mandated data base against which that proportionality review is to be conducted. Without honest comparative proportionality review irrationality and arbitrariness, even discrimination, are likely to be the norm. Consequently, Appellant has a due process and a corresponding liberty interest in having a properly undertaken proportionality review.

In State v. Steffen, 31 Ohio St. 3d 111 (1987), this Court held that "the proportionality review required by O.R.C. §2929.05(A) is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed." Id., at 123-124. However, the appellant asserts that only reviewing cases in which the death penalty was imposed does not result in a fair proportionality review. Instead, it results in a system without meaningful analysis, void of unbiased comparisons and it also serves to "rubber stamp" all death verdicts.

Ohio's proportionality statutes very specifically inform the appellate and Supreme Courts and that they "shall" create a very specific database, (O.R.C. §2929.02 and .03), and that they "shall" make a proportionality review in the context of that data base.

In Ohio v. Jenkins, 5 Ohio St.3d 164, 208-209, (1987), this Court acknowledged the Ohio Legislature's purpose behind mandating the specific information sought to be collected in §2929.02 and .03:

> To aid the courts in conducting their proportionality review under O.R.C. 2929.05, O.R.C. 2929.021 *requires* that certain information be provided to the Ohio Supreme Court with respect to capital indictments issued or dismissed. Also, under O.R.C. 2929.03(F), trial judges rendering opinions in capital cases *are required* to file copies of those opinions with their court of appeals and with the Ohio Supreme Court. O.R.C. 2929.05(A) also *requires* courts of appeals to file copies of their sentencing opinions with the Ohio Supreme Court. *The purpose of these provisions is to provide the reviewing courts with some basis for reviewing the proportionality of the imposition of the death sentence in comparison with sentences entered in similar cases.* (emphasis added)

The Ohio Legislature required the court or panel to write a decision when a life sentence was imposed:

> The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of Section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The Court or panel shall file the opinion required to be prepared by this division with the Clerk of the appropriate Court of Appeals and with the Clerk of the Supreme Court

> within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

R.C. §2929.03(F)

The statute is clear and concise: when the court imposes a life sentence, it shall make specific findings. There exists no rational reason to have a trial judge make findings of fact when (s)he rejects a jury's death recommendation and not make such findings when (s)he accepts a life recommendation. In both cases, findings of fact are needed to have a complete data bank for the purposes of O.R.C. §§ 2929.021; 2929.03(G), and 2929.05(A).

By only considering cases in which the death penalty has been imposed, it is the equivalent of having an automatic rule of affirmance, which, in a weighing state like Ohio, is unconstitutionally invalid. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). Since 1981, not one Ohio court has found that a death sentence is disproportionate. This is the best evidence available that the proportionality review sanctioned in State v. Steffen is unfair.

The failure to properly conduct a meaningful proportionately review is violative of the Due Process Clause of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Proposition of Law XII:

The death penalty is unconstitutional as presently administered in Ohio.

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

A. Arbitrary and unequal punishment

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

Ohio's capital punishment scheme allows the death penalty to be imposed in an arbitrary and discriminatory manner in violation of Furman and its progeny. Prosecutors' virtually uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death penalty. Mandatory death penalty statutes were deemed fatally flawed because they lacked standards for imposition of a death sentence and were therefore removed from judicial review. Woodson v. North Carolina, 428

U.S. 280 (1976). Prosecutors' uncontrolled discretion violates this requirement.

Ohio's system imposes death in a racially discriminatory manner. Blacks and those who kill white victims are much more likely to get the death penalty. While African-Americans are less than twenty percent of Ohio's population, about half of Ohio's death row inmates are African-American. (See Death Penalty Statistics, maintained by the Office of the Ohio Public Defender, as of Jan. 24, 2000). While few Caucasians are sentenced to death for killing African-Americans, over thirty African-Americans sit on Ohio's death row for killing a Caucasian.

Ohio's statistical disparity is consistent with national findings. The General Accounting Office found victim's race influential at all stages, with stronger evidence involving prosecutorial discretion in charging and trying cases. "Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities," U.S. General Accounting Office, Report to Senate and House Committees on the Judiciary (February 1990).

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

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. Commonwealth v. O'Neal II, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring); Utah v. Pierre, 572 P.2d 1338 (Utah 1977) (Maughan, J., concurring and dissenting). Moreover, where fundamental rights are involved personal liberties cannot be broadly stifled "when

the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479 (1960). The United States Supreme Court has recognized that the fundamental right to "life" deserves the highest protection possible under the Fourteenth Amendment's protection of "life, liberty and property." Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five Justices recognized a distinct "life" interest protected by the Due Process Clause in all stages of a capital case, above and beyond protected liberty and property interests). Death is different; for that reason more process is due, not less. See Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). To imperil this protected, fundamental life interest, the State must show that it is the "least restrictive means" to a "compelling governmental end." O'Neal, 339 N.E.2d at 678.

Despite the most exhaustive research by noted experts in the field, there is no convincing evidence that the death penalty is a deterrent superior to lesser punishment. "In fact, the most convincing studies point in the opposite direction." Id. at 682. Studies in Ohio, more particularly, have similarly failed to show any deterrent effect by imposition of the death penalty. Over twenty years ago, a study spanning fifty (50) years of executions in Ohio found no evidence that executions have any discernible negative effect on homicide rates. Ohio Legisl. Serv. Comm'n., Capital Punishment (1961). See also Bailey, The Deterrent Effect of the Death Penalty for Murder in Ohio. A Time-Series Analysis, 28 Cleve. St. L. Rev. 51, 68, 70 (1979). The Supreme Court of Ohio has not addressed the issue of lack of evidence supporting deterrence in its previous decisions upholding the death penalty.

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

B. Unreliable sentencing procedures

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

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

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

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor is within the individual decision-maker's discretion. State v. Fox, 69 Ohio St. 3d 183, 193, 631 N.E.2d 124, 132 (1994). Giving so much discretion to juries inevitably leads to arbitrary and capricious judgments.

Empirical evidence is developing in Ohio and around the country that, under commonly used penalty phase jury instructions, juries do not understand their responsibilities and apply inaccurate standards for decision. See Cho, Capital Confusion: The Effect of Jury Instructions on the Decision

To Impose Death, 85 J. Crim. L. & Criminology 532, 549-557 (1994), and findings of Zeisel discussed in Free v. Peters, 12 F.3d 700 (7th Cir. 1993). This confusion violates the Federal and State Constitutions. Because of these deficiencies, Ohio's statutory scheme does not meet the requirements of Furman and its progeny.

C. Induced ineffective assistance of counsel and denial of an impartial jury

Ohio's capital statutory scheme provides for a sentencing recommendation by the same jury which determines the facts at trial if Defendant is found guilty. This procedure violates Defendant's rights to effective assistance of counsel and to a fair trial before an impartial jury as guaranteed by the State and Federal Constitutions.

Ohio's bifurcated capital trial process with the same jury violates Defendant's right to effective assistance of counsel as guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution; McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970); Powell v. Alabama, 287 U.S. 45, 47 (1932); Ohio Const. art. I §§ 10 & 16; State v. Hester, 45 Ohio St. 2d 71, 341 N.E.2d 304 (1976).

First, under the operation of the current statute, if counsel argues to the jury a defense which loses at the guilt phase of the trial, in effect he is forced to simultaneously destroy Defendant's credibility prior to the start of the trial's sentencing phase. By invoking the defendant's right to strenuously argue for his innocence in the first phase, a loss for the defense in the first phase means that counsel will have significantly reduced the credibility desperately needed to successfully argue for a life sentence.

The legislature should have eliminated this constitutional dilemma by providing for two separate juries, the first for determining guilt and the second for determining punishment. It is

respectfully suggested that at the second trial the prosecuting attorney would be allowed to reiterate the specific evidence of aggravating circumstances. This proposed order of trial would eliminate the impairment of the right to have a defense presented with the effective assistance of counsel. The State essentially has "prevented (counsel) from assisting the accused during a critical stage of the proceeding." United States v. Cronic, 466 U.S. 648, 659, n.25 (1984). This creates constitutional error without any showing of prejudice necessary. Id.

The State's claim that it has an interest in having a single jury for both phases of the trial and that this should surmount the Defendant's right to a fair and impartial trial phase jury is also belied by the Attorney General's recent efforts in the Ohio legislature (through H.B. 585 and S.B. 258, introduced early 1996) to require that a second jury be selected for purposes of resentencing trials when a capital defendant's death sentence is overturned on appeal. The Attorney General's present claim that this two-jury practice would be workable and inexpensive flies in the face of the State's earlier urgings against just such a two-jury practice at the initial trial. The State cannot have it both ways, and the capital criminal justice system must not force defendants into trial before a less than impartial jury. No Ohio court has yet considered the impact that the State's contradictory positions have on the fairness of the present capital scheme.

Under Ohio's death penalty statutory scheme, an intolerable risk exists that a defendant's life may be put in the hands of a hostile venire, which in effect creates uncertainty in the reliability of the determination reached. Such a risk cannot be tolerated in a capital case. Beck v. Alabama, 447 U.S. 625, 638 (1980). Therefore, the statute must be struck down as an unconstitutional violation of Defendant's right to an impartial jury under the State and Federal constitutions.

D. Lack of individualized sentencing

The Ohio statutes are unconstitutional because they require proof of aggravating circumstances in the trial phase of the bifurcated proceeding. The Supreme Court of the United States has approved schemes that separate the consideration of aggravating circumstances from the determination of guilt. Those schemes provide an individualized determination and narrow the category of defendants eligible for the death penalty. See Zant v. Stephens, 462 U.S. 862 (1983); Barclay v. Florida, 463 U.S. 939 (1983). Ohio's statutory scheme cannot provide for those constitutional safeguards.

The jury must be free to determine whether death is the appropriate punishment for a defendant. Requiring proof of the aggravating circumstances simultaneously with proof of guilt effectively prohibits a sufficiently individualized determination in sentencing as required by post-Furman cases. See Woodson, 428 U.S. at 961. This is especially prejudicial because this is accomplished without consideration of any mitigating factors.

E. Defendant's right to a jury is burdened

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

Justice Blackmun found this discrepancy to be constitutional error. Lockett v. Ohio, 438 U.S. 586, 617 (1978) (Blackmun, J., concurring). This disparity violated United States v. Jackson, 390 U.S. 570 (1968), and needlessly burdened the defendant's exercise of his right to a trial by jury.

Since the Supreme Court's decision in Lockett, this infirmity has not been cured and Ohio's statute remains unconstitutional.

F. Mandatory submission of reports and evaluations

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

G. The definition of mitigating factors in Ohio Rev. Code §2929.04(B)(7) violates the reliability component of the Eighth Amendment

"Any other factors that are relevant to the issue of whether the offender should be sentenced to death" may be introduced as mitigation under Ohio Rev. Code §2929.04(B)(7) (emphasis added). The court's charge and the definition in Ohio Rev. Code §2929.04(B)(7) are unconstitutional. Both permit the sentencer to convert (B)(7) mitigation into reasons for imposing death.

The Eighth Amendment requires that the class of death eligible offenders be narrowly and rationally guided by state law. McCleskey v. Kemp, 481 U.S. 279, 305 (1987). In Ohio, the factors that make a defendant death-eligible are detailed in Ohio Rev. Code §2929.04(A). The (B)(7) definition eviscerates the narrowing achieved by Ohio Rev. Code §2929.04(A) because it literally invites the sentencer to consider any factor relevant to imposing death. That language creates a "reasonable likelihood" that the sentencer will view proffered (B)(7) mitigation as a nonstatutory aggravator, rather than evidence that weighs against a death sentence. See Stringer v. Black, 503

U.S. 222, 231-235 (1992); Boyde v. California, 494 U.S. 370, 380-81 (1990).

The (B)(7) definition also precludes the jury from giving mitigating evidence its full consideration and effect. The intent was to allow the jury to consider all relevant evidence supporting a life sentence. See Lockett v. Ohio, 438 U.S. 586; see also O.R.C §2929.04(C). Poor wording frustrates the General Assembly's intent. The definition shifts the focus of the (B)(7) mitigating evidence to reasons to impose a death sentence. Because (B)(7) mitigating evidence can be construed as an aggravating factor, it is stripped of its full mitigating effect. To satisfy the Eighth Amendment, each actor in the capital sentencing scheme must be able to give consideration and full mitigating effect to all relevant mitigating evidence offered by the defendant. Penry v. Lynaugh, 492 U.S. 302; Eddings v. Oklahoma, 455 U.S. 104; Lockett, 438 U.S. 586. See Graham v. Collins, 506 U.S. 461, 510 (1993) (Souter, J. dissenting).

H. Ohio Rev. Code §2929.04(A)(7) is constitutionally invalid when used to aggravate Ohio Rev. Code §2903.01(B) aggravated murder

"[T]o avoid [the] constitutional flaw of [vagueness and over breadth under the Eighth Amendment], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of a defendant as compared to others found guilty of (aggravated) murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). Ohio's statutory scheme fails to meet this constitutional requirement because Ohio Rev. Code §2929.04(A)(7) fails to genuinely narrow the class of individuals eligible for the death penalty.

Ohio Rev. Code §2903.01(B) defines the category of felony-murderers. If any factor listed in Ohio Rev. Code §2929.04(A) is specified in the indictment and proved beyond a reasonable doubt

the defendant becomes eligible for the death penalty. Ohio Rev. Code §§2929.02(A) and 2929.03.

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

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

The killer who kills with prior calculation and design is treated less severely, which is also nonsensical because his blameworthiness or moral guilt is higher, and the argued ability to deter him less. From a retributive stance, this is the most culpable of mental states. Comment, The Constitutionality of Imposing the Death Penalty for Felony Murder, 15 Hous. L. Rev. 356, 375 (1978).

Felony-murder also fails to reasonably justify the death sentence because the Supreme Court

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

Equal protection of the law requires that legislative classifications be supported by, at least, a reasonable relationship to legitimate State interests. Skinner v. Oklahoma, 316 U.S. 535 (1941). The State has arbitrarily selected one class of murderers who may be subjected to the death penalty automatically. This statutory scheme is inconsistent with the purported State interests. The most brutal, cold-blooded and premeditated murderers do not fall within the types of murder that are automatically eligible for the death penalty. There is no rational basis or any State interest for this distinction and its application is arbitrary and capricious.

I. Ohio Rev. Code §§2929.03(D)(1) and 2929.04 are unconstitutionally vague

Ohio Rev. Code §2929.03(D)(1)'s reference to "the nature and circumstances of the aggravating circumstance" incorporates the nature and circumstances of the offense into the factors to be weighed in favor of death. The nature and circumstances of an offense are, however, statutory

mitigating factors under Ohio Rev. Code §2929.04(B). Ohio Rev. Code §2929.03(D)(1) makes Ohio's death penalty weighing scheme unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor as an aggravator.

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

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

Despite wide latitude, Ohio has carefully circumscribed its selection factors into mutually exclusive categories. See Ohio Rev. Code §2929.04(A) and (B); Wogenstahl, 75 Ohio St. 3d at 356, 662 N.E.2d at 321-22. Ohio Rev. Code §2929.03(D)(1) makes Ohio Rev. Code §2929.04(B) vague because it incorporates the nature and circumstances of an offense into the aggravating circumstances. The sentencer cannot reconcile this incorporation. As a result of Ohio Rev. Code

§2929.03(D)(1), the "nature and circumstances" of any offense become "too vague" to guide the jury in its weighing or selection process. See Walton, 497 U.S. at 654. Ohio Rev. Code §2929.03(D)(1) therefore makes Ohio Rev. Code §2929.04(B) unconstitutionally arbitrary.

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

J. Mandatory death penalty and failure to require appropriateness analysis

The Ohio death penalty statutory scheme precludes a mercy option, either in the absence of mitigation or when the aggravating circumstances "outweigh" the mitigating factors. The statutes in those situations mandate that death shall be imposed. Ohio Rev. Code §§2929.03, 2929.04. The sentencing authority is impermissibly limited in its ability to return a life verdict by this provision.

In Gregg, the United States Supreme Court stated, "nothing" in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. 428 U.S. at 199. Gregg held only that, "in order to minimize the risk that the death penalty would be

imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." Id. Gregg requires the State to establish, according to constitutionally sufficient criteria of aggravation and constitutionally mandated procedures, that capital punishment is appropriate for the defendant. Nothing requires the State to execute defendants for whom such a finding is made. Indeed the Georgia statute, approved in Gregg as being consistent with Furman, permits the jury to make a binding recommendation of mercy even though the jury did not find any mitigating circumstances in the case. Fleming v. Georgia, 240 S.E.2d 37 (Ga. 1977); Hayes v. Georgia, 282 S.E.2d 208 (Ga. 1981). Subsequent to Lockett, the Fifth and Eleventh Circuits repeatedly reviewed and remanded cases for error in the jury instructions when the trial court failed to clearly instruct the jury that they had the option to return a life sentence even if the aggravating circumstances outweighed mitigation. Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978); Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1981); Westbrooke v. Zant, 704 F.2d 1487 (11th Cir. 1983); Tucker v. Zant, 724 F.2d 882 (11th Cir. 1984); Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982); Prejean v. Blackburn, 570 F. Supp. 985 (D. La. 1983).

Capital sentencing that is constitutionally individualized requires a mercy option. An individualized sentencing decision requires that the sentencer possess the power to choose mercy and to determine that death is not the appropriate penalty for this defendant for this crime. In Barclay v. Florida, 463 U.S. at 950, the Court stated that the jury is free to "determine whether death is the appropriate punishment."

Absent the mercy option, the Defendant faces a death verdict resulting from Lockett-type

statute, i.e., a statute that mandated a death verdict in the absence of one of three specific mitigating factors. Under current Ohio law, the sentencer lacks the option of finding a life sentence appropriate in the face of a statute which requires that when aggravating circumstances outweigh mitigating factors "it shall impose a sentence of death on the offender." Ohio Rev. Code §2929.03(D)(3).

A non-mandatory statutory scheme that affords the jury the discretion to recommend mercy in any case "avoids the risk that the death penalty will be imposed in spite of factors 'too intangible to write into a statute' which may call for a less severe penalty, and avoidance of this risk is constitutionally necessary." Conner v. Georgia, 303 S.E.2d 266, 274 (Ga. 1983). Other state courts have also required a determination of "appropriateness" beyond mere weighing of aggravating circumstances and mitigating factors. California v. Brown, 726 P.2d 516 (Cal. 1985), rev'd on other grounds, 479 U.S. 538 (1987).

In California v. Brown, 479 U.S. 538, 543 (1987), the Supreme Court repeated "the Eighth Amendment's need for reliability in the determination that death is the appropriate punishment in a specific case." In Brown, the Court agreed that jurors may be cautioned against reliance on "extraneous emotional factors," and that it was proper to instruct the jurors to disregard "mere sympathy." Id. This instruction referred to the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase. The Court's analysis clearly approved and mandated that jurors be permitted to consider mercy, i.e., sympathy tethered or engendered by the penalty phase evidence.

The Ohio statute does not permit an appropriateness determination; a death sentence is mandated after a mere weighing. Finally, while the Supreme Court of Ohio has claimed that a

"jury is not precluded from extending mercy to a defendant," State v. Zuern, 32 Ohio St. 3d 56, 64, 512 N.E.2d 585, 593 (1987), Ohio jurors are not in fact informed of this capability. In fact, the Supreme Court of Ohio has permitted penalty phase jury instructions in direct contradiction to this extension of mercy capability. The Ohio "no-sympathy" instructions to juries do not in any way distinguish between "mere" sympathy (untethered), and that sympathy tied to the evidence presented in penalty phase, and therefore commit the very violation of the Eighth Amendment which the California instruction had narrowly avoided.

While the Supreme Court of Ohio claims extending mercy is permissible in Ohio, and acknowledges that "[s]entencing discretion is an absolute requirement of any constitutionally acceptable capital punishment statute," id. at 65, 512 N.E.2d at 594, there is in fact no such indication on the statute's face, and no state court assurance that jurors are so informed. Bald, unsupported assertions of compliance with the constitution are inadequate.

K. Ohio's "beyond a reasonable doubt" standard

1. The statutes fail to require proof beyond all doubt as to guilt that aggravating circumstances outweigh mitigating factors, and the appropriateness of death as a punishment before the death sentence may be imposed.

The burden of proof required for capital cases should be proof beyond all doubt. The jury should be instructed during both phases that the law requires proof beyond all doubt of all the required elements. Most importantly, death cannot be imposed as a penalty except upon proof beyond all doubt of both the crime itself and the fact that the aggravating circumstances outweigh the mitigating factors.

Insistence on reliability in guilt and sentencing determination is a vital issue in the United States Supreme Court's capital decisions. This emphasis on the need for reliability and certainty

is a product of the unique decision that must be made in every capital case - the choice of life or death. The Supreme Court has consistently emphasized the "qualitative difference" of death as a punishment, stating that "death profoundly differs from all other penalties" and is "unique in its severity and irrevocability." Woodson, 428 U.S. at 305; Lockett, 438 U.S. at 605; Gardner v. Florida, 430 U.S. 349 (1977); Gregg, 428 U.S. at 187.

Proof beyond all doubt, a higher standard than the statutory proof beyond a reasonable doubt, should be required in a capital case because of the absolute need for reliability in both the guilt and penalty phases. The irrevocability of the death penalty demands absolute reliability. Absent such a safeguard, Defendant may be subject to a sentence of death in violation of his Eighth and Fourteenth Amendment rights.

The proof beyond a reasonable doubt standard is required in criminal cases "to safeguard men from dubious and unjust convictions." In re Winship, 397 U.S. 358, 363 (1970). The petitioner in Winship was a juvenile facing a possible six years imprisonment. Crucial to the Court's decision was its assessment of the importance of the defendant's right not to be deprived of his liberty. Proof beyond a reasonable doubt was demanded in recognition that "the accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the convictions." Id. Only this standard of proof adequately commanded "the respect and confidence of the community in applications of the criminal law." Id. at 364.

In a capital case, far more than liberty and stigmatization are at issue. The defendant's interest in his life must be placed on the scales. Only then can an appropriate balancing of the interests be performed; only then can one know whether the "situation demands" a particular

procedural safeguard. Given the magnitude of the interests at stake in a capital case and the necessity that the community "not be left in doubt whether innocent men are being condemned" a high standard is required which reduces the margin of error "as much as humanly possible," Id.; Eddings, 455 U.S. at 878. This is all the more so when a petitioner's "life" interest (protected by the "life, liberty and property" language in the Due Process Clause) is at stake in the proceeding. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five Justices recognized a distinct "life" interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests). The most stringent standard of proof that is "humanly possible" is proof beyond all doubt.

The American Law Institute's Model Penal Code, cited by the United States Supreme Court as a statute "capable of meeting constitutional concerns," adopts the beyond-all-doubt standard at the sentencing phase. See Gregg v. Georgia, 428 U.S. 153, 191-195 (1976). The Model Penal Code mandates a life sentence if the trial judge believes that "although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt." Model Penal Code §210.6(1)(f). If the trial judge has any doubt of the defendant's guilt, life imprisonment is automatically imposed without a sentencing hearing. The words used are "all doubt," not merely "doubt" or "reasonable doubt."

2. Ohio's definition of proof "beyond a reasonable doubt" results in a burden of proof insufficiently stringent to meet the higher reliability requirement in capital cases at the guilt phase, and this has not been cured by appellate courts in their review of convictions or death sentences.

Ohio law provides standard jury instructions of "reasonable doubt" and "proof beyond a reasonable doubt" as the applicable burden of proof in capital cases. Ohio Rev. Code

§2901.05(D). However, Ohio's definition actually articulates the standard for the lower burden of proof by a preponderance of the evidence; thus unconstitutionally diluting Defendant's rights to a fair trial. See Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118 (1954); Holland v. United States, 348 U.S. 121 (1954); Scurry v. United States, 347 F.2d 468, 470 (D.C. Cir. 1965) (... [I]mportant affairs is the traditional test for clear and convincing evidence ... The jury ... is prohibited from convicting unless it can say beyond a reasonable doubt that defendant is guilty as charged. ... To equate the two in the juror's mind is to deny the defendant the benefit of a reasonable doubt.). State v. Crenshaw, 51 Ohio App. 2d 63, 65, 366 N.E.2d 84, 84-85 (1977); cf. State v. Nabozny, 54 Ohio St. 2d 195, 375 N.E.2d 784 (1978), vacated on other grounds, Nabozny v. Ohio, 439 U.S. 811 (1978); State v. Seneff, 70 Ohio App. 2d 171, 435 N.E.2d 680 (1980).

The Ohio reasonable doubt instructions fail to satisfy the requirement of reliability in a capital case. Even in Winship, when considering the reasonable doubt standard, the Court stated that the fact finder must be convinced of guilt "with utmost certainty," and that the court must impress on the trier of fact the necessity of reaching a subjective state of certitude. Winship, 397 U.S. at 363, 364. Ohio's definition of a reasonable doubt is inadequate to meet even these standards.

3. The Ohio death penalty statutes fail to require that the jury consider as a mitigating factor pursuant to Ohio Rev. Code §2929.04(B) that the evidence fails to preclude all doubt as to the defendant's guilt.

The language of Ohio Rev. Code §§2929.04(D)(2) contemplates a balancing process focusing upon the mitigating factors present in the case as compared to the offender's "guilt" with respect to the aggravating specifications.

In determining the appropriateness of the death penalty, the fact that the evidence presented failed to foreclose all doubt as to guilt must be considered as a relevant mitigating factor. "The jury should have before it not only the prosecution's unilateral account of the offense but the defense version as well. The jury should be afforded the opportunity to see the whole picture ... ." California v. Terry, 390 P.2d 381 (Cal. 1964). The failure to require jury consideration of the fact that the evidence does not foreclose all doubt as to guilt violates the constitutional standards established for the imposition of the death penalty.

N. Sentencing an individual to death in violation of treaties to which the United States of America is a signatory violates the Supremacy Clause of the United States Constitution.

International law binds each of the states that comprise the United States. Ohio is bound by international law whether found treaty or in custom. Because the Ohio death penalty scheme violates international law, Defendant cannot be subjected to the possibility of the death penalty.

1. International law binds the State of Ohio

"International law is a part of our law[.]" The Paquete Habana, 75 U.S. 677, 700 (1900). A treaty made by the United States is the supreme law of the land. Article VI, United States Constitution. Where state law conflicts with international law, it is the state law that must yield. See Zschernig v. Miller, 389 U.S. 429, 440 (1968); Clark v. Allen, 331 U.S. 503, 508 (1947); United States v. Pink, 315 U.S. 203, 230 (1942); Kansas v. Colorado, 206 U.S. 46, 48 (1907). The Paquete Habana, 175 U.S. at 700; The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924). In fact, international law creates remediable rights for United States citizens. Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980); Forti v. Suarez-Mason, 672 F.Supp. 1531 (N.D. Cal. 1987).

2. Ohio's obligations under charters, treaties, and conventions

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

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

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

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

Ohio's statutory scheme denies equal protection and due process in several ways. It allows

for arbitrary and unequal treatment in punishment. See discussion infra Section A. Ohio's sentencing procedures are unreliable. See discussion infra Section B. Ohio's statutory scheme fails to provide individualized sentencing. See discussion infra Section C. Ohio's statutory scheme burdens a defendant's right to a jury. See discussion infra Section D. Ohio's requirement of mandatory submission of reports and evaluations precludes effective assistance of counsel. See discussion infra Section E. Ohio Rev. Code §2929.04(B)(7) arbitrarily selects certain defendants who may be automatically eligible for death upon conviction. See discussion infra Section F. Ohio's proportionality and appropriateness review is wholly inadequate. See discussion infra Section I. As a result, Ohio's statutory scheme violates the ICCPR's and the ICERD's guarantees of equal protection and due process. This is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

b. Ohio's statutory scheme violates the ICCPR's protection against arbitrary execution

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

However, several aspects of Ohio's statutory scheme allow for the arbitrary deprivation of life. Punishment is arbitrary and unequal. See discussion infra Section A. Ohio's sentencing procedures are unreliable. See discussion infra Section B. Ohio's statutory scheme lacks individualized sentencing. See discussion infra Section C. Ohio's statutory definition of the (B)(7)

mitigator renders sentencing unreliable. See discussion infra Section F. The (A)(7) aggravator maximizes the risk of arbitrary and capricious action by singling one class of murders who may be eligible automatically for the death penalty. See discussion infra Section G. The vagueness of Ohio Rev. Code §§2929.03(D)(1) and 2929.04 similarly render sentencing arbitrary and unreliable. See discussion infra Section H. Ohio's proportionality and appropriateness review fails to distinguish those who deserve death from those who do not. See discussion infra Section I. As a result, executions in Ohio result in the arbitrary deprivation of life and thus violate the ICCPR's death penalty protections. This is a direct violation of international law and a violation of the Supremacy Clause of the United States Constitution.

c. Ohio's statutory scheme violates the ICERD's protections against race discrimination.

The ICERD, speaking to racial discrimination, requires that each state take affirmative steps to end race discrimination at all levels. Art. 2. It requires specific action and does not allow states to sit idly by when confronted with practices that are racially discriminatory. However, Ohio's statutory scheme imposes the death penalty in a racially discriminatory manner. See discussion infra Section A. A scheme that sentences blacks and those who kill white victims more frequently and which disproportionately places African-Americans on death row is in clear violation of the ICERD. Ohio's failure to rectify this discrimination is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

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

The ICCPR prohibits subjecting any person to torture or to cruel, inhuman or degrading treatment or punishment. Art. 7. Similarly, the CAT requires that states take action to prevent

torture, which includes any act by which severe mental or physical main is intentionally inflicted on a person for the purpose of punishing him for an act committed. See Art. 1-2. As administered, Ohio's death penalty inflicts unnecessary pain and suffering, see discussion infra Section J, in violation of both the ICCPR and the CAT. Thus, there is a violation of international law and the Supremacy Clause of the United States Constitution.

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

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

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

treaty will become law. Thus the Senate lacks the power to do just that. Therefore, any conditions or reservations made by the Senate are unconstitutional. See id.

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

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

The Senate indicated that the ICCPR is not self-executing. However, the question of whether a treaty is self-executing is left to the judiciary. Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985) (citing Restatement (Second) of Foreign Relations Law of the United States, Sec. 154(1) (1965)). It is the function of the courts to say what the law is. See Marbury v. Madison, 5 U.S. 137 (1803).

Further, requiring the passage of legislation to implement a treaty necessarily implicates the participation of the House of Representatives. By requiring legislation to implement a treaty, the House can effectively veto the treaty by refusing to pass the necessary legislation. However, Article 2, Section 2 excludes the House of Representatives from the treaty process. Therefore, declaring a

treaty to be not self-executing gives power to the House of Representatives not contemplated by the United States Constitution. Thus, any declaration that a treaty is not self-executing is unconstitutional. See Clinton, 417 U.S. at 438.

3. Ohio's obligations under customary international law

International law is not merely discerned in treaties, conventions and covenants. International law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law." United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820). Regardless of the source "international law is a part of our law[.]" The Paquete Habana, 75 U.S. at 700.

Ohio should be cognizant of the fact that its statutory scheme violates numerous declarations and conventions drafted and adopted by the United Nations and the Organization of American States, which may because of the sheer number of countries that subscribe to them, codify customary international law. See id. Included among these are:

1. The American Convention on Human Rights, drafted by the Organization of American States and entered into force in 1978. It provides numerous human rights guarantees, including: equal protection (Art. 1, 24), the right to life and precludes the arbitrary deprivation of life (Art. 4(1)), allows for the imposition of the death penalty only for the most serious crimes (Art. 4(2)), prohibits re-establishing the death penalty once abolished (Art. 4(3)), prohibits torture, cruel, inhuman or degrading punishment (Art. 5(2)), and guarantees the right to a fair trial (Art. 8).

2. The United Nations Declaration on the Elimination of All Forms of Racial Discrimination proclaimed by U.N. General Assembly resolution 1904 (XVIII) in 1963. It prohibits racial discrimination and requires that states take affirmative action in ending racial discrimination.

3. The American Declaration of the Rights and Duties of Man adopted by the Ninth International Conference of American States in 1948. It includes numerous human rights guarantees, including: the right to life (Art. 1), equality before the law (Art. 2), the right to a fair trial (Art. 16), and due process (Art. 26).

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

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

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

These documents are drafted by the people Smith contemplates and are subscribed to by a substantial segment of the world. As such they are binding on the United States as customary

international law. A comparison of the Sections A - J clearly demonstrates that Ohio's statutory scheme is in violation of customary international law.

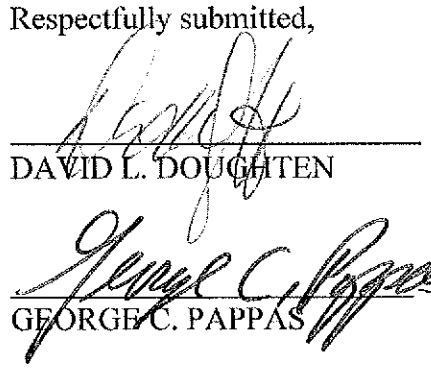
O. Conclusion

Ohio's death penalty scheme fails to ensure that arbitrary and discriminatory imposition of the death penalty will not occur. The procedures actually promote the imposition of the death penalty and, thus, are constitutionally intolerable. Ohio Revised Code §§2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution. Furthermore, subjecting Defendant to the prospect of capital punishment violates international law and the Supremacy Clause of the United States Constitution.

CONCLUSION

Pursuant to the preceding Propositions of Law I, II, the defendant-appellant, Hersie Wesson, respectfully requests that this Honorable Court reverse the conviction of Aggravated Murder and instate a conviction for Murder, R.C. §2903.02. In addition, pursuant to Propositions of Law III, IV, and V, it is requested that this matter be remanded for a new trial. In the alternative, pursuant to remaining Propositions of LawI, the appellant respectfully requests reverse his death sentence and a remand with an order for a new sentencing hearing.

Respectfully submitted,



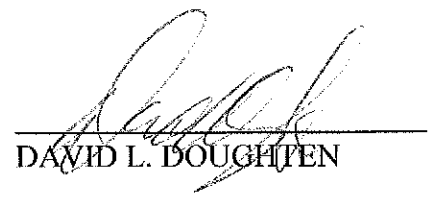
DAVID L. DOUGHTEN

GEORGE C. PAPPAS

Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellant was served upon Sherry Bevan Walsh, Esq., Summit County Prosecutor, 53 University Street, 7th Floor, Akron, OH 44308-1680 by Regular U.S. Mail on this 5th day of March, 2010.



DAVID L. DOUGHTEN

APPENDIX

In the Supreme Court of Ohio

STATE OF OHIO	)	CASE NO. 09-0739
	)	
Appellee	)	On Appeal from the Summit County Common Pleas Court,
	)	
Vs.	)	Case No. 2008-03-0710
	)	
HERSIE R. WESSON	)	
	)	
Appellant	)	CAPITAL CASE

ORIGINAL

NOTICE OF APPEAL OF APPELLANT HERSIE R. WESSON

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COUNSEL FOR APPELLANT

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COUNSEL FOR APPELLEE

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SUPREME COURT OF OHIO

FILED
APR 22 2009
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT HERSIE R. WESSON

Appellant, Hersie R. Wesson, hereby gives notice of appeal to the Supreme Court of Ohio from the Judgment of the Summit County Court of Common Pleas, entered in Case No. CR 2008-03-0710, on March 13, 2009.

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

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been mailed by regular U.S. Mail this 20th day of April, 2009, to the Summit County Prosecutor's Office, 53 University Avenue, Akron, Ohio 44308.

DAVID L. DOUGHTEN #0002847
GEORGE C. PAPPAS #0037374
Counsel for Appellant

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IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

DANIEL M. HORRIGAN
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SUMMIT COUNTY
CLERK OF COURTS

THE STATE OF OHIO)

vs.)

HERSIE R. WESSON
(PAGE 1 OF 4)

Case No. CR 08 03 0710

JOURNAL ENTRY

THIS DAY, to-wit: The 18th day of March, A.D., 2009, upon due consideration of this Court, IT IS HEREBY ORDERED that the Journal Entry dated March 13, 2009 be amended to read as follows:

THIS DAY, to-wit: The 13th day of March, A.D., 2009, now comes the Assistant Prosecuting Attorneys Margaret Kanellis and Felicia Easter on behalf of the State of Ohio, the Defendant, HERSIE R. WESSON, being in Court with counsel, LAWRENCE WHITNEY and DONALD HICKS, for sentencing.

Heretofore on January 23, 2009, the three-judge panel consisting of Judge Thomas A. Teodosio (Presiding), Judge Brenda Burnham Unruh and Judge Robert M. Gippen, returned their verdict finding the Defendant, HERSIE R. WESSON, GUILTY, beyond a reasonable doubt, of the crime of AGGRAVATED MURDER, as contained in Count Two (2) of the Indictment, Ohio Revised Code Section 2903.01(B), a special felony; GUILTY, beyond a reasonable doubt, of Specification One to Count Two of the indictment, Ohio Revised Code Section 2929.04(A)(4)(b); GUILTY, beyond a reasonable doubt, of Specification Two to Count Two of the indictment, Ohio Revised Code Section 2929.04(A)(5); GUILTY, beyond a reasonable doubt, of Specification Three To Count Two of the indictment, Ohio Revised Code Section 2929.04(A)(7); GUILTY, beyond a reasonable doubt, of the crime of AGGRAVATED MURDER, as contained in Count Three (3) of the Indictment, Ohio Revised Code Section 2903.01(D), a special felony; GUILTY, beyond a reasonable doubt, of Specification One To Count Three of the indictment, Ohio Revised Code Section 2929.04(A)(4)(b); GUILTY, beyond a reasonable doubt, of Specification Two to Count Three of the indictment, Ohio Revised Code Section 2929.04(A)(5); GUILTY, beyond a reasonable doubt, of Specification Three to Count Three of the indictment, Ohio Revised Code Section 2929.04(A)(7); GUILTY, beyond a reasonable doubt, of the crimes of AGGRAVATED ROBBERY, as contained in Count 7 of the Indictment, Ohio Revised Code Section 2911.01(A)(1), a felony of the first (1st) degree; GUILTY, beyond a reasonable doubt, of the crime of HAVING WEAPONS WHILE UNDER DISABILITY, as contained in Count 9 of the Indictment, Ohio Revised Code Section 2923.13(A)(2), a felony of the third (3rd) degree; GUILTY, beyond a reasonable doubt, of the crime of TAMPERING WITH EVIDENCE, as contained in Count 10 of the Indictment, Ohio Revised Code Section 2921.12(A)(1), a felony of the third (3rd) degree; GUILTY, beyond a reasonable doubt, of the crime of ATTEMPTED MURDER, as contained in Count 11 of the Supplement One to indictment, Ohio Revised Code Section 2903.02(A)/2923.02, a felony of the first (1st) degree; GUILTY, beyond a reasonable doubt, of the crime of ATTEMPTED MURDER, as contained in Count 12 of the Supplement One to Indictment, Ohio Revised Code Section 2903.02(B)/2923.02, a felony of the first (1st) degree; GUILTY, beyond a reasonable doubt, of the crime of AGGRAVATED ROBBERY, as contained in Count 13 of the Supplement One to Indictment, Ohio Revised Code Section 2911.01(A)(3), a felony of the first (1st) degree, which offenses all occurred on or about February 25, 2008.

Prior to the mitigation/sentencing phase, the Court ordered the merger of Count Two and Count

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time, both of which involved the aggravated murder of the same victim, Emil Varhola. The State elected to proceed on Count Two and the three specifications to Count Two of the indictment at the mitigation/sentencing phase of the trial.

The mitigation/sentencing phase of trial commenced on the 6th day of March, 2009 at 9:00 a.m. The Defendant was present in open Court accompanied by his Attorneys, Lawrence Whitney and Donald Hicks. The State was present by Assistant Prosecuting Attorneys Margaret Kanellis and Felicia Easter.

The panel began its deliberations on March 6, 2009 at 3:00 p.m. After due deliberations, on March 13, 2009 at 2:20 p.m., the three-judge panel announced that it had reached a verdict. The Defendant, HERSIE R. WESSON, his Attorneys, Lawrence Whitney and Donald Hicks and Assistant Prosecuting Attorneys Margaret Kanellis and Felicia Easter, were brought back into open Court. The panel, in the presence of the Defendant, HERSIE R. WESSON, and his counsel, announced its verdict that it unanimously found by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors. Based on the finding of the 3-judge panel, and in accordance with the requirements of Ohio law and Ohio Revised Code Section 2929.03(D)(3) a sentence of death shall be imposed on the Defendant.

Prior to imposing the sentence the Court inquired of counsel for Defendant if they wished to speak on behalf of Defendant. Counsel for Defendant did address the Court prior to sentence being imposed.

The Court then inquired of the Defendant, HERSIE R. WESSON, if he desired to make a statement or present any evidence to the Court prior to sentence being pronounced against him. The Defendant did address the Court prior to sentence being imposed.

The Court then inquired of Assistant Prosecutor Kanellis if the State, the victim or a representative of the victims desired to make a statement or present any relevant information. The panel heard from the victims' son, Paul Varhola, and his wife Mary Varhola; the victims' nephew Denny Woods; and a taped statement from the victim, Mary Varhola.

The Court then inquired of counsel for Defendant if they desired to respond to any new material facts raised by the victims or the victim representatives in their comments. Counsel for Defendant declined to respond to any new material facts raised by the victims or the victim representatives in their comments.

Whereupon, the Court proceeded to impose sentence in this matter.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THIS COURT that Defendant, HERSIE R. WESSON, be committed to the Ohio Department of Rehabilitation and Correction for punishment of the crime of AGGRAVATED MURDER, as to the death of Emil Varhola, as contained in Count Two of the Indictment, Ohio Revised Code Section 2903.01(B), a special felony, with Specification One to Count Two, O.R.C. 2929.04(A)(4)(b); Specification Two to Count Two, O.R.C. 2929.04(A)(5), Specification Three to Count Two, O.R.C. 2929.04(A)(7), and that **the sentence is DEATH**. The Court finds that because of the nature of the sentence on Count Two there is no reason to advise the defendant of post-release control on this special felony.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, HERSIE R. WESSON, be committed to the Ohio Department of Rehabilitation and Correction for a **mandatory** prison term of Nine (9) years for punishment of the crime of AGGRAVATED ROBBERY, as contained in Count Seven (7) of the Indictment, Ohio Revised Code Section 2911.01(A)(1), a felony of the first degree, together with a period of 5 years **mandatory** post-release control pursuant to Ohio Revised Code Section 2967.28. The Defendant has a

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IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

THE STATE OF OHIO	)	**Case No. CR 08 03 0710**
	)	
vs.	)	
	)	**JOURNAL ENTRY**
HERSIE R. WESSON		

prior conviction for Burglary, a felony of the second degree; therefore the nine-year sentence imposed on Count Seven (7) is a mandatory term of imprisonment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, HERSIE R. WESSON, be committed to the Ohio Department of Rehabilitation and Correction for a prison term of Four (4) years for punishment of the crime of HAVING WEAPONS WHILE UNDER DISABILITY, as contained in Count Nine (9) of the Indictment, Ohio Revised Code Section 2923.13(A)(2), a felony of the third degree, together with a period of post release control to the extent the parole board may determine, as provided by law and pursuant to Ohio Revised Code Section 2967.28.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, HERSIE R. WESSON, be committed to the Ohio Department of Rehabilitation and Correction for a prison term of Four (4) years for punishment of the crime of TAMPERING WITH EVIDENCE, as contained in Count Ten (10) of the Indictment, Ohio Revised Code Section 2921.12(A)(1), a felony of the third degree, together with a period of post release control to the extent the parole board may determine, as provided by law and pursuant to Ohio Revised Code Section 2967.28.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, HERSIE R. WESSON, be committed to the Ohio Department of Rehabilitation and Correction for a **mandatory** prison term of Nine (9) years for punishment of the crime of ATTEMPTED MURDER, as contained in Count Eleven (11) of the Supplement One to Indictment, Ohio Revised Code Sections 2903.02(A)/2923.02, a felony of the first degree, together with a period of 5 years **mandatory** post release control pursuant to Ohio Revised Code Section 2967.28. The Defendant has prior a prior conviction for Burglary, a felony of the second degree; therefore the nine-year sentence imposed on Count Eleven (11) is a mandatory term of imprisonment.

IT IS FURTHER ORDERED that the Court, pursuant to Ohio Revised Code Section 2941.25(A), declines to impose a sentence on the Defendant, HERSIE R. WESSON, on the charge of ATTEMPTED MURDER, as contained in Count Twelve (12) of the Supplement One to Indictment, Ohio Revised Code Sections 2903.02(B)/2923.02, a felony of the first degree, for the reason that said offense is merged with the charge of ATTEMPTED MURDER, as contained in Count Eleven (11) of the Supplement One to Indictment.

IT IS FURTHER ORDERED that the Court, pursuant to Ohio Revised Code Section 2941.25(A), declines to impose a sentence on the Defendant, HERSIE R. WESSON, on the charge of AGGRAVATED ROBBERY, as contained in Count Thirteen (13) of the Supplement One to Indictment, Ohio Revised Code

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Section 2911.01(A)(3), a felony of the first degree, for the reason that said offense is merged with the charge of AGGRAVATED ROBBERY, as contained in Count Seven (7) of the Indictment.

IT IS FURTHER ORDERED that the sentences imposed in Counts Seven, Nine, Ten, and Eleven are ordered to be served consecutively and not concurrently with each other.

THEREUPON, the Court informed the Defendant of the consequences of violating the terms and conditions of post-release control and the consequences of being convicted of a new felony offense while on post-release control.

THEREUPON, the Court informed the Defendant of his right to appeal pursuant to Rule 32, Criminal Rules of Procedure.

IT IS FURTHER ORDERED that the Attorneys George C. Pappas and David L. Doughton, both certified death penalty qualified appellate counsel under Rule 20 of the Rules of Superintendence for the Courts of Ohio, were appointed to represent the Defendant, HERSIE R. WESSON, for purpose of appeal, as the Defendant is indigent and unable to employ counsel.

IT IS FURTHER ORDERED that the Summit County Clerk of Courts deliver the entire record in this case to the Ohio Supreme Court pursuant to Ohio Revised Code Section 2929.03(G)(2).

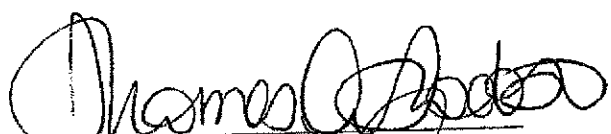
IT IS FURTHER ORDERED that the Defendant, HERSIE R. WESSON, receive credit for 401 days against his sentence for time served in the Summit County Jail.

IT IS FURTHER ORDERED that the Defendant, HERSIE R. WESSON, pay the costs of this prosecution for which execution is hereby awarded; said monies to be paid to the Summit County Clerk of Courts, Courthouse, 205 South High Street, Akron, Ohio 44308-1662.

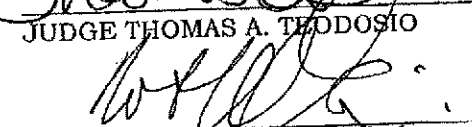
IT IS FURTHER ORDERED that the Defendant, HERSIE R. WESSON, is to be conveyed by the Sheriff of Summit County, Ohio, within Five (5) days to the CORRECTIONAL RECEPTION CENTER at Orient, Ohio, for immediate transport to the SOUTHERN OHIO CORRECTIONAL FACILITY, at Lucasville, Ohio, and he be there safely kept until February 25, 2010, 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, HERSIE R. WESSON, 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 administer a lethal injection until the Defendant, HERSIE R. WESSON, is **DEAD.**

IT IS SO ORDERED.

APPROVED:
March 18, 2009
TAT/pmw



JUDGE THOMAS A. TEODOSIO



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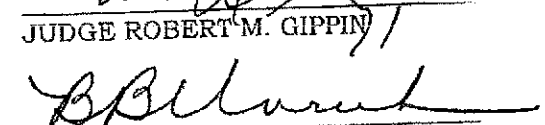

JUDGE BRENDA BURNHAM UNRUH

cc: Assistant Prosecutor Felicia Easter
Assistant Prosecutor Margaret Kanellis
Criminal Assignment
Attorney Lawrence J. Whitney – **CERTIFIED**
Attorney Donald Hicks – **CERTIFIED**
(Court Convey – **EMAIL**)
(Pretrial Services – **JAIL CREDIT** - **EMAIL**)
Registrar's Office
Southern Ohio Correctional Facility – **CERTIFIED**

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DANIEL M. HORRIGAN
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SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO,	)	CASE NO. CR 2008-03-0710
	)	
Plaintiff,	)	JUDGE THOMAS A. TEODOSIO
	)	
-vs-	)	
	)	
HERSIE R. WESSON,	)	**JUDGMENT ENTRY – OPINION OF THE COURT FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING IMPOSITION OF THE DEATH PENALTY**
	)	
Defendant.	)	

The three-judge panel finds that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. The Court shall impose the penalty of death on the Defendant, Hersie R. Wesson, in accordance with the mandates of R.C. § 2929.03(D)(3) and all other applicable provisions of law.

As required by R.C. § 2929.03(F), this Opinion states the panel's specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the Defendant was found guilty of committing, and the reasons why the aggravating circumstances the Defendant was found guilty of committing were sufficient to outweigh the mitigating factors.

I. PROCEDURAL STATUS

On January 23, 2009, the three-judge panel found Hersie R. Wesson guilty of two counts of Aggravated Murder (Counts Two and Three) and of three death penalty specifications to each of those counts for the killing of Emil Varhola. Prior to the sentencing phase of the trial, the

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Court merged Counts Two and Three, by its Order filed on March 3, 2009. The State elected to proceed on Count Two for purposes of sentencing. Under Count Two, the Defendant was convicted of purposely causing the death of Emil Varhola while committing, attempting to commit, or fleeing immediately after committing or attempting to commit the offense of aggravated robbery.

The specifications to Count Two of which the Defendant was convicted and which serve as the aggravating circumstances for the sentencing phase of the Defendant's trial were: First, that the aggravated murder occurred while the Defendant was under detention; Second, that the aggravated murder was part of a course of conduct involving the purposeful killing or attempt to kill two or more persons; and Third, that the aggravated murder was committed while the Defendant was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery and that the Defendant was the principal offender in the commission of the aggravated murder.

A sentencing hearing was held on March 6, 2009, before the same three-judge panel that presided over the trial phase. The three-judge panel deliberated following the hearing.

II. FINDINGS OF FACT

A. NATURE AND CIRCUMSTANCES OF THE OFFENSE

The Defendant murdered Emil Varhola in the early evening of February 25, 2008, and attempted to kill Mary Varhola, his wife, shortly thereafter. Mr. and Mrs. Varhola were both elderly and suffered from serious medical conditions, but lived together self-sufficiently in the home they had owned for most of their married life.

Mr. Varhola had a pacemaker implanted and a continuous oxygen supply. In the home, a

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long tube connected to the oxygen pump allowed Mr. Varhola substantial mobility. Mrs. Varhola required a cane to walk.

The Defendant, then about 50 years old, had become acquainted with the Varhola's the previous year, when he began living with a girlfriend in the same neighborhood. In particular, the Defendant became casually friendly with Mr. Varhola, sitting outside and chatting with him on numerous occasions. The Defendant had been inside the Varhola's house one time before, in December of 2007, for an impromptu social visit.

Mr. Varhola maintained a collection of long guns; an additional collection belonging to the Varhola's son Paul was also stored in the house. Mr. Varhola also owned a handgun for protection. The handgun was normally kept hidden in a hollowed-out book in the living room. The Varhola's were security-conscious, keeping the doors well-locked and installing video cameras outside to discourage intruders. The cameras did not operate, but appeared to do so.

The Defendant said in his unsworn statement that when he came to the door in December, he saw that Mr. Varhola was holding a handgun. According to the Defendant, Mr. Varhola put the gun in his pocket after he recognized the Defendant and let him in.

The Defendant was not living with his girlfriend on February 25, 2008, because of incidents that had occurred between them. The girlfriend had contacted the Defendant's Parole Officer concerning the incidents.

That evening, the Defendant rode from across town by bus, arriving in the neighborhood sometime shortly before 7:00 p.m. He apparently went directly to the backdoor of the Varhola's house. The Varhola's readily let him in. There was no evidence that Mr. Varhola had the handgun with him on this occasion. The Defendant and Mr. Varhola sat and talked in the kitchen, while Mrs. Varhola remained in the living room. The Defendant was apparently offered

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some food and drink. He also used the upstairs bathroom.

After awhile, Mrs. Varhola heard a whistling noise from the kitchen. When she got there (slowed by her infirmity), she saw her husband lying bleeding and motionless on the floor. The whistling noise she heard was coming from Mr. Varhola's wind pipe. The Defendant was going through Mr. Varhola's pockets. Mrs. Varhola cried out that the Defendant had killed her husband and the Defendant said that he had, grinning at her.

The Defendant then came at Mrs. Varhola with a knife. He asked her repeatedly, "Where is the gun?" They struggled, Mrs. Varhola attempting to defend herself as best she could with her cane. The Defendant punched, kicked, and stabbed Mrs. Varhola repeatedly. She finally decided to "play dead" and went quiet and motionless, though she remained conscious. The Defendant only then left her alone and spent a few minutes going around the house before exiting. Mrs. Varhola was able to move to a phone to call her son for help awhile later.

The Medical Examiner's Report showed that Mr. Varhola was stabbed deeply with a knife multiple times, in his neck, chest, and back. The evidence indicated that the back wounds were made after Mr. Varhola's heart had stopped.

One of the Varhola's long guns and a teacup were found in bushes outside the house, with the Defendant's DNA on them. Mr. Varhola's wallet was found weeks later, several blocks away, without any money it. There was no evidence of the Defendant's DNA on the wallet. Mrs. Varhola reported that jewelry and coins were missing. There was no evidence that the handgun was removed from its book compartment until after the incident.

The panel finds that the nature and circumstances of the offense do not provide any mitigating factors.

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B. AGGRAVATING CIRCUMSTANCES

The State introduced seven exhibits that were admitted at the trial phase of the proceedings and submitted no further evidence. State Exhibits 100, 100A, and 100B were submitted in support of the First Aggravating Circumstance. Exhibit 100 is a certified copy of the Defendant's journal entry of conviction, filed July 31, 2003, for the offenses of Burglary, a felony of the second degree and three misdemeanors. Exhibit 100A is the Ohio Department of Rehabilitation and Correction's Post Release Control Assessment of Defendant, dated January 10, 2007, finding that he was subject to mandatory post release control upon release from prison. Exhibit 100B is the State of Ohio Department of Rehabilitation and Correction Adult Parole Authority's conditions of post-release control supervision for Defendant, which were signed by him on May 7, 2007.

State Exhibits 108 and 118 were submitted in support of the Second Aggravating Circumstance. Exhibit 108 is the Summit County Medical Examiner's Report of Investigation and Report of Autopsy concerning the February 25, 2008, death of Emil Varhola. Exhibit 118 contains the medical records of Mary Varhola. Those records diagnosed an assault, abrasions, lacerations, multiple stab wounds on the chest, abdomen, and on the third and fourth digits of the right hand. The physical exam revealed a large V shaped laceration to the right cheek; "four superficial linear lacerations" on the left breast; "three superficial linear lacerations" on the abdomen; and a laceration on the third and fourth digits of the right hand. According to the records, Mary Varhola was 77 years old when examined.

State Exhibits 37 and 99 were submitted in support of the Third Aggravating Circumstance. Exhibit 37 is a photograph of the butt of the rifle taken from the Varhola residence as it was found sticking out from an evergreen bush. Exhibit 99 is the wallet of Emil

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Varhola, found beneath the porch of a house a few blocks from the crime scene.

The State also asked the Court to consider the evidence at the trial phase that was relevant to the three aggravating circumstances of which the Defendant was convicted.

The three-judge panel finds the aggravating circumstances to have been very substantial and gives them great weight. The panel gives particular weight to the Second Aggravating Circumstance, concerning the Defendant's multiple homicidal acts.

C. MITIGATING FACTORS

The Defendant introduced the expert testimony of a clinical forensic psychologist, Dr. Jeffrey L. Smalldon, the testimony of the Defendant's older sister, Yvette Wesson, and the unsworn statement of the Defendant. The panel found both witnesses to be fully credible, though not the Defendant, for the most part. Evidence of the following factors was considered in mitigation of the death penalty:

Victim Inducement or Facilitation (R.C. § 2929.04(B)(1)) – The panel found the Defendant's statement that Emil Varhola induced or facilitated the crime not to be credible and gives this factor no weight. The factor will accordingly not be discussed further.

Duress, Coercion, or Strong Provocation (R.C. § 2929.04(B)(2)) – The panel similarly finds that the Defendant's statements that Emil Varhola's actions against him had strongly provoked him were not credible. There is no evidence of duress or coercion. Accordingly, this factor is given no weight. It also will not be discussed further.

Lack of Substantial Capacity to Conform to the Requirements of the Law (R.C. § 2929.04(B)(3)) –

Dr. Smalldon expressed the view that certain conditions of the Defendant that he had diagnosed could have affected the Defendant's ability to conform to the requirements of the law.

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Dr. Smalldon ruled out any effect on the Defendant's capacity to appreciate the criminality of his conduct and that aspect of this statutory mitigating factor will not be discussed further. Dr. Smalldon did not express any formal professional opinions to a reasonable degree of certainty concerning the Defendant.

Dr. Smalldon diagnosed the Defendant to have these conditions: (1) depressive disorder, not otherwise specified; (2) borderline intellectual functioning; (3) alcohol dependence; and (4) personality disorder, not otherwise specified, with passive-aggressive, narcissistic and antisocial features.

Dr. Smalldon spent approximately 15 hours face to face with the Defendant over the course of three trips to Akron. While at the Summit County Jail, Dr. Smalldon observed that the Defendant was friendly, respectful, and congenial with the deputies. In his interviews with Dr. Smalldon, the Defendant was respectful, polite, cooperative, and compliant, although he refused to take certain tests.

Dr. Smalldon also reviewed the Defendant's records from the Ohio Department of the Ohio Adult Parole Authority; Community Health Center counseling records for the period September 2007 through January 2008; records received from defense counsel that they obtained through pretrial discovery; collateral interview records and interviews he did with Yvette Wesson, two half-sisters, one of the Defendant's daughters, an aunt, his girlfriend and others. He also received background information from the defense team's mitigation specialist. Dr. Smalldon believed that he had a valid social history for the Defendant.

The evidence presented concerning the Defendant that supported Dr. Smalldon's diagnoses was as follows:

Family History and Background / Poor Family Environment – The Defendant had a very

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difficult childhood. He was born in 1957. He has an older full sister (Yvette) and a younger full brother (Wayne). He has several younger half-siblings through both parents.

The Defendant's parents were both alcoholics who drank heavily daily. His mother drank when she was pregnant with the Defendant. When the Defendant was six months old, he and his sister were locked in a closet with a pillow and a blanket while their mother and grandmother went out drinking. Before leaving, they prepared a bottle that contained a mixture of Gordon's Gin and gave it to Yvette to feed to the Defendant. Yvette gave the bottle to her younger brother, after which he passed out and she thought he was dead.

Yvette described herself as the Defendant's primary caregiver from the ages 1-5 years old. She made sure he had food to eat. While their mother worked two jobs, a maid was hired to watch the children to avoid having them taken by Child Services and so the children would not be home alone. The neighborhood and extended family provided extensive care for the Wesson children. There was evidence presented of positive role models, especially the Defendant's uncle Eugene.

When he was 11 months old, the Defendant was reported by Yvette to have suffered a head injury when his cousin fell down stairs while holding him. Her recollection was that the Defendant was knocked out but was not taken to the hospital.

The Defendant's father often beat him and belittled him. The beatings were with razor straps, electric chords, belts, switches with knots, and whatever else was available. At times, Yvette was also made by their father to beat the Defendant. When the Defendant was ten years old, Yvette confronted their father about the beatings that he inflicted upon the Defendant. She told him to beat her instead, which the father did. However, the beatings of the Defendant then stopped over the next four years.

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The Defendant had a bad stuttering speech impairment, which was a subject of the father's belittlement. He was beaten when he would not respond quickly to his father due to his stuttering. Mr. Wesson's sister and brother also stuttered. They all had a cut made underneath their tongues, which helped Yvette and Wayne's conditions but not the Defendant's. The Defendant ultimately received treatment while in prison for his condition and was able to make his unsworn statement to the panel without stuttering.

When he was five years old, the family became homeless, so the Defendant moved in with his maternal aunt in Cleveland. Yvette went to live with a different cousin in Cleveland. His parents separated and, in 1963, the father moved to Tennessee. The family experienced extreme poverty. The Defendant's mother became involved with another man named Marino who moved them into his home. Marino was violent at times. He once placed the Defendant's mother in a bathtub, tied her up, and threw glasses at her while the Defendant and Yvette fought him. He also caused their mother to miscarry due to assaults against her. The Defendant and his sister witnessed this violence.

When the Defendant was twelve years old he came to live with his alcoholic grandmother in Akron. The grandmother forced the Defendant to do very rigorous chores and would hit him with her cane.

The Defendant quit school in the seventh grade. He had attended many schools and had performed poorly. His stuttering condition caused him to be teased frequently.

The Defendant was robbed and mugged when he was 15-16 years old. He was hurt in the incident and suffered cuts to the back of his head and hand. The Defendant's brother also hit him over the head with a 35-40 pound glass fruit basket during a fight in those years. There were other reports of head injuries from falling out of a tree and from a police beating.

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In 1973, when the Defendant was 16 years old, Yvette moved to Oakland, California. She attempted to have the Defendant join her in California, but he remained in Oakland with Yvette for only 23 hours before returning to Akron, because he missed his mother and was homesick. There was no evidence that he lived other than in Akron thereafter.

There was evidence that the Defendant fathered five children in three relationships, has numerous grandchildren, and an extensive loving and supportive family (many of whom were present at the hearing). Other than the Defendant's criminal history, there was no evidence presented concerning his life experiences between his childhood and the time of the murder. Yvette remained a significant support for him.

Yvette was in Las Vegas in January 2008 until approximately February 15, 2008. The Defendant lived at Yvette's house in Akron with her roommate while she was in Las Vegas. Prior to going to Las Vegas, Yvette took the Defendant to appointments at Portage Path Mental Health, and also took him on job searches and to the parole office. He also worked with her in her bakery. She described the Defendant as doing great at that time. He had a girlfriend and she thought he was complying with the rules and regulations of parole.

However, the Defendant lost his job in the Fall of 2007, which affected his mood negatively. There was evidence presented at trial that the Defendant's relationship with Mimi Ford, with whom he had been living nearby to the Varohola's, had encountered difficulties in the days before the murder and that the Defendant was facing a possible parole violation because of information Ms. Ford had provided.

The information Dr. Smalldon received about the Defendant's history was consistent and corroborative of a chaotic childhood with frequent physical abuse of the Defendant and of his mother in his presence. There was little encouragement and supervision. Dr. Smalldon stated

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that the effect on the Defendant is that he is very insecure, has deep feelings of inadequacy, low self-esteem and is filled with self-doubt.

Substance Abuse, Personality Disorders and Low Level of Intelligence --

Dr. Smalldon identified some prenatal risk factors based on information received from family members concerning the mother's alcoholism. He did not diagnose the Defendant as suffering from Fetal Alcohol Syndrome; however, he did believe that the Defendant was exposed to alcohol prenatally and displays symptoms of Fetal Alcohol Effect. Fetal Alcohol Effect can be characterized by an inability to assess the consequences of behavior and respond appropriately to social clues; expressive language skill deficits (such as stuttering); difficulty with language comprehension; impulsivity; and frustration. Dr. Smalldon testified that Fetal Alcohol Effect is one of many factors that predisposed the Defendant to developing a personality disorder, based on an inability to respond to developmental stressors.

There were reports of the Defendant's alcohol consumption as a child. The Defendant is an admitted alcoholic. Records from the Community Health Center indicate a diagnosis of alcohol dependence and major depression in 2007.

Dr. Smalldon assumed as accurate the reported history of head injuries suffered by the Defendant. He did not review any records that documented any incidents involving a head injury to the Defendant. Dr. Smalldon testified that head injuries can cause behavioral problems and cause one to be impulsive and have poor judgment. He stated that neuropsychological testing could have determined the presence of a head injury, but that the Defendant refused to consent to that testing.

Dr. Smalldon did perform a number of psychological tests on the Defendant. The significant results demonstrate very low literacy and arithmetic skills; a full-scale IQ of 76

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(borderline range); poor judgment, constructional, articulation, and perceptual motor accuracy skills; clinical depression, low self-worth, and high anxiety. The Defendant did show a high level of motivation. Dr. Smalldon found the results to be consistent with brain injury, but could not make any diagnosis from the limited information.

The Community Health Center records noted the Defendant's frustration over his inability to find work, low self-esteem and poor relationships with women that were filled with conflict, alcohol, and ambivalence. Dr. Smalldon expressed the view that the Defendant's insecurity, his deep feelings of inadequacy, and his self-doubt made him dependent on acceptance by females. He became frantic when he perceived rejection. When those relationships ended, it rekindled his bad childhood.

As to his diagnosis of depressive disorder, Dr. Smalldon testified that the Defendant did not meet the full diagnostic criteria. Rather his diagnosis was based on the 2007 diagnosis reflected in the Community Health Center records and the Defendant's social history of depression, hopelessness, despair, and frustration. The Community Health Center records also supported his diagnosis of alcohol dependence. The diagnosis of personality disorder not otherwise specified, with passive-aggressive, narcissistic, and antisocial features, is a diagnosis deeply rooted in a person's developmental history.

Dr. Smalldon concluded that the Defendant is impulsive, overreacts, and does not think of consequences, especially when alcohol is involved, and that these factors, together with his limited intelligence and other factors, could affect his ability to conform his conduct to the law.

R.C. § 2929.04(B)(4)(youth), (5)(absence of criminal history), and (6)(not principal offender) –

The panel considered the mitigating factors set forth in those subdivisions, as required,

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but finds no evidence that gives them any mitigating weight.

Other Factors Relevant to Whether Defendant Should be Sentenced to Death (R.C. § 2929.04(B)(7)) –

The panel takes all of the evidence previously discussed into account in weighing this "catch-all" factor. In addition, the panel considers the following:

Remorse – The Defendant stated that he "regretted that night" and that he was "sorry for that night." He said that he did not intend to kill Mr. Varhola (or Mrs. Varhola), but noted that if he is threatened he will react and will never let anyone hurt him again. He said that Mr. Varhola "should have never reached into his pocket." The panel does not find any evidence of remorse in the Defendant's statement. He seemed to blame the victim for what happened, instead of appreciating that he had committed a wrong against him.

Love/Support of Family Members – The panel gives some limited weight to the evident love and support the Defendant's family has for him.

Good Prison Conduct – The panel gives a small amount of weight to the Defendant's reportedly cooperative conduct in jail and the absence of any evidence of bad conduct in prison.

III. APPLICABLE LAW

Pursuant to R.C. § 2929.03(D)(3), if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose a sentence of death on the offender.

In order to sentence the Defendant to death, R.C. § 2929.04 requires that the three-judge panel find that the aggravating circumstances in this case outweigh the mitigating factors beyond a reasonable doubt. The panel must consider and weigh against the aggravating circumstances

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proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the Defendant, and the applicable statutory mitigation factors.

Mitigating factors are factors which, while they do not justify or excuse the crime, nevertheless in fairness and mercy, may be considered as they call for a penalty less than death, or lessen the appropriateness of a sentence of death. Mitigating factors are factors about an individual which weigh in favor of a decision that one of the life sentences is the appropriate sentence.

IV. CONCLUSIONS

As required by R.C. § 2923.03(D)(1), the panel considered the evidence raised at trial that is relevant to the aggravated circumstances the Defendant was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, the testimony and other evidence that is relevant to the nature and circumstances of the aggravated circumstances the Defendant was found guilty of committing, the mitigating factors set forth in R.C. § 2929.04(B) and any other factors in mitigation of the imposition of the sentence of death, the statement of the Defendant, and the arguments of counsel for the defense and prosecution relevant to the penalty that should be imposed.

As noted in Sec. II.B., the panel gives great weight to the three aggravating circumstances, particularly the second one involving the Defendant's killing of Emil Varhola and attempted killing of Mary Varhola. That the murder moreover occurred while the Defendant was still in detention through post-release control and in the course of an aggravated robbery only adds further weight to the already very significant multiple-victim aggravating circumstance.

The defense primarily asserted that the Defendant's diagnosed conditions, the result of his pre-natal development, and childhood abuse warranted giving them very significant weight.

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The panel finds them to be worthy of only limited weight. The aggravating circumstances far outweigh them.

While Dr. Smalldon stated that he had diagnosed four conditions as to the Defendant, he expressed no professional opinions concerning the effects of those conditions on the Defendant's conduct in murdering Emil Varhola. He could only provide a "qualified yes" to the question of whether those conditions caused the Defendant to be substantially unable to conform to the requirements of law.

Dr. Smalldon's carefully limited statements, without the expression of any professional opinion, fell far short of establishing that much, if any, weight could be given to mitigating factor (B)(3). The panel concludes that the factor can only be given very limited weight.

However, the evidence pertaining to factor (B)(3), together with other trial evidence, the testimony from Yvette Wesson and the Defendant's unsworn statement, does carry weight as to factor (B)(7), the "catch-all" factor. While the panel considers that weight to be significant, it nevertheless falls far short of what would be required to enable the panel to find that the aggravating circumstances did not outweigh all of the mitigating factors taken together beyond a reasonable doubt.

Consequently, notwithstanding the regret the panel must feel that the Defendant experienced so unhappy a childhood and the panel's acknowledgement that he suffers from the disorders Dr. Smalldon diagnosed, the result required by the statutory weighing of the evidence is very clearly adverse to the Defendant.

The three-judge panel accordingly finds unanimously by proof beyond a reasonable doubt that the aggravating circumstances presented here far outweigh the mitigating factors evidenced in the nature and circumstances of the offense, the history, character and background

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of the Defendant, and the applicable statutory mitigating factors.

The panel sentences the Defendant to the penalty of death.

IT IS SO ORDERED.

JUDGE THOMAS A. TEODOSIO
(Presiding Judge)

JUDGE ROBERT M. GIPPIN

JUDGE BRENDA BURNHAM UNRUH

cc: Asst. Pros. Felicia Easter
Asst. Pros. Margaret Kanellis
Attorney Lawrence J. Whitney
Attorney Donald Hicks

§ 2945.06. Jurisdiction of judge when jury trial is waived; three-judge court

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. The court shall follow the procedures contained in sections 2929.03 and 2929.04 of the Revised Code in all cases in which the accused is charged with an offense punishable by death. If in the composition of the court it is necessary that a judge from another county be assigned by the chief justice, the judge from another county shall be compensated for his services as provided by section 141.07 of the Revised Code.

§ 2903.01. Aggravated murder

(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.

§ 2903.01. Aggravated murder

(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.

§ 2903.02. Murder

(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

§ 2911.01. Aggravated robbery

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;

(2) Have a dangerous ordnance on or about the offender's person or under the offender's control;

(3) Inflict, or attempt to inflict, serious physical harm on another.

§ 2911.12. Burglary

(A) No person, by force, stealth, or deception, shall do any of the following:

(1) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense;

(2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense;

(3) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense;

(4) Trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present.

(B) As used in this section, "occupied structure" has the same meaning as in section 2909.01 of the Revised Code.

(C) Whoever violates this section is guilty of burglary. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree. A violation of division (A)(4) of this section is a felony of the fourth degree.

§ 2913.02. Theft

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat;

(5) By intimidation.

(B) (1) Whoever violates this section is guilty of theft.

§ 2929.021. Notice to supreme court of indictment charging aggravated murder; plea

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

(1) The name of the person charged in the indictment or count in the indictment with aggravated murder with a specification;

(2) The docket number or numbers of the case or cases arising out of the charge, if available;

(3) The court in which the case or cases will be heard;

(4) The date on which the indictment was filed.

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

(1) The name of the person who entered the guilty or no contest plea or who is named in the indictment or count that is dismissed;

(2) The docket numbers of the cases in which the guilty or no contest plea is entered or in which the indictment or count is dismissed;

(3) The sentence imposed on the offender in each case.

§ 2921.12. Tampering with evidence

(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;

(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.

(B) Whoever violates this section is guilty of tampering with evidence, a felony of the third degree.

§ 2929.03. Imposing sentence for aggravated murder

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

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

(a) Life imprisonment without parole;

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

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

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

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

§ 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.

§ 2929.05. Appellate review of death sentence

(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.

(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 [2929.02.2] 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.

§ 2929.191. Correction to judgment of conviction concerning post-release control

(A) (1) If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section 2929.14 of the Revised Code, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender will be supervised under section 2967.28 of the Revised Code after the offender leaves prison.

If, prior to the effective date of this section, a court imposed a sentence including a prison term of a type described in division (B)(3)(d) of section 2929.19 of the Revised Code and failed to notify the offender pursuant to that division that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison or to include a statement to that effect in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(2) of section 2929.14 of the Revised Code, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that the offender may be supervised under section 2967.28 of the Revised Code after the offender leaves prison.

(2) If a court prepares and issues a correction to a judgment of conviction as described in division (A)(1) of this section before the offender is released from imprisonment under the prison term the court imposed prior to the effective date of this section, the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. If the court sends a copy of the entry to the department, the department promptly shall deliver a copy of the entry to the offender. The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the sentence and the judgment of conviction entered on the journal and had notified the offender that the offender will be so supervised regarding a sentence including a prison term of a type described in division (B)(3)(c) of section 2929.19 of the Revised Code or that the offender may be so supervised regarding a sentence including a prison term of a type described in division (B)(3)(d) of that section.

(B) (1) If, prior to the effective date of this section, a court imposed a sentence including a prison term and failed to notify the offender pursuant to division (B)(3)(e) of section 2929.19 of the Revised Code regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control or to include in the judgment of conviction entered on the journal a statement to that effect, at any time before the offender is released from imprisonment under that term and at a hearing conducted in accordance with division (C) of this section, the court may prepare and issue a correction to the judgment of conviction that includes in the judgment of conviction the statement that if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of section 2929.19 of the Revised Code, and if the offender violates that supervision or a condition of post-release control imposed under division (B) of section 2967.131 [2967.13.1] of the Revised Code the parole board may impose as part of the sentence a prison term of up to one-half of the stated prison term originally imposed upon the offender.

(2) If the court prepares and issues a correction to a judgment of conviction as described in division (B)(1) of this section before the offender is released from imprisonment under the term, the court shall place upon the journal of the court an entry nunc pro tunc to record the correction to the judgment of conviction and shall provide a copy of the entry to the offender or, if the offender is not physically present at the hearing, shall send a copy of the entry to the department of rehabilitation and correction for delivery to the offender. If the court sends a copy of the entry to the department, the department promptly shall deliver a copy of the entry to the offender. The court's placement upon the journal of the entry nunc pro tunc before the offender is released from imprisonment under the term shall be considered, and shall have the same effect, as if the court at the time of original sentencing had included the statement in the judgment of conviction entered on the journal and had notified the offender pursuant to division (B)(3)(e) of section 2929.19 of the Revised Code regarding the possibility of the parole board imposing a prison term for a violation of supervision or a condition of post-release control.

(C) On and after the effective date of this section, a court that wishes to prepare and issue a correction to a judgment of conviction of a type described in division (A)(1) or (B)(1) of this section shall not issue the correction until after the court has conducted a hearing in accordance with this division. Before a court holds a hearing pursuant to this division, the court shall provide notice of the date, time, place, and purpose of the hearing to the offender who is the subject of the hearing, the prosecuting attorney of the county, and the department of rehabilitation and correction. The offender has the right to be physically present at the hearing, except that, upon the court's own motion or the motion of the offender or the prosecuting attorney, the court may permit the offender to appear at the hearing by video conferencing equipment if available and compatible. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if the offender were physically present at the hearing. At the hearing, the offender and the prosecuting attorney may make a statement as to whether the court should issue a correction to the judgment of conviction.

§ 2941.25. Multiple counts

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

§ 2945.05. Defendant may waive jury trial

In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: "I ....., defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury."

Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial.

§ 2945.06. Jurisdiction of judge when jury trial is waived; three-judge court

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. The court shall follow the procedures contained in sections 2929.03 and 2929.04 of the Revised Code in all cases in which the accused is charged with an offense punishable by death. If in the composition of the court it is necessary that a judge from another county be assigned by the chief justice, the judge from another county shall be compensated for his services as provided by section 141.07 of the Revised Code.

§ 2945.21. Peremptory challenges

(A) (1) In criminal cases in which there is only one defendant, each party, in addition to the challenges for cause authorized by law, may peremptorily challenge three of the jurors in misdemeanor cases and four of the jurors in felony cases other than capital cases. If there is more than one defendant, each defendant may peremptorily challenge the same number of jurors as if he were the sole defendant.

(2) Notwithstanding Criminal Rule 24, in capital cases in which there is only one defendant, each party, in addition to the challenges for cause authorized by law, may peremptorily challenge twelve of the jurors. If there is more than one defendant, each defendant may peremptorily challenge the same number of jurors as if he were the sole defendant.

(3) In any case in which there are multiple defendants, the prosecuting attorney may peremptorily challenge a number of jurors equal to the total number of peremptory challenges allowed to all of the defendants.

(B) If any indictments, informations, or complaints are consolidated for trial, the consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information, or complaint.

(C) The exercise of peremptory challenges authorized by this section shall be in accordance with the procedures of Criminal Rule 24.

§ 2967.28. Period of post-release control for certain offenders; sanctions; proceedings upon violation

(A) As used in this section:

(1) "Monitored time" means the monitored time sanction specified in section 2929.17 of the Revised Code.

(2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(3) "Felony sex offense" means a violation of a section contained in Chapter 2907. of the Revised Code that is a felony.

(B) Each sentence to a prison term for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person shall include a requirement that the offender be subject to a period of post-release control imposed by the parole board after the offender's release from imprisonment. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a sentencing court to notify the offender pursuant to division (B)(3)(c) of section 2929.19 of the Revised Code of this requirement or to include in the judgment of conviction entered on the journal a statement that the offender's sentence includes this requirement does not negate, limit, or otherwise affect the mandatory period of supervision that is required for the offender under this division. Section 2929.191 [2929.19.1] of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to notify the offender pursuant to division (B)(3)(c) of section 2929.19 of the Revised Code regarding post-release control or to include in the judgment of conviction entered on the journal or in the sentence pursuant to division (F)(1) of section 2929.14 of the Revised Code a statement regarding post-release control. Unless reduced by the parole board pursuant to division (D) of this section when authorized under that division, a period of post-release control required by this division for an offender shall be of one of the following periods:

(1) For a felony of the first degree or for a felony sex offense, five years;

(2) For a felony of the second degree that is not a felony sex offense, three years;

(3) For a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three years.

Crim R 11 Pleas, rights upon plea

(A) Pleas

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas

With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim. R. 32.

(C) Pleas of guilty and no contest in felony cases

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim. R. 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses

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AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Constitution of the United States

AMENDMENT 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT 8

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

AMENDMENT 14

Section 1

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

Section 2

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

Section 3

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

Section 4

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

Section 5

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