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### **Overview of Reply Brief**

The defendant-appellant Hersie R. Wesson will reply to the Appellee brief in relation to the First, Second, Fourth and Seventh Propositions of Law. Wesson will rely upon the arguments raised in his Merit Brief for the remaining 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.**

As noted in Wesson's Merit brief, 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 Appellee is correct that defense counsel did not raise objections to the indictment issues before or during trial. The Appellee is also correct in that this court has found that Aggravated Robbery pursuant to State v. Lester, 123 Ohio St.3d 396, 2009 Ohio 4225, this court has ruled that violations of R.C. §2911.01(A)(1) do not require the intent element as the offense is strict liability.

The problem is that the indictment did not include which subsection of the Aggravated Robbery statute, R.C. §2911.01(A), the grand jury relied upon in finding probable cause on each as every element of the offense charged, including the specification. The panel convicted the appellant in Count Two of Aggravated Murder in relevant part:

. . . 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.

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.

This Court in State v. Fry, 125 Ohio St.3d 163, 2010 Ohio 1017, did affirm in a similar situation. In Fry this Court held:

Rather, a person commits felony murder pursuant to R.C. 2903.02(B) by proximately causing another's death while possessing the mens rea element set forth in the underlying felony offense. In other words, the predicate offense contains the mens rea element for felony murder. See State v. Sandoval, 9th Dist. No. 07CA009276, 2008 Ohio 4402, P 21. Thus, the mens rea element need not appear in the count for felony murder as long as the mens rea component is specified in the count charging the predicate offense

Id. 169- 170

Even with the holding in Fry for what it is, the decision still does not resolve the problem. Count Seven did not require the mens rea element according to Lester. Count Thirteen, which charged under R.C. §2911.01(A)(3) does require such the listing of the mens rea. State v. Colon, 119 Ohio St.3d 204, 2008 Ohio 3749. Because the indictment under Count Two does not specify which count was considered to be predicate offense, it is not known whether the mandate of Fry was followed here. If even one of the jurors relied upon Count Thirteen as the predicate, the verdict would lack the unanimity required for a valid conviction. Schad v. Arizona (1992), 501 U.S. 624.

### **Double Jeopardy Protection Requirement of Indictment**

Herein lies the importance of the indictment. It is, in addition to a notice document, a *proof document*. It is the only proof that we have that the grand jury has fulfilled its constitutional obligation. It is the only evidence that we have, because the proceedings are understandably protected, that the independent body has made the constitutionally required findings on the elements. If the grand jury fails to provide this proof in the indictment, the

charges must be dismissed.

Knowing the grand jury findings is essential for determining the adequacy of an indictment. In Russell v. United States (1982), 369 U.S. 749, 82 S. Ct. 1038, the United States Supreme Court put forth the criteria by which the sufficiency of an indictment is to be measured:

These criteria are, first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,'" and, secondly, "'in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'"

369 U.S. at 763-64.

Thus, an indictment is only sufficient if it; (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy.

While the federal right to a grand jury indictment has never been found to be incorporated against the states, see Hurtado v. California, (1884) 110 U.S. 516, 534-35, courts have found that the due process rights enunciated in Russell are required not only in federal indictments but also in state criminal charges. See De Vonish v. Keane 19 F.3d 107, 108 (2d Cir. 1994); Fawcett v. Bablitch, 962 F.2d 617, 618 (7th Cir. 1992); see also Isaac v. Grider, 211 F.3d 1269, (6th Cir. 2000).

Without the inclusion of the specific statutory section relied upon by the grand jury in returning the charged offense, it is difficult to determine if the defendant is indeed protected from double jeopardy considerations. This adequacy of the charging instrument was not addressed in the Fry decision.

This Court did not find in Fry that a death penalty specification pursuant to R.C.

§2929.04(A)(7) “does not need include a mens rea component.” Perhaps Wesson is misinterpreting the Appellee’s brief (p.5), but it appears that the Appellee is arguing the capital specifications do not need to include all elements of the predicate offense. The cited paragraph reads as follows:

[\*\*P51] The felony-murder specification does not set forth the mens rea because R.C. 2929.04(A)(7) does not include a mens rea component. Aggravated burglary was charged as the sole predicate offense in Specification One. As previously discussed, aggravated burglary was separately charged, and the indictment properly alleged the mens rea for this offense. Accordingly, there was no defect in this indictment because aggravated burglary contains the mens rea component for felony murder.

The clear intent of this court is that all elements need not be included so long as the predicate elements have been fully found by the grand jury elsewhere in the indictment.

In this case, because the record is not clear which theory of the predicate offense was relied upon by the jury in the Felony-Murder count, the Fry assurances do not legitimize the indictment.

## 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).**

As the Summit County Prosecutor's Office has always been extremely professional as an adversary in capital litigation, it is not a surprise the it has conceded that the State v. Singleton, 124 Ohio St.3d 173, 2009 Ohio 6434 and State v. Bezak, 114 Ohio St.3d 94, 2007 Ohio 3250 error. The issue becomes how to resolve the error.

The state suggests that the matter be corrected by independent reweighing. Reweighing by this Court may not correct the error. There is a long litany of cases discussing how courts are to determine whether jury consideration of an invalidated aggravator, In a weighing state, which includes Ohio, the sentencer's consideration of an invalid eligibility factor necessarily skews its balancing of aggravators with mitigators. Stringer v. Black (1992), 503 U.S. 222, at 232. Such error required reversal of the sentence unless a state appellate court determined the error was harmless or reweighed the mitigating evidence against the valid aggravating factors. Clemons v. Mississippi (1990) 494 U.S. 738. Although Clemons did allow reweighing where the state statutory scheme permitted so, the requirement proved cumbersome and was fraught with inconsistencies.

To remedy this situation, and to simplify the distinction between the traditional weighing and non- weighing states, the Supreme Court of the United States tackled the issue in Brown v. Sanders, 546 U.S. 212, 126 S. Ct. 884 (2006). As the result of this case, there is no longer a harmless error analysis or re-weighing conducted where the jury improperly considered an

invalid statutory aggravating factor. If the jury improperly considered evidence in aggravation that should not have been introduced, the result is constitutional error requiring reversal of the death sentence.

In Brown v. Sanders, *supra*, per Justice Scalia, the United States Supreme Court simplified the issue of jury consideration of invalid statutory aggravating factor.

An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

Brown, at 220.

Stated otherwise, if the evidence introduced to establish the invalid aggravator was legally considered by the jury through the evidence proving the remaining valid aggravators, any error is harmless. However, if the jury considered evidence which would not otherwise have been considered by it in the penalty phase deliberations, the error is of a constitutional magnitude. Prejudice is presumed.

In Wesson's trial, the three judge panel found Wesson guilty of counts Two and Three. Both counts included a specification under R.C. §2929.04(A)(4)(b) that alleged that Wesson was under detention at the time of the offense. As this specification is invalid, the question becomes whether the evidence supporting that aggravating factor would have been admissible to prove the remaining factors.

A review of these factors must result in a conclusion that the detention factor would not have been otherwise admitted. The remaining capital specification included R.C. §2929.04(A)(5), Course of Conduct; and (3) R.C. §2929.04(A)(7), Felony Murder. The fact that

Wesson had committed the offense while under detention for a prior felony is an element not necessary for proving the remaining specification. Because the trier-of-fact would not have otherwise heard the allegation that Wesson committed the offense while having broken detention from the burglary, under Brown v. Sanders, the error is simply prejudicial. None of the other sentencing factors would have enabled “the sentencer to give aggravating weight to the same facts and circumstances.” The matter must be remanded for a new sentencing hearing. Reweighing is no longer an option.

In addition, Count Three of the Indictment must also be dismissed. Although this count was merged into Count Two for sentencing purpose, it must nonetheless be dismissed for lack of sufficient evidence. In this Count, 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). It is this same burglary that is invalid here. Count Three must be dismissed in its entirety.

**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 State argues that Wesson waived this issue because he did not object to the panel as it was constituted. The problem is, the record does not establish that the waiver of this statutory right was provided in a knowing, intelligent and voluntary manner. Boykin v. Alabama (1969), 395 U.S. 238. The record does not establish that the defendant, or anyone else in the courtroom for that matter, was aware of the statutory requirement. To waive a right, one must be aware that the right exists.

This Court has held that "shall" means "shall." State v. Pless, 74 Ohio St. 3d 333, 339 (1996). Pless affirms that this Court may not change the intent of the legislature. Therefore, a reviewing court must strictly confine its decisions to the intent provided by the legislature.

**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.**

The state argues that the error, if any, which occurred in this issue, was moot because, “. . .there is no possibility that anything said afterwards by friends or family members. . . . influenced the verdict.” Appellee brief p. 20. The stated reason for there being no possible influence that the challenged statements were not provided in the penalty phase hearing, but rather in the sentencing hearing. Apparently, the belief is that the panel may only consider for death penalty sentencing purposes the evidence adduced in the penalty phase hearing. This logic presupposes that the judge or panel either may not or would not consider statements of the parties at the sentencing hearing.

This Court has on numerous occasions established that the trial court may consider such evidence. State v. Roberts (2006), 110 Ohio St.3d 71, 2006 Ohio 3665. If this were not the case, a defendant’s right of allocution would be rendered a meaningless exercise of form over substance. In fact, even when a trial court has written its sentencing opinion, that court is free to change its mind after hearing the statements made at the sentencing rather than penalty phase hearing. There is no restriction.

For example, in State v. Frye, 125 Ohio St.3d 451, 2010 Ohio 1017, the defendant complained that the trial judge had written her opinion required by R.C. §2929.03(f) before he had a chance to provide his allocution. He asked that the sentence be reversed and the case be remanded so that he could make a statement before the opinion had been written.

In denying the issue, this court noted that:

[\*\*P192] . . . , the trial court here allowed Fry an opportunity to personally plead for his life at the sentencing hearing, and because Fry made a statement, the record is clear as to what he said. Having listened to Fry, *the court had an opportunity to evaluate his statement and could have modified its sentencing entry if it had felt obliged to do so.* However, the trial court chose not to modify the sentence, and as in *Reynolds*, no prejudice inured to Fry.

[\*\*P193] Moreover, in *Reynolds*, we concluded that no prejudicial error occurred even though the trial court informed the parties that it had filed the sentencing decision *before* allowing counsel to make a statement and even though the court did not personally address Reynolds before imposing sentence on the aggravated-murder charge. *Here, the trial court permitted Fry to make a statement, and having listened to it, did not modify the entry, though it could have done so. . . .*

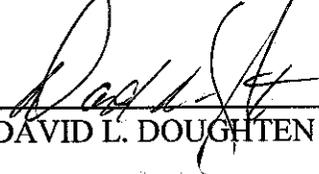
(Emphasis added)

Thus, it is without question that the panel had every right to consider the content of the statements from either party in consideration of the appropriate sentence. Here, the panel allowed the challenged statement *before* the opinion was written and filed. Because the panel permitted the statements, and did not comment as to the extent it may or would consider the victim-impact in question, it must be assumed the panel did, in fact, consider the statements. The weight assigned is unknown.

**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 IV, and V, it is requested that this matter be remanded for a new trial. In the alternative, pursuant to remaining Propositions of Law, the appellant respectfully requests reverse his death sentence and a remand with an order for a new sentencing hearing.

Respectfully submitted,

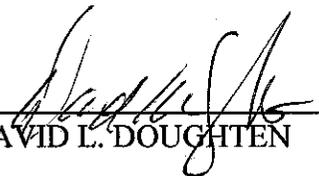
  
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Counsel for Appellant

**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, 7<sup>th</sup> Floor, Akron, OH 44308-1680 by Regular U.S. Mail on this \_\_\_\_ day of August, 2010.

  
\_\_\_\_\_  
DAVID L. DOUGHTEN