

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	CASE NO. 2010-0854
Appellee	:	
vs.	:	Appeal taken from
	:	Hamilton County
ANTHONY KIRKLAND	:	Court of Common Pleas
Appellant	:	Consolidated Case No. B-0901629
	:	and B-0904028

MERIT BRIEF OF APPELLANT ANTHONY KIRKLAND

THIS IS A CAPITAL CASE

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Proposition of Law No. 1.....19

It was error for the trial court to allow the jurors to hear evidence of other bad acts, notwithstanding the fact that the judge ordered that nothing be said in reference to defendant's conviction therefrom, since it was inherently prejudicial and had little if any probative value regarding the four homicides before the court.

Proposition of Law No. 2.....20

Just as prosecutorial misconduct is plain error and cannot be appropriately characterized as being either harmless or capable of being waived, so also it is with ineffective assistance of counsel. These two often occur simultaneously. Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under parallel provisions of Article One, Sections 2-16 of the Constitution of the State of Ohio, were violated.

Proposition of Law No. 3.....23

Where counsel for the State of Ohio make comments that are inherently prejudicial and which destroy fundamental fairness of the trial, Appellant is denied due process of law and equal protection. Such comments violate Appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the Constitution of the United States, as well as parallel rights conferred under Article One, § 2, 9, and 16 of the Constitution of the State of Ohio.

Proposition of Law No. 4.....27

An accused in a capital case has the right to specialized, specific, and focused voir dire, given the bifurcated special nature of the proceeding. Where counsel undertakes only standard voir dire, typical of "garden variety" felony jury selection, the accused rights are violated under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution of the United States, and under parallel provisions of Article One §§ 2, 5, 9, 10, and 16 of the Constitution of the State of Ohio.

Proposition of Law No. 5.....29

A capital defendant's death sentence is inappropriate where the mitigating circumstances raise reasonable doubt. O.R.C. §§ 2929.03, 2929.04; U.S. Const. amend. VIII and XIV; Ohio Const. art. I, §§ 9, 16.

Proposition of Law No. 6.....30

Ohio's death penalty law is unconstitutional. O.R.C. §§ 2903.01, 2929.02, 2929.021, 2929.02, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Anthony Kirkland. U.S. Const. amends.

V, VI, VIII, and XIV; Ohio Const. art. I, §§ 2, 9, 10, and 16. Further, Ohio's death penalty statute violates the United States' obligations under international law.

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The accused's right to due process under the Fourteenth Amendment to the United States Constitution and Article I, § 16 of the Ohio Constitution is violated when the State's burden of persuasion is less than proof beyond a reasonable doubt.

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A conviction based upon insufficient evidence is a deprivation of due process. U.S. Const. Amend. V & XIV; Ohio Const. Art. I, § 10.

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Statement of the Facts

Anthony Kirkland was indicted on March 17, 2009 in Hamilton County in Case No. B-0901629. This was a twelve-count indictment, involving the homicides of three young women. Counts one through five involved the death of Casonya Crawford. The charges were Attempted Rape with specifications O.R.C. § 2923.02(A); Aggravated Murder with specifications including capital specifications O.R.C. § 2903.01(B); Aggravated Robbery with specifications O.R.C. § 2911.01(A)(3); Aggravated Murder with specifications including capital specifications O.R.C. § 2903.01(B); and Gross Abuse of a Corpse O.R.C. § 2927.01(B). These offenses allegedly took place on May 4, 2006.

Counts six and seven involved the death of Mary Jo Newton. Charges included Murder O.R.C. § 2903.02(A) and Gross Abuse of a Corpse O.R.C. § 2927.01(B). Those offenses allegedly took place on June 14, 2006.

Counts eight through twelve involved the death of Esme Kenney. Charges were Attempted Rape with specifications O.R.C. § 2923.02(A); Aggravated Murder with specifications including capital specifications O.R.C. § 2903.01(B); Aggravated Robbery O.R.C. § 2911.01(A)(3); Aggravated Murder with specifications including capital specifications O.R.C. § 2903.01(B); and Gross Abuse of a Corpse O.R.C. § 2927.01(B). These offenses allegedly took place on March 7, 2009.

Next, in Case No. B-0904028, the State of Ohio indicted Anthony Kirkland in a two-count indictment on June 22, 2009. The charges were Murder O.R.C. § 2903.02(A); and Gross Abuse of a Corpse O.R.C. § 2927.01(B). The allegations involved the death of Kimya Rolison on December 22, 2006. The State of Ohio, over defense objection, successfully moved to

have the two indictments consolidated for trial. Their theory was that Anthony Kirkland was a serial killer, and that his actions followed a common course of conduct.

Anthony Kirkland was convicted as charged. Accordingly, a penalty phase of the trial was conducted, a phase in which the trial defense failed to offer even a marginal amount of mitigation testimony. Although the defense promised a relative's explanation of why the parents of Appellant were not put on to beg jurors to spare his life, no such witness ever was produced.

Appellant was sentenced to the maximum terms permissible on each of the respective counts. A few counts were merged for purposes of sentencing by the trial court. All remaining sentences were to be run consecutively to each other, and consecutive to the sentences received in the other indictment. Appellant has filed a timely notice of appeal and stay of execution, and he is otherwise properly before the Ohio Supreme Court.

Pretrial motions were either resolved by agreement or argued. Some of which had decisions left pending until February 26, 2010, when the jury selection (unremarkable, using medical terminology) was completed (T.p. 307). On that date, discovery exchange was deemed to be complete, and stipulations were in place which were of mutual benefit to the parties, and which greatly would simplify the presentation, helping jurors understand the testimony that was critical to a proper determination of the outcome (T.p. 310).

The court issued preliminary comments to the jurors (T.p. 315). The panel had viewed the scenes relevant to several homicides. A motion to sever the counts into four separate homicide trials was formally overruled because the state was alleging a plan to kill two or more people as one of the capital homicide specifications (T.p. 814-816). The State of Ohio withdrew its

intention to use evidence of other bad acts, i.e. a formal conviction of a same and similar homicide for which the Appellant served 17 years. Counsel for Kirkland argued that photos of the victims were properly the subject of exclusion because the defense was going to acknowledge that Appellant did, in fact, commit the four enumerated homicides, making victim identification unnecessary (T.p. 816-817).

As to defendant's multiple pretrial statements to agents of law enforcement, the court denied Appellant's pretrial requests that they be suppressed, finding that they were undertaken knowingly, intentionally, and voluntarily (T.p. 819-822). Finally, and immediately before the jurors would be brought out to hear opening statements of counsel, the defense announced strategic changes, and said that Appellant was going to plead guilty to the non-capital homicides, one per each merged trial court case number. Appellant also pled guilty to Gross Abuse of a Corpse (T.p. 825). The prosecution in turn dropped specifications on certain counts which alleged that Appellant's crimes qualified him to be categorized as a sexual predator, thereby entitling him to enhanced punishment. The defense felt, albeit mistakenly, that evidence of other bad acts evidence (prior sex offense facts) would be excluded (T.p. 825-843). When the jury was brought in, the court explained that the Appellant had entered pleas of guilty to two non-capital homicides, as well as counts of Gross Abuse of a Corpse (T.p. 854).

Prosecutor Joseph T. Deters opened for the State of Ohio. His presentation went through the proposed testimony of the plaintiff, in the same sequence that it would be presented. First he referenced the homicide of Casonya "Sharee" Crawford, then the two victims whose guilt had been established by guilty pleas (Mary Jo Newton and Kimya Rolison), and finally victim Esme Kinney (T.p. 855-876).

Afterwards defense counsel A. Norman Aubin, opened with a concession that Kirkland will have effectively admitted to killing four victims (T.p. 883). He stated that he fully expected that the case would survive defense challenges to what would mostly be merit phase evidence, and ultimately reach a penalty phase (T.p. 884). What was emerging was what would ultimately be proven to be a defense strategy of acceptance of responsibility for the four underlying homicides, coupled with the argument that life without the possibility of parole would be sufficient to satisfy all of society's legitimate goals at sentencing.

The first factual merits phase witness was Patricia Crawford, grandmother of Casonya "Sharee" Crawford and *de facto* custodial parent. The girl had been removed from the custody and care of the biological mother at age ten. She stated that Casonya was taking antidepressants, and was last seen alive wearing pajamas. Her book bag and cell phone were missing (T.p. 888-890).

The second witness was Tania Harmon, who last saw the victim when she was asleep the night she went missing. She was a friend of the victim, and said that there was a plan in place for the victim to come to her house, a common occurrence, but that she never arrived (T.p. 896-900).

Witness number three was RaShaud Bowden, the victim's boyfriend. He spoke to her that evening, between the time she left home and the time she was supposed to arrive to visit her friend. That cell call "died" in the middle of a sentence (T.p. 903-907).

Previously, the parties had stipulated that one crime scene investigator could speak what otherwise might in part be hearsay, summarizing the investigation and work product

of all the homicide personnel (T.p. 846). Officer Glindmeyer was the first law enforcement witness (T.p. 908). He discovered a decomposed body (T.p. 917-919). It had only one sock on one foot (T.p. 925). The body had been burned, bones had been scattered by animals, and the work of the elements of nature impeded further conclusions (T.p. 928).

Dr. Obinni Ugwu, formerly an assistant Hamilton County coroner, stated that he had examined the preliminary work products of others, and crime scene investigatory reports (T.p. 939-949). He said that completion of a "rape kit" examination was impossible, given the state of decay of the body (T.p. 946). He noticed premortem bruising on the legs and foot (T.p. 951-952).

Frank Wright testified in his expert capacity as a forensic odontologist. He compared the body's teeth with those of known patients at Children's Hospital, and declared that to a reasonable medical certainty the victim's teeth could be identified. Dr. Ugwu had set the foundation for this testimony previously (T.p. 940-941).

Police officer Howard Grant testified that the photos of the victim published to the jury at prosecution request were those of the first victim. He also investigated the homicide of Mary Jo Newton, and he authenticated and explained aerial maps of the city, comparing geographic locations of the bodies of the victims one and two, relative to their residences (T.p. 956-960). Appellant's address at the time was also pinpointed. Due to geographic similarities and potential similarities in modus operandi, he started to think that a serial killer was at work.

Police officer David Landesberg next took the stand (T.p. 966). He processed the Wehrman Avenue crime scene in 2006, when the ashes were still smoldering (T.p. 967-

970). Both of the first two victims were potentially assaulted, killed, and burned with an accelerant (T.p. 968-979). He also used aerial maps and photographs. He bagged up certain things he found (chunks of wood, cigarette butts, beer cans) to submit for DNA analysis (T.p. 970-982). The fire department's arson investigators came and assisted as advisors (T.p. 983). Landesberg was certain that the Crawford and Newton homicides were perpetrated by the same individual (T.p. 985-986).

Barbara McAvoy testified that she was the older sister of Mary Jo Newton (T.p. 993-994). She said that her deceased sister had drug and behavioral issues, and likely was bipolar (T.p. 995). She fell in with the wrong friends. Drugs distorted her thinking, her common sense, and her priorities (T.p. 995-996). She last saw her sister at her mother's house, the night she went missing, and shortly after her sister had been a psychiatric inpatient (T.p. 997-999). The defense objected sidebar that this wasn't "prior bad acts" evidence, but instead was impermissible victim impact testimony (T.p. 1001). The State of Ohio's rebuttal was the statement that they planned to show that the accused, a coward, made impaired and helpless women his victims, thereby setting up a common *modus operandi* (T.p. 1002). The defense objection was overruled, and made an ongoing objection as to projected additional testimony regarding Kimya Rolison (T.p. 1002). The witness then identified a photograph as representative of her sister just before she disappeared (T.p. 1003-1004).

The next witness was forensic pathologist Gretel Stephens, a salaried Hamilton County Deputy Coroner. She presented testimony supportive of her curriculum vitae (T.p. 1005-1008). She was allowed to testify as to her professional capacity without defense objection, and she said that she was called to the Wehrman Avenue crime scene when it

was still fresh. Burning was sufficient so that the gender of the victim was uncertain. She collected items that she felt were relevant to the autopsy. Stephens said this degree of damage was consistent with the use of an accelerant (T.p. 1011). She stated that previously admitted photographs fairly and accurately depicted the crime scene (T.p. 1014). Stephens testified that the victim had to have been freshly dead when burned (T.p. 1016). Dental records demonstrated that the body was that of Mary Jo Newton (T.p. 1018-1019).

Stephens said that she allowed Dr. Elizabeth Murray, a forensic anthropologist, to assist with examining the skull, to look for hidden clues of injuries contributing to the cause of death (T.p. 1019). They determined that the head and neck were free of major injuries, and that the victim was dead before the body was burned (T.p. 1020-1021). The evidence was consistent with the conclusion that the deceased had borne at least one child. Clothing was linked to the victim by the family (T.p. 1023). Stephens was unable to establish a cause of death (T.p. 1024). The manner of death, including concealment, was consistent with some sort of a homicide (T.p. 1020). She compared notes with the file of the first victim, and preliminarily concluded that both deaths were the work of a single person (T.p. 1030).

A videotaped deposition of Gary Rolison, unavailable witness and the victim's father, was played for the jury (T.p. 1031). He identified his daughter from a photograph. He said that his daughter was withdrawn, rebellious, and that she later married. She bore two children in a violent and unhealthy relationship with her husband. Substance abuse was also problematic (T.p. 1035-1038). Her husband eventually went to prison for robbery. His daughter returned to enter into a drug treatment program (T.p. 1038-1039). His last contact with her was in October of 2006 (T.p. 1040).

Officer Steve Villing next testified. He did many of the crime scene investigation techniques that civilians are used to seeing on television (T.p. 1045-1065). He identified Anthony Kirkland as the man he ultimately met, shortly after the body of Esme Kinney was discovered. He identified a photograph of Kirkland that was consistent with how he looked at that time (T.p. 1056-1057). A search warrant got Kirkland's clothing sent to the crime lab for analysis (T.p. 1058). Buccal and genital swabs and nail and hair samples were taken from the suspect (T.p. 1063).

William Ralston, the chief deputy coroner senior forensic pathologist, testified next (T.p. 1066). He investigated the evidence to try and determine cause of death of Kimya Rolison. He found evidence of sharp force injury to her neck, and extensive burning. He concluded that the neck wound was the ultimate cause of death (T.p. 1074-1075).

Elizabeth Murray testified. She is a biology professor as well as a forensic anthropology consultant (T.p. 1078). Her specialty is dealing with badly decomposed or dismembered bodies, where standard forensic pathology needs assistance in determining cause of death (T.p. 1079). She was hired to attempt to construct a biological profile of the victim (T.p. 1081). She identified Casonya Crawford from a picture (T.p. 1083). She said the remains were those of a young teenage female (T.p. 1085). The prosecution was attempting to show similarities between the victims, as to age, gender, and methods of death and concealment of evidence afterwards.

Dr. Frank Wright testified (T.p. 1108, et. seq.). He positively identified Mary Jo Newton and one other victim from dental records (T.p. 1116-1117). Later, he used preexisting exhibits and reports to identify Casonya "Sharee" Crawford (T.p. 1129).

By motion of the parties, the ninth count, a rape charge, was amended to "Attempted Rape," i.e. the crime Appellant allegedly tried to cover up when he abused the corpse (T.p. 1135). Lisa Kenney, Esme's mother, testified (T.p. 1139). She identified where she was living when her daughter was murdered from aerial photographs (T.p. 1139-1140). A large water reservoir was directly across the street from their house, and Esme wanted to go out to jog. The family treated the woods surrounding the reservoir as their personal extended backyard. Esme's mother was busy cleaning up drywall dust, and declined an invitation to join her daughter (T.p. 1144-1145). All of a sudden, Ms. Kinney had a terrible feeling that something was radically wrong. She ran across the street, and at a corner location she found a pair of men's pants (T.p. 1148). She also found a case of beer with seven bottles being unopened (T.p. 1150). She ran home and called her husband, saying "Esme is missing" (T.p. 1150).

Lisa Kenney returned to the reservoir location after calling 911. She entered the woods, thick with honeysuckle and grapevine. She unknowingly got within 10 yards of where her daughter's body was found (T.p. 1151-1152). She found an open door on a foreclosure house, and went inside. Then her husband arrived with one of their dogs (T.p. 1154-1154). They searched around until the police came (T.p. 1154-1155). The police considered the possibility that the girl was with friends, or was a runaway (T.p. 1156). Other neighborhood mothers came over (T.p. 1157). After 11:00 PM the police returned to the house, showing the mother an iPod and a watch, which the mother positively identified, the child's name was on the iPod (T.p. 1161-1162). These items were recovered from the defendant, now a suspect (T.p. 1163). At 3:30 a.m., watching the news during a sleepless night, Ms. Kenney and her husband learned that Esme's body had been found (T.p. 1163). At 5:30 a.m., one of the

assistant chiefs came to the door with a chaplain, confirming the content of the television story. Esme's status was now clear (T.p. 1164). Lisa identified Esme's photograph (T.p. 1163).

The next witness was police officer Ron Geisler (T.p. 1168). He was responding to a run in Winton Terrace and drove right past Esme's mother. Ten minutes later, he stopped on his way back from the radio run and talked to her, getting Esme's description (T.p. 1171-1173). He and his partner told both parents to stay home, so they would not compromise the investigation. The officers walked the area around the reservoir. They checked abandoned buildings. Then they went to the parents' home, and secured permission to search (T.p. 1178-1180). The officer then hand-delivered his interim report to the Personal Crimes Unit team, since they handle sex crimes against children (T.p. 1181).

Police Officer Jennifer Ernst testified. She was a canine officer who responded after getting a report of a missing child from District Five (T.p. 1182). Ironically she lives on the same street as does Esme Kenney's family (T.p. 1185). She and her partner went to the area, taking a maintenance road, and they discovered Appellant sleeping under a tree (T.p. 1189). He said he was homeless and asleep. Two steak knives were sticking out of his pockets, with the blades up (T.p. 1190). In the right front pants pocket they found what turned out to be the victim's watch and iPod (T.p. 1191). A lighter was also recovered (T.p. 1192). The officers cuffed Kirkland, not telling him that they were looking for Esme. The officers waited for a supervisor to arrive with the parents, who identified the recovered items (T.p. 1194).

Kirkland stated that he had found the property, pointing away from where the body was ultimately found (T.p. 1196). Kirkland said his name was "Anthony Palmore." The birthdate and Social Security number produced no "hits" (T.p. 1197). A "9 Henry 10" helicopter arrived, scanning the area with a system that picks up body heat. Then they searched using the dogs. Shortly, Officer Anthony White yelled that they had found the body (T.p. 1200). Once the body was located, he radioed for a supervisor (T.p. 1211-1214). The suspect did not try to flee or resist (T.p. 1213).

Police Officer William Keuper responded to the radio run, took custody of the prisoner, searched him again, turned on the car camera, and "Mirandized" Kirkland as he sat in the back of the police car (T.p. 1217). He displayed his "Miranda card," the same one he had used for every arrest since he graduated from the Police Academy (T.p. 1218). Twenty minutes later, Kirkland gave the officer his real name (T.p. 1221). Kirkland was not disruptive in the police cruiser (T.p. 1222).

The next witness was police officer Barbara Mirlenbrink, the lead criminalist in the investigation (T.p. 1227). Esme's body was found where the trees bent down and formed a natural canopy (T.p. 1231-1232). She identified the blowup of the diagram she made at the scene showing where possible relevant items were located (T.p. 1234). Ninhydrin, sprayed on objects that are later put in a hot container with water, will turn purple, reacting to sweat on fingerprints. Fingerprint powder is volcanic ash. Sometimes Super-glue is used for a protocol similar to that of Ninhydrin (T.p. 1238-1239). Nothing useful was found in that regard (T.p. 1240).

A secondary crime scene led to certain items being recovered (T.p. 1255, et. seq.). Officer Scott Radigan, a criminalist, took some photos of shoe prints (T.p. 1279, et. seq.). Also, Mike Trimpe, a forensic scientist and trace evidence examiner at the Coroner's Laboratory, made generalized identifications of Kirkland's shoes vis-à-vis photos of footprints in the snow (T.p. 1280-81, 1284, et. seq.). Next, Joan Burke, a DNA specialist (serologist) with the Coroner's laboratory, said that Esme's DNA could not be excluded from DNA found on Kirkland's boxer shorts, penis, and hands (T.p. 1292, 1314).

Officers also testified as to results of interviews regarding the instant case. First, Keith Witherell testified that he was a veteran homicide detective (T.p. 1322). One of his roles was to interrogate suspect Kirkland, and hopefully to get a confession out of him (T.p. 1325). Previously, he had interviewed witnesses in the Crawford case. Murder cases remain open until they are solved (T.p. 1327). Witherell was a secondary investigator on the Newton case (T.p. 1329). On March 15, 2007, he interviewed Anthony Kirkland as to both the Crawford and Newton homicides (T.p. 1329). Kirkland said that he lived on Ridgeway Avenue, halfway between the addresses of the two crime scenes. Kirkland denied knowing Crawford when he was shown her picture. He did admit that he frequented the path connecting the end of Blair Avenue to Victory Parkway, which was near the scene of the crime (T.p. 1331-1332). He also denied having any involvement with the Newton homicide, and at that time police had no forensic evidence linking him to either of those crimes (T.p. 1333).

On March 8, 2009, Detective Witherell came in on his day off to interview Kirkland about the Kenney homicide. He was contacted since he had interviewed the same suspect about the other two homicides in 2007 (T.p. 1334-1335). Kirkland was catego-

rized as bright, controlling, and as having a preference for male interviewers (T.p. 1336). He used the fact that they were both fathers as a bridge to get Kirkland to open up (T.p. 1337). He did not tell Kirkland that the Esme's body had been found, fearing that he would refuse further interrogation (T.p. 1338). The tactic worked, and Kirkland spoke to him for over four hours. At first, Kirkland denied knowing anything (T.p. 1339).

Kirkland's interview with Detective Witherell's partner was both digitally recorded and transcribed (T.p. 1340). The recording was received into evidence without objection (T.p. 1341). Several silent portions of the interview were edited or redacted by court order. The jury heard the interview and was simultaneously able to read the transcribed version on the screen. The transcript between pages 1343 and 1509 reflects what was on this recording. Kirkland acknowledged being orally Mirandized by other detectives, understanding what they read to him, and he acknowledged signing a consent form (T.p. 1345). Kirkland was asked where he had been on the previous day. He said that he went to Daly Park on his way to his mom's house in Finneytown, previously having been kicked out of the Volunteers of America halfway house (T.p. 1350-1351). He admitted seeing the victim at the reservoir, saying at the time that he was with "some other dude" named Pedro (T.p. 1356). He said he found twelve Budweiser beers, a partial case, and drank some (T.p. 1358). Pedro then supposedly left to find something to eat (T.p. 1370).

Towards the end of the reservoir he said that he found a watch and a pink radio (T.p. 1373-1375). Kirkland recalled that the watch said "3:08 p.m." (T.p. 1378). He then said that he went to McDonald's and BP, meeting up again with Pedro (T.p. 1379-1382). Kirkland said that he found some leftover chicken on the ground in "Daly Park," and ate it (T.p. 1389). He said he took a blue geared bike, and went past his parents' house, but

no lights were on (T.p. 1390-1391). He returned to the reservoir, and was sitting, resting under a tree in the dark when several police officers approached him, and searched him. He said that he gave a false name and Social Security number because he figured that he had an outstanding warrant for a parole violation (T.p. 1393-1395). He said that he had always wanted to be in his son's life (T.p. 1397, et. seq.). Kirkland said that on that day he observed nothing that was unusual (T.p. 1408, 1409, 1410, 1415).

At this point (3:08 p.m.), Kirkland was confronted with the fact that the Kenney girl was still at home. Therefore, he was inaccurate when citing the time (T.p. 1417). (Counsel now asked the court to take a break, so they could redact a line wherein Kirkland admitted previously having been to prison (T.p. 1428)). Kirkland was crying (T.p. 1435-1436). He continued to deny that he knew where the child was (T.p. 1445). Finally he said that he met up with the victim after he left Pedro (T.p. 1451). He said what happened was an accident, the fault of his temper, his sense of hopelessness and helplessness, and lack of power (T.p. 1454). He said he saw the girl running, she ran into him, and caused him to drop his bottle of beer. She offered him the watch to make amends (T.p. 1456). He said he saw not the girl, but instead his son's mother, and he "lost it" (T.p. 1457). He punched her and knocked her out, kicked her, and punched her in the stomach (T.p. 1458-1459). When asked if he stomped her, he said "not really" (T.p. 1459).

Interviewers pushed for the exact location (T.p. 1463-1465). Kirkland said she should still be alive (T.p. 1466). Police told Kirkland that she was located and that she was dead (T.p. 1468). Kirkland said that she ran, and he had chased her (T.p. 1471-1473). He punched her several times in the head (T.p. 1478). She fell and he hit her again (T.p. 1479). He said that her clothes were intact (T.p. 1471). He said that he left her on the trail with Pedro (T.p. 1481).

He said he was unsure what condition she was in (T.p. 1508). Finally, he said that he knew she was dead when he left, and that she died because of his hatred (T.p. 1496). When the first interview had concluded, Kirkland had still maintained that he was with Pedro, that the girl was on the trail when he left, and that Pedro must have moved her (T.p. 1505).

Detective Witherell allowed Kirkland to control the interview at times, to both empower him and to give him a false sense of self-confidence that he could talk his way out of being charged with the girl's murder (T.p. 1520-1521). Other police personnel observed the interview from the adjacent room (T.p. 1522). Kirkland never indicated that he knew where Esme Kenney lived in relation to the reservoir (T.p. 1515). Detective Witherell, as lead detective said "...these cases consumed his life for the last several years" (T.p. 1529). The detective on cross-examination acknowledged that Kirkland cried at times during the interview, and that he said that his life was completely torn apart (T.p. 1533). Kirkland was not, in the detective's opinion, under the influence of alcohol or drugs when he was interrogated (T.p. 1535).

William Hilbert was the State's next witness (T.p. 1537). In 2006 and 2007, he was Witherell's partner. He said that Ms. Crawford was discovered wearing only one sock (T.p. 1539). He looked for other items that she supposedly had when she left home. The police supplied minutes to the phone, so that if a suspect was using it they could apprehend him (T.p. 1541). Police have the ability to "ping a tower," determining approximately which transmission tower was involved in making or receiving a given call (T.p. 1541-1543). Hilbert talked to Kirkland primarily about the homicides of Crawford and Newton. He said that police need more than a generalized confession, they need details from the sus-

pect that are consistent with those only the perpetrator would know (T.p. 1545). He also interviewed Kirkland about the Rolison homicide. He stated that Kirkland provided intimate details of each homicide to him (T.p. 1545). He interviewed Kirkland twice on the March 8, 2009, first for 2.5 hours, and then again for 1.3 hours. Recorded copies of those interviews were moved into evidence without objection (T.p. 1547).

Kirkland admitted that he knew Mary Jo Newton. He met her waiting for a bus in front of the Justice Center. He said she worked as a prostitute to support her drug habit (T.p. 1550). Hilbert told Kirkland that he was going to be in prison for the rest of his life, so he should give the families of the other three victims closure, and tell him what happened (T.p. 1565). Kirkland said "It's like a coping mechanism in me" (T.p. 1570). Mary Jo went to Roberta's house to visit Kirkland, causing friction. They went to Eden Park, and there she began hitting him. She died in the van; he had choked her (T.p. 1580-1581). Afterwards, he burned her body on Wehrman Avenue (T.p. 1585).

Kirkland said he met Casonya on the bridge coming from Walnut Hills High School. He offered her \$20.00 for sex, and she threw it back at him (T.p. 1603). He got mad, grabbed her, and she kneed him (T.p. 1607). He choked her under the trestle. When she was dead, he carried her to where he burned her body (T.p. 1609). Kirkland said he burned his victims since fire purifies, like the way the Vikings used it to purify. The same metaphor was used when he described the Newton homicide (T.p. 1589-1592).

Kirkland confirmed that Newton was apparently arguing on her cell phone (T.p. 1625). The detective identified Kirkland as a loner, trying to get him to admit Pedro of the Kenney homicide was fictional (T.p. 1632). Kirkland said he was a poor stress manager,

lashing out when it was overwhelming (T.p. 1635). He blamed Esme's murder on anger and Vicodin (T.p. 1637-1638). Hilbert told Kirkland that he needed to "come clean" for little Anthony, his son (T.p. 1642-1643). Kirkland explained that he collided with Esme while she was jogging (T.p. 1646). He chased her, and she fell (T.p. 1649). He tried to have sex with her (T.p. 1651-1655). He choked her to death then set her on fire (T.p. 1657-1658).

Kirkland cried after his admission (T.p. 1666). He said he felt things were helpless and out of control (T.p. 1668). During a break, most exhibits were admitted without renewed defense objection (T.p. 1679). The "photos of the victim objection" was preserved, as being redundant, graphic, and prejudicial (T.p. 1680-1681). The defense mitigation trial was estimated to last only one morning, with not more than two witnesses. The defense indicated that Kirkland's family was reluctant to appear in his behalf. They planned to make a proffer from mitigation investigator John Lee of what attempts to bring in the family had been made (T.p. 1689-1690).

Hilbert's interview continued. He got Kirkland to admit that he killed Esme with a rag from behind, consistent with ligature marks found on her neck (T.p. 1695-1697). No satisfactory explanation was forthcoming as to what happened to the clothes (T.p. 1701-1706). Finally Kirkland admitted to killing and burning the body of another victim, "Kinya Rolison" (T.p. 1728-1729). She was killed around Christmas of 2006, from California, and a prostitute (T.p. 1730-1731). He said police records should confirm that they got pulled over in Fairview Park by the police, (T.p. 1732-1733). She was murdered in his gray van, he stabbed her in the neck on Central Parkway (T.p. 1753). Late he dumped the body on Pulte Street, and burned it (T.p. 1747-1748). Kirkland did not try to talk his way out of this offense (T.p. 1778). He said he was out of control (T.p. 1782). He cried (T.p.

1782-1783). Kirkland said her birthday was the 22 of October, and police checking records found her, listing a birth date of the 21 of October. He correctly identified where the body was recovered (T.p. 1762). She was burned on a bed of wood (T.p. 1773). Hilbert told the prosecutor that Kirkland was free to terminate his multiple interviews at any time (T.p. 1783).

Detective Karaguleff testified that he located records of the inquiry of the identities of Kirkland and Kim in Fairview Park (T.p. 1789-1792). They were preserved on a field interview card.

Dr. Karen Looman testified in her professional capacity as a forensic pathologist for the coroner's office. She said that Esme's body was partially in rigor mortis, that the cause of death was asphyxiation due to strangulation by ligature, and that the manner of death was homicide (T.p. 1799-1827).

Kylah Williams testified, over defense objection, to other bad acts evidence regarding a 2007 situation, wherein Kirkland while on parole and before he was arrested, had solicited sexual contact with her. Previously the court agreed to let in the testimony, as long as no reference to a conviction was made. The motion in limine was renewed (T.p. 1838). The sixteen-year-old witness said that Kirkland was staying with her mother and younger sister. Kirkland allegedly came into her room with his pants down, his genitals exposed (T.p. 1848-1849). Later he reappeared, saying via a note that "I want to be the first one to eat you out, and I'll pay you." He offered her \$5.00 (T.p. 1852). She walked outside in the rain to avoid him, and eventually her mother found her, and was told the story. District Four police were called (T.p. 1853-1855).

The prosecution rested its case. The defense rested, without putting on any witnesses (T.p. 1856). The defense made a sidebar Rule 29 motion, which was denied (T.p. 1857-1860). Closing arguments followed.

Proposition of Law No. 1

It was error for the trial court to allow the jurors to hear evidence of other bad acts, notwithstanding the fact that the judge ordered that nothing be said in reference to defendant's conviction therefrom, since it was inherently prejudicial and had little if any probative value regarding the four homicides before the court.

As was set out in Appellant's Statement of Facts, supra., and (T.p. 1848-1855), years before Kirkland's involvement with these cases he was charged with exposing himself to a young girl, and making sexually suggestive references, essentially unsuccessfully soliciting sexual contact. The trial judge herein let the evidence in over defense objection, with the stipulation that no reference of a conviction therefrom be admitted. It is respectfully submitted that this created a distinction without a difference.

Rule of Evidence 401 defines "relevant evidence" as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence. Evid. R. 401. Relevant evidence is generally admissible. Evid. R. 402. Evidence whose exclusion is mandatory is defined as evidence that may be inherently prejudicial or confusing. Evidence that is admissible in the reasonable discretion of the judge is evidence that may be cumulative, confusing to the trier of fact, or both. Evid. R. 403.

Character evidence is not admissible to prove conduct, subject to certain exceptions. Evid. R. 404(B). It must be noted that Appellant elected not to testify, so no defense character evidence needed rebuttal. Thus, the only relevant part of Evid. R. 404 is Section "B."

The State introduced evidence of other crimes, wrongs, or acts. This is unacceptable to prove the defendant's character. It may, however, be used to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. None of these exceptions is present, at least not sufficiently for the probative value to be outweigh the inherently prejudicial effect. Horrible as they were, these acts had nothing to do with what Kirkland was tried for in the instant cases. He did not try to rape, rob, or kill Kylah Williams as he was charged with here (T.p. 1840, et. seq.).

In the instant case, please note that the Rolison family disagreed with a recommendation of a death sentence. The victim's stepmother testified, "We respectfully request that the convicted murderer be (only) sentenced to life in prison." *Cincinnati Enquirer*, April 1, 2010, p. A-1.

The prejudicial material indeed made the difference between life and death.

The girl whom Kirkland offered \$5.00 for sex by Kirkland in a prior bad act turned the corner in the sentencing phase, according to Prosecutor Deters, who said "Without her, I think that it (the sentence) would have been a coin flip." *Cincinnati Enquirer*, March 18, 2010, p. A-1.

Anthony Kirkland respectfully submits that inclusion of the testimony of this unrelated prior incident not only violates the mandate of Evid. R. 404(B) but also is violative of the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States, as well as parallel § 2 and 16 of the Constitution of the State of Ohio.

Proposition of Law No. 2

Just as prosecutorial misconduct is plain error and cannot be appropriately characterized as being either harmless or capable of being waived, so also it is with ineffective assistance of counsel. These two often occur simultaneously. Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under parallel provisions of Article One, Sections 2-16 of the Constitution of the State of Ohio, were violated.

Appellant herein incorporates by reference as if fully rewritten herein the arguments and citations set forth in the Proposition of Law No. 2 regarding prosecutorial misconduct.

In *Combs v. Coyle*, 205 F. 3d 269 (6th Cir. 2000), the trial court's verdict was reversed and remanded after the sentence was vacated. The reason was that defense counsel, without undertaking a full investigation, presented an expert witness whose testimony contradicted the defense's sole theory, i.e. that the defendant lacked the requisite intent to commit murder. In the instant case, the defense mitigation theory was that Appellant was burdened with a mental disease or defect that involuntarily decreased his ability to refrain from bad acts. Dr. Scott Bresler was qualified as an expert defense witness, and he stated that the Appellant suffered from being a psychopath. The defendant, having given comments to the effect that he was beaten as a child and was sorry to the police and to experts for his crimes, prosecutors asked if Appellant was comfortable with truthfulness. Bresler said that a psychopath was a pathological liar.

In the instant case, the mitigation opening statement defense counsel gave jurors was that Appellant's parents would not be coming to court to beg for his life. Counsel said that an uncle would come instead, to explain their absence, and to say how Appellant was entitled to a sentence other than death. No mitigation witnesses were put forward, other than Bresler, and no explanation to the jury on closing was given as to why the uncle failed to appeal. This is ineffective assistance of counsel under the theory recited in *Frazier v. Hoffman*, 343 F. 3d 780 (6th Cir. 2003). In this case, the matter was reversed and remanded when the petitioner established that his right to effective assistance of counsel was violated in the penalty phase. There was reasonable probability that, but for counsel's failure to offer any mitigating evidence during the penalty phase, the result would have been different. Evidence of petitioner's brain injury would have

constituted mitigating circumstances. This case effectively expands the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984) to include the “gold standard” American Bar Association Guidelines for Effective Assistance of Counsel in Capital Cases. When Bresler testified regarding Kirkland’s propensity for violence, he opened the door to let in cross-examination that Kirkland had served 17 years in prison, a fact not otherwise admissible.

In *Moore v. Mitchell*, Case No. 1:00-cv-23, Report and Recommendations (S.D. Ohio, Feb. 15, 2007), defense counsel failed to adequately prepare a psychiatric expert, and where that expert’s testimony conflicted with defense’s mitigation theory, ineffective assistance was proven.

In *Haliym a/k/a Frazier v. Mitchell*, 492 F. 3d 680 (6th Cir. 2007) (dissent), the defense presentation was categorized as ineffective where counsel failed to explore possible obvious avenues of investigation. These would include, but expressly not be limited to, abusive and violent childhood, suffering of intense grief over loss of family, and mental disease or defect. The court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence might reasonably lead a reasonable attorney to investigate further. In the case at bar, instead of digging deeper, the defense’s own expert contradicted defense case theories, being inconsistent with the fact that Appellant was abused throughout childhood.

As discussed in Proposition of Law No. 5, the defense mitigation expert, Dr. Scott Bresler, testified that a low level of the neurochemical serotonin can exacerbate psychopathy and contribute toward impulsive behavior (T.p. 2087). The problem can become even worse with drug dependency. Dr. Bresler had prepared a report in advance, as is customary, which would have alerted defense counsel to the serotonin issue. Interestingly, lead counsel for Appellant also represented a similar defendant in which the serotonin issue was very critical. In *State v Robinson*, No. C-040161 (First Dist., March 16, 2005), the defendant was convicted of aggravated

murder for the brutal beating death of an elderly man. In the mitigation phase of that capital trial, S. Paul Rossby, Ph. D., a behavioral neurobiologist, testified that he took a serotonin sample from Robinson and, comparing it to samples from a statistically valid control group, determined that Robinson's serotonin level was dangerously low. This made the crack-addicted Robinson even more prone to engage in brutal and impulsive behavior. This Hamilton County jury, considering mostly otherwise standard mitigation, subsequently spared Robinson's life (T.p. of *Robinson* 1004, et. seq.).

With strikingly similar circumstances, we must wonder why Appellant was not tested for possible lack of serotonin. While nothing is certain, defense counsel had glaring notice of an issue that may have made the difference between life and death.

The above failures and deficiencies amount to ineffective assistance of counsel. The errors were not harmless.

Proposition of Law No. 3

Where counsel for the State of Ohio make comments that are inherently prejudicial and which destroy fundamental fairness of the trial, Appellant is denied due process of law and equal protection. Such comments violate Appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the Constitution of the United States, as well as parallel rights conferred under Article One, § 2, 9, and 16 of the Constitution of the State of Ohio.

Where prosecutors "cross the line" and materially prejudice Appellant's right to fundamental fairness in a bifurcated capital proceeding, a contemporaneous objection by the defense is mandatory, coupled with a sidebar argument on the record. However, a curative instruction is inadequate to cure the inherent damage that has been done because "the bell cannot be unring." The trial court is required to sustain such an objection, and grant a new trial. Here, the cases consolidated for trial involved the possibility of the imposition of the ultimate penalty, a consequence rarely overturned by the judge. Jurors must listen to the court's jury instructions as to

what matters regarding proffered and admitted evidence. The American Bar Association's Standards for Effective Assistance of Representation of Counsel in Capital Cases has become the "gold standard" of capital case representation, and those standards substantially exceed in interpretation previous "reads" of *Strickland v. Washington*, 466 U.S. 668 (1984). Either or both prosecutorial misconduct and ineffective assistance of counsel constitute "plain error."

Here, suggestions were made to the jury by prosecutors that jurors were allowed to consider as aggravating factors the nature and circumstances of the four homicides (as well as the inappropriately-admitted Evid. R. 404(B) evidence). "Aggravating factors are statutory, and no other factors may appropriately be considered. *State v. Wogenstahl*, 75 Ohio St. 3d 344, 345, 662 N.E. 2d 311 (1996). This tactic is beyond inflammatory.

Other gratuitous and inappropriate comments were made to the jury by the prosecution during closing argument, which met the definition of inappropriate "vouching." Counsel may not proffer their personal opinions as to what the evidence suggests, especially when this inflammatory tactic is woven together with a *Wogenstahl* violation. Co-counsel for the State of Ohio said that "Even us that really work in this (death penalty cases) all the time rarely find a case this horrible" (T.p. 2151). Then we hear "I can't imagine a case that could be any clearer than this." (T.p. 2154-2155). Later, he puts forward highly inflammatory, speculative, and prejudicial victim impact testimony, saying "She's (Kenney) petrified, she tells him (Kirkland) 'just don't hurt me'" (T.p. 2164). Then, he says "She's not struggling. She just pounds her little hands on the ground and digs into the dirt. At that point, she's no longer begging (Kirkland) to let her live...she's (merely) begging that man to let her die" (T.p. 2166-2167).

It is at this point that the elected prosecutor takes over during the final portion of a bifurcated closing argument. He vouches for his subjective interpretation of what consistently has

been held by federal courts to be inappropriate mitigation. The risk that Kirkland would reoffend in prison was inappropriate, since no 13 year-old females are in a close-security prison housing those without parole sentences (T.p. 2177). Defense counsel are denigrated for proffering an unsworn statement from Kirkland, notwithstanding the fact that using such a statement is expressly granted under Ohio's sentencing scheme (T.p. 2204-2205). Counsel for the defense is condemned; "They're throwing red pepper in your eyes. It doesn't matter how he behaves in prison" (T.p. 2207). Later, the elected prosecutor says "... that has nothing to do with this" (T.p. 2207-2208). It is well settled that a convicted defendant's lack of opportunity to reoffend in prison, or his lack of propensity to kill adult male guards, is acceptable mitigation subject matter. The prosecution deliberately misstated the status of the law, and furthermore has done so in a highly emotional context to an easily-influenced jury. Also, there is a chance that all defendants, like all afflicted with the human condition, flawed children of God, may nevertheless someday become capable of redemption.

Finally, the elected prosecutor, in arguably Hamilton County's highest-profile case in history, gratuitously says "Not one time when the defense attorneys were up here did they say that the aggravating circumstances didn't outweigh the mitigating factors, not one time" (T.p. 2214). This is another *Wogenstahl* violation, and furthermore it misstates the burden of proof, by counsel for the party that is required to overcome that burden by a reasonable doubt. Imputing evil motives to defense counsel for merely doing their jobs under difficult circumstances rises to the level of plain error.

Subsequently, the State's mistakes are compounded by defense counsel, when only a general, one-time-only objection is made, and no sidebar motion for a mistrial is done to complete the obligatory sequence. This is ineffective assistance of counsel, and the other shoe has

dropped. The court is hard-pressed to *sua sponte* grant a mistrial for only a general unrenewed and unspecific objection to the cumulative inflammatory comments.

Prosecutorial misconduct coupled with ineffective assistance of counsel constitute plain error, entitling Appellant to have his convictions overturned, and the case remanded, for a new and fair trial. Furthermore, the trial court, as gatekeeper of the evidence, needs to be constantly vigilant, assuring that verdicts and recommended sentences are only generated from relevant, material, and non-prejudicial evidence and arguments of counsel.

In *State v Fears* (1999), 86 Ohio St. 2d 329, 715 N.E. 2d 136, a First District Court of Appeals case ultimately decided by the Ohio Supreme Court on September 8, 1999, the message that such conduct should and would no longer be tolerated reverberated loudly and clearly, voiced by both the late Chief Justice Moyer and by Associate Justice Pfeifer. In their dissenting opinion, citing *Berger v. United States*, 295 U.S. 78 (1935), Chief Justice Moyer stated that "...the role of the prosecutor is to ensure 'not that he will win the case, but that justice be done.'" Then, citing *State v. Depew* (1988), 38 Ohio St. 3d 275, 288, 528 N.E. 2d 542, 556, Justice Pfeifer joined in, saying "Apparently, our increasing alarm in this regard (discovery of repeated specific incidents of prosecutorial misconduct originating from Hamilton County) has been less than successful. Time and time again, we see counsel misconduct which in many cases would appear to be grounds for reversal and the vacating of sentences." It is respectfully submitted that the Court as currently composed would honor the memory of Chief Justice Moyer by refusing to treat the instant recited misconducts as harmless error. Recited errors herein must be outcome-determinative. Merely scolding the prosecution for serial violations would reward a "slash and burn" strategy of "winning regardless of cost." These should not be consequence-free events.

In mitigation closing, the elected prosecutor tells jurors that they cannot “hold out.” Defense counsel objects (T.p. 2199-2200). This happens again on (T.p. 2214). Although the defense objection is sustained, nevertheless the prosecutor keeps talking (T.p. 2214). The prosecutor attacks defense-oriented jurors, saying that they are no better than the accused if they fail to recommend a verdict other than death (T.p. 2201). No defense objection is forthcoming. Expert defense witness Dr. Scott Bresler is categorized as a “paid mouthpiece,” and no objection is forthcoming (T.p. 2202). Ironically, Bresler is morphed into a genius, when he says Kirkland’s veracity is not to be trusted, since he is a psychopath (T.p. 2203). This conduct is specifically what is prohibited by Justices Moyer and Pfeifer in the *Fears* dissent. See also *State v. Keenan* (1993), 66 Ohio St. 3d 402, 613 N.E. 2d 203.

The prosecution improperly commented on the defendant’s use of the unsworn statement (T.p. 2204-2205). Because the accused pled to cases involving victims Newton and Rolison, somehow the prosecutor rationalized in a comment that defense counsel has somehow made the homicides of victims Crawford and Kenney “freebies,” notwithstanding the fact that the latter cases carry the potential of the death penalty.

If an Ohio attorney’s IOLTA account is even one penny overdrawn, due only to inadvertence, there are negative consequences. If an Ohio attorney fondles a female client who is not his wife or current girlfriend, even in a single moment of weakness, there are negative consequences. But if an Ohio attorney gets carried away putting someone to death, should there not be consequences as well?

Proposition of Law No. 4

An accused in a capital case has the right to specialized, specific, and focused voir dire, given the bifurcated special nature of the proceeding. Where counsel undertakes only standard voir dire, typical of “garden variety” felony jury selection, the accused rights are violated under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the

Constitution of the United States, and under parallel provisions of Article One §§ 2, 5, 9, 10, and 16 of the Constitution of the State of Ohio.

This subject was briefly treated elsewhere under "ineffective assistance of counsel," but it warrants being broken out separately, and fully expanded. Death is different, capital cases are the only cases where the jury has specific input in sentencing. Juries need to know that "recommending" death is tantamount statistically to actually imposing the death sentence, since judges for a variety of reasons rarely fail to honor a jury's death sentence recommendation.

Automatic death penalty jurors in the voir dire panel need to be weeded out. Some will materially misrepresent their feelings on the issue of capital punishment, to secure a place on a capital jury. If only asked "would you consider mitigation testimony before voting for death," jurors may tell themselves, consciously or subconsciously, "I'll consider it, then I'll vote to execute the murderer." Jurors often misunderstand the Ohio legislature's sentencing scheme. Equal attention is paid to four sentencing options, only one of which involves death, where an accused is convicted of capital murder in the merits phase. The prosecution then has the exclusive burden of proving beyond a reasonable doubt that the statutory aggravating factors (and NOT the nature and circumstances of the underlying offense) must outweigh mitigating factors beyond a reasonable doubt. Each juror may individually determine exactly what, if any, weight he or she assigns to any mitigating factor. One empowered juror may block imposition of the death penalty, and suffer no negative consequence. Jurors often do not realize that Ohio now has a life without the possibility of parole sentencing option. Even if the case results in a conviction of capital murder, the law does not express a preference for the death penalty, it is merely one of four options.

Mitigating factors have been held to include but expressly NOT be limited to:

1. Defendant's personality disorder or mental disturbance. *Eddings v. Oklahoma*, 455 U.S. 104;
2. Residual doubt as to whether the accused committed the underlying murder. *Lockhart v. McCree* (1986), 476 U.S. 162; *Penry v. Lynaugh* (1989), 492 U.S. 302;
3. The defendant's potential for rehabilitation. *Skipper v. South Carolina* (1986), 476 U.S. 1, fn 2;
4. The defendant's ability to make a well-behaved and peaceful adjustment and to lead a useful life behind bars if sentenced to life imprisonment. *Skipper v. South Carolina* (1986), 476 U.S. 1;
5. The accused was the victim of childhood abuse, physical and psychological. *Penry v. Lynaugh* (1989), 492 U.S. 302;
6. Any other factors that call for a penalty less than death, or lessen the appropriateness of a sentence of death.

Proposition of Law No. 5

A capital defendant's death sentence is inappropriate where the mitigating circumstances raise reasonable doubt. O.R.C. §§ 2929.03, 2929.04; U.S. Const. amend. VIII and XIV; Ohio Const. art. I, §§ 9, 16.

A number of factors raise reasonable doubt as to the mandate of death for Anthony Kirkland.

Kirkland was abused as a child. His father, George Palmore, was alcohol-dependent and extremely violent toward Kirkland and his mother. Kirkland watched his father beat and rape his mother (T.p. 2090). While all of his siblings were abused, his sisters were not abused as much as Kirkland was (T.p. 2112). This put Kirkland on the road to psychopathy (T.p. 2087, et. seq.)

Kirkland also became chemically dependent as a teen (T.p. 2093). The defense mitigation expert, Dr. Scott Bresler, a psychologist, explained that drug abuse can exacerbate psychopathy (T.p. 2085). Dr. Bresler further related that psychopaths can suffer from organic abnormalities in the brain or "certain genetic vulnerabilities, hard-wired if you will." One of those organic abnormalities is the neurochemical serotonin in the brain. (See Proposition of Law No. 2

for discussion of failure of defense counsel to further pursue the serotonin factor.) These were circumstances far beyond Kirkland's control.

Kirkland demonstrated remorse. Dr. Bresler testified that Kirkland would cry when he talked about Esme Kenney and would say that she should not have died (T.p. 2102). He similarly cried in his admission to police (T.p. 1783).

This admission, part of a several-hour discussion with police, is another factor that should have raised reasonable doubt against execution. See State v Perez, 124 Ohio St. 3d 122, 159, 920 N.E. 2d 104, 141(2009) (stating that a "defendant's confession and cooperation with law enforcement are mitigating factors").

Dr. Bresler's testimony pointed toward life imprisonment as a satisfactory alternative. He noted that death-row inmates can be no more violent than others in the general prison population who commit violent felonies.

Dr. Bresler further testified that prison can keep the rest of us safe from Kirkland and he needs to be locked up for life (T.p. 2104-2105, 2122).

Life imprisonment for Anthony Kirkland works for society.

Proposition of Law No. 6

Ohio's death penalty law is unconstitutional. O.R.C. §§ 2903.01, 2929.02, 2929.021, 2929.02, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Anthony Kirkland. U.S. Const. amends. V, VI, VIII, and XIV; Ohio Const. art. I, §§ 2, 9, 10, and 16. Further, Ohio's death penalty statute violates the United States' obligations under international law.

The Eighth Amendment to the 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, 592 (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, 282 (1972) (Brennan, J., concurring); *Rhodes v. Chapman*, 452 U.S. 337, 361 (1981); *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). The Ohio scheme offends this bedrock principle in the following ways:

1. Arbitrary and Unequal Punishment.

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

Ohio's capital punishment scheme allows imposition of the death penalty in an arbitrary or 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 therefore were removed from judicial review. See *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 12% of Ohio's population in 2008, 98 or 52% of Ohio's death row inmates at that time were African-American. See <http://quickfacts.census.gov/qfd/states/39000.html>, visited April 15, 2008; Ohio Public Defender Commission Statistics, Feb. 8, 2008, available at

http://www.opd.gov/dp/dp_prosta.pdf; See also *The Report of the Ohio Commission on Racial Fairness* (1999); See generally the American Bar Association Report, submitted Sept. 2007, *Evaluating Fairness and Accuracy in State Death Penalty Systems: the Ohio Death Penalty Assessment Report*, pp.351-367. While four Caucasians were sentenced to death for killing African-Americans (or an African-American), 41 African-Americans sit on Ohio's death row for killing a Caucasian. As of 2008, Ohio Public Defender Commission Statistics, Feb. 8, 2008, available at http://www.opd.gov/dp/dp_prosta.pdf. Ohio's statistical disparity is tragically consistent with national findings. The General Accounting Office found the 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 should encourage this Court to adopt a rule requiring tracking of the offender's race. O.R.C. § 2953.21(A)(2), this Court has not adopted a rule. 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.

Furthermore, Ohio's system imposes death in a geographically discriminatory manner. According to a study by the American Bar Association, the chance of getting a death sentence in Hamilton County is 2.7 times higher than in the rest of the state. Further, a convicted killer from the Cincinnati area is 3.7 times more likely to be sentenced to die than a convicted killer from Cleveland and 6.2 times more likely than one from Columbus, the study found. Jon Craig and

Sharon Coolidge, "Suspend Execution, Bar Group Urges Ohio," *Cincinnati Enquirer*, September 25, 2007.

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. *Commonwealth v. O'Neal*, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring); *State 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, 488 (1960). To take a life by mandate, the State must show that it is the "least restrictive means" to a "compelling governmental end." *O'Neal*, 339 N.E.2d at 678.

The death penalty is neither the least restrictive nor an effective deterrent. Less restrictive means can effectively serve both isolation of the offender and retribution. Society's interests do not justify the death penalty.

2. Unreliable Sentencing Procedures.

The Due Process and Equal Protection Clauses prohibit arbitrary and capricious procedures in the State's application of capital punishment. *Gregg v. Georgia*, 428 U.S. 153, 188, 193-195 (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 aggravating 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. *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 are within the individual decision-maker’s discretion. *State v. Fox*, 69 Ohio St. 3d 183, 193, 631 N.E.2d 124, 132 (1994). Giving so much discretion to juries inevitably leads to arbitrary and capricious judgments. The Ohio open discretion scheme further risks that constitutionally relevant mitigating factors that must be considered as mitigating youth or childhood abuse (*Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982)), mental disease or defect (*Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) *rev’d on other grounds*, *Penry v. Johnson*, 532 U.S. 782 (2001)), level of involvement in the crime (*Enmund v. Florida*, 458 U.S. 782, 798 (1982)), or lack of criminal history (*Delo v. Lashley*, 507 U.S. 272, 279 (1993)), will not be factored into the sentencer’s decision. While the federal constitution may allow states to shape consideration of mitigation, See *Johnson v. Texas*, 509 U.S. 350 (1993), Ohio’s capital scheme fails to provide adequate guidelines to sentencers, and fails to assure against arbitrary, capricious, and discriminatory results.

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

federal and state constitutions. Because of these deficiencies, Ohio's statutory scheme does not meet the requirements of *Furman* and its progeny.

3. Defendant's Right to a Jury is Burdened.

A. 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 the 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 and 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 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 elimi-

nate 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. Cronin*, 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 phases jury is also belied by the Attorney General's recent effort 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.

B. 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 de-

termination 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 v. North Carolina*, 428 U.S. 280 at 961 (1976). This is especially prejudicial because this is accomplished without consideration of any mitigating factors.

C. Defendant's right to a jury is burdened versus a plea

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 burdens 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.

D. The definition of mitigating factors in O.R.C. § 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 O.R.C. § 2929.04(B)(7)(emphasis added). The court’s charge and the definition in O.R.C. § 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 O.R.C. § 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 non-statutory aggravator, rather than evidence that weighs against a death sentence. *See Stringer v. Black*, 503 U.S. 222, 231-235 (1992); *Boyd v. California*, 494 U.S. 370, 380-381 (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).

4. O.R.C. § 2929.04(A)(7) is Constitutionally Invalid When Used to Aggravate O.R.C. § 2903.01(B) Aggravated Murder.

“[T]o avoid [the] constitutional flaw of vagueness and over breadth under the Eighth Amendment, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of a defendant as compared to others found guilty of (aggravated) murder.” *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Ohio’s statutory scheme fails to meet this constitutional requirement because O.R.C. § 2929.04(A)(7) fails to genuinely narrow the class of individuals eligible for the death penalty. This precise error occurred in Kirkland’s case; he was convicted of felony murder along with the O.R.C. § 2929.04(A)(7) specification.

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

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

As compared to other aggravated murderers, the felony-murderer is treated more severely. Each O.R.C. § 2929.04(A) circumstance, when used in connection with O.R.C. §

2903.01(A), adds an additional measure of culpability to an offender such that society arguably should be permitted to punish him more severely with death. But the aggravated murder defendant alleged to have killed during the course of a felony is automatically eligible for the death penalty-not a single additional proof of fact is necessary.

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

Felony-murder also fails to reasonably justify the death sentence because this Court has interpreted O.R.C. § 2929.04(A)(7) as not requiring that intent to commit a felony precede the murder. *State v. Williams*, 74 Ohio St. 3d 569, 660 N.E.2d 724, syl. 2 (1996). The asserted state interest in treating felony-murder as deserving of greater punishment is to deter the commission of felonies in which individuals may die. Generally courts have required that the killing result from an act done in furtherance of the felonious purpose. *Id.*, referencing the Model Penal Code. Without such a limitation, no state interest justifies a stiffer punishment. This Court has discarded the only arguable reasonable justification for imposition of the death sentence on such individuals, a position that engenders constitutional violations. *Zant*, 462 U.S. 862. Further, this Court's current position is inconsistent with previous cases, thus creating the likelihood of arbitrary and inconsistent applications of the death penalty. See, e.g., *State v. Rojas*, 64 Ohio St. 3d 131, 139, 592 N.E.2d 1376, 1384 (1992).

Equal protection of the law requires that legislative classifications be supported by, at least, a reasonable relationship to legitimate state interests. *Skinner v. Oklahoma*, 316 U.S.

535 (1942). The state has arbitrarily selected one class of murderers who may be subjected to the death penalty automatically. This statutory scheme is inconsistent with the purported state interests. The most brutal, cold-blooded, and premeditated murderers do not fall within the types of murder that are automatically eligible for the death penalty. There is no rational basis or any state interest for this distinction and its application is arbitrary and capricious.

5. O.R.C. §§ 2929.03(D)(1) and 2929.04 are Unconstitutionally Vague.

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

To avoid arbitrariness in capital sentencing, states must limit and channel the sentencer's discretion with clear and specific guidance. *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). A vague aggravating circumstance fails to give that guidance. *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *vacated on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002); *Godfrey*, 446 U.S. at 428. Moreover, a vague aggravating circumstance is unconstitutional whether it is eligibility or a selection factor. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994). The aggravating circumstances in O.R.C. § 2929.04(A)(1)-(8) are both.

O.R.C. § 2929.04(B) tells the sentencer that the nature and circumstances of the offense are selection factors in mitigation. Moreover, because the nature and circumstances of the offense are listed only in O.R.C. § 2929.04(B), the sentencer must weigh them only as selection

factors in mitigation. See *State v. Wogenstahl*, 75 Ohio St. 3d 344, 356, 662 N.E.2d 311, 321-322 (1996). However, O.R.C. § 2929.03(D)(1) eviscerates the clarity and specificity of O.R.C. § 2929.04(B); selection factors that are strictly mitigating become part and parcel of the aggravating circumstance.

Despite wide latitude, Ohio has carefully circumscribed its selection factors into mutually exclusive categories. See O.R.C. § 2929.04(A) and (B); *Wogenstahl*, 75 Ohio St. 3d at 356, 662 N.E.2d at 321-322. O.R.C. § 2929.03(D)(1) makes O.R.C. § 2929.04(B) vague because it incorporates the nature and circumstances of an offense into the aggravating circumstances. The sentencer cannot reconcile this incorporation. As a result of O.R.C. § 2929.03(D)(1), the “nature and circumstances” of any offense become “too vague” to guide the jury in its weighing or selection process. See *Walton*, 497 U.S. at 654. O.R.C. § 2929.03(D)(1) therefore makes O.R.C. § 2929.04(B) unconstitutionally arbitrary.

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

6. Proportionality and Appropriateness Review.

Ohio Revised Code §§ 2929.021 and 2929.03 require trial courts to report data to the courts of appeals and to the Ohio Supreme Court. There are substantial doubts as to the adequacy of the information received after guilty pleas to lesser offenses or after charge reductions at trial. O.R.C. § 2929.021 requires only minimal information on these cases. Additional data is necessary to make an adequate comparison in these cases. This prevents adequate appellate review.

Adequate appellate review is a precondition to the constitutionality of a state death penalty system. *Zant*, 462 U.S. at 879; *Pulley v. Harris*, 465 U.S. 37, 50 (1984). The standard for review is one of careful scrutiny. *Zant*, 462 U.S. at 884-885. Review must be based on a comparison of similar cases and ultimately must focus on the character of the individual and the circumstances of the crime. *Id.*

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

The comparison method is also constitutionally flawed. Review of cases where the death penalty was imposed satisfies the proportionality review required by O.R.C. § 2929.05(A). *State v. Steffen*, 31 Ohio St. 3d 111, 509 N.E.2d 383, syl. Para. 1 (1987). However, this pre-

vents a fair proportionality review. There is no meaningful manner to distinguish capital defendants who deserve the death penalty from those who do not.

This Court's appropriateness analysis is also constitutionally infirm. O.R.C. § 2929.05(A) requires appellate courts to determine the appropriateness of the death penalty in each case. The statute directs affirmance only where the court is persuaded that the aggravating circumstances outweigh the mitigating factors and that death is the appropriate sentence. *Id.* This Court has not followed these dictates. The appropriateness review conducted is very cursory. It does not "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460 (1984).

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

7. Lethal injection is cruel and unusual punishment.

O.R.C. § 2949.22 (A) provides that death by lethal injection "shall be executed by causing the application to the person of a lethal injection drug or combination of drugs of sufficient dosage to quickly and painlessly cause death[.]" This mode of punishment offends not only contemporary standards of decency *Trop* at 101, but does not necessarily "quickly and painlessly cause death" as the statute mandates.

Lethal injection causes unnecessary pain. See Marian J. Borg and Michael Radelet, "Botched Lethal Injections," 53 *Capital Report*, March/April 1998; Kathy Sawyer, "Protracted Execution In Texas Draws Criticism: Lethal Injection Delayed by Search for Vein," *Washington Post*, March 14, 1985; "Killer Lends a Hand to Find Vein for Execution," *Los Angeles Times*, August 20, 1986; "Killer's Drug Abuse Complicates Execution," *Chicago Tribune*, April 24, 1992; "Murderer Executed After Leaky Lethal Injection," *New York Times*, December 14, 1988; "Rector's Time Came, Painfully Late," *Arkansas Democrat Gazette*, January 26, 1992; "Gacy Lawyers Blast Method: Lethal Injections Under Fire after Equipment Malfunction," *Chicago Sun-Times*, May 11, 1994; Lou Ortiz and Scott Fornek "Witness Describe Killer's 'Macabre' Final Few Moments," *Chicago Sun-Times*, May 11, 1994; Cf. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (Eighth Amendment proscribes "the unnecessary and wanton infliction of pain.")

Prisoners have been stuck repeatedly with a needle for almost an hour in an effort to find a vein suitable for use. Marian J. Borg and Michael Radelet, "Botched Lethal Injections," 53 *Capital Report*, March/April 1998; "Murderer of Three Women is executed in Texas," *New York Times*, March 14, 1985; Kathy Sawyer, "Protracted Execution In Texas Draws Criticism: Lethal Injection Delayed by Search for Vein," *Washington Post*, March 14, 1985; "Killer's Drug Abuse Complicates Execution," *Chicago Tribune*, April 24, 1992; "Rector's Time Came, Painfully Late," *Arkansas Democrat Gazette*, January 26, 1992. Prisoners have actually had to assist technicians in finding vein suitable to use. "Killer Lends a Hand to Find Vein for Execution," *LA Times*, August 20, 1986; "Moans Pierced Silence During Wait," *Arkansas Democrat Gazette*, January 26, 1992; This happened specifically in Ohio in the case of Ronell Broom, Jon Craig and Lisa Preston, "Problems Postpone Execution," *Cincinnati Enquirer*, September 16, 2009. There can be dosage miscalculations or errors. In Missouri, a doctor who was involved in dozens of

executions was quoted recently as saying he was dyslexic and occasionally altered the amounts of anesthetic given. Ron Word (Associated Press), "No Cruel or Unusual Punishments: Can Lethal Injection Ever Meet the Constitutional Standard?," *Cincinnati Enquirer*, October 6, 2007.

Equipment failures are not uncommon. "Murderer Executed After a Leaky Lethal Injection," *New York Times*, December 14, 1988; Marian J. Borg and Michael Radelet, "Botched Lethal Injections," *53 Capital Report*, March/April 1998. Gasping and choking from the prisoner is not uncommon. *Id.* Because the prisoner is restrained and paralyzed there may be no reaction to the pain felt, but death by lethal injection is not painless. Rather, it is cruel and unusual punishment prohibited under the Eighth Amendment to the United States Constitution, the ICCPR, and the CAT. Lethal injection also violates the United States' obligations under the International Convention on Civil and Political Rights (1992) (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (1994) (CAT).

8. Ohio's Statutory Death Penalty Scheme Violates International Law.

International law binds each of the states that comprise the United States. Ohio is bound by international law whether found in treaty or in custom. Because the Ohio death penalty scheme violates international law, Kirkland's capital convictions and sentences cannot stand.¹

A. International Law Binds the State of Ohio.

"International law is a part of our law[.]" *The Paquete Habana*, 175 U.S. 677, 700 (1900). A treaty made by the United States is the supreme law of the land. Article VI, U.S. Const. 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*

¹ *Medellin v. Texas*, 552 U.S. 491, does not address this issue. In *Medellin*, the Supreme Court simply found that the President did not have the authority to order the State of Texas to ignore state procedural bars in order to enforce an international court ruling.

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. Seattle*, 265 U.S. 332, 341 (1924). 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).

B. Ohio's Obligations under International Charters, Treaties, and Conventions.

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

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

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

Section 1. Implementation of Human Rights Obligations.

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

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

C. Ohio's Statutory Scheme Violates the ICCPR's and ICERD's Guarantees of Equal Protection and Due Process.

Both the ICCPR, ratified in 1992, and the ICERD, ratified in 1994, guarantee equal protection of the law. ICCPR Art. 2(1), 3, 14, 26; ICERD Art. 5(a). The ICCPR further guarantees due process via Articles 9 and 14, which includes numerous considerations: a fair hearing (Art. 14(1)), an independent and impartial tribunal (Art. 14(1)), the presumption of innocence (Art. 14(2)), adequate time and facilities for the preparation of a defense (Art. 14(3)(e)), 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 supra). Ohio's sentencing procedures are unreliable. (See discussion supra). Ohio's statutory scheme fails to provide individualized sentencing. (See discussion supra). Ohio's statutory scheme burdens a defendant's right to a jury. (See discussion supra). O.R.C. § 2929.04(B)(7) arbitrarily selects certain defendants who may be automatically eligible for death upon conviction. (See discussion supra). Ohio's proportionality and appropriateness review is wholly inadequate. (See discussion supra). 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 Constitution.

D. 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 supra). Ohio's sentencing procedures are unreliable. (See discussion supra). Ohio's statutory scheme lacks individualized sentencing. (See discussion supra). The (A)(7) aggravator maximizes the risk of arbitrary and capricious action by singling one class of murderers who are eligible automatically for the death penalty. (See discussion supra). The vagueness of O.R.C. §§ 2929.03(D)(1) and 2929.04 similarly render sentencing arbitrary and unreliable. (See discussion supra). Ohio's proportionality and

appropriateness review fails to distinguish those who deserve death from those who do not. (See discussion supra). 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.

E. 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 supra). A scheme that sentences blacks and those who kill white victims more frequently and that disproportionately places African-Americans on death row is in 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.

F. 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 the states take action to prevent torture, which includes any act by which severe mental or physical pain is intentionally inflicted on a person for the purpose of punishing him for an act committed. See Art. 1-2. As administered, Ohio's death penalty inflicts unnecessary pain and suffering, See *Cooley v. Strickland*, Case no. 2:04cv1156 (S.D. Ohio), in violation of both the ICCPR and the CAT. Thus, there is a violation of international law and the Supremacy Clause.

G. Ohio's Obligations Under the ICCPR, the ICERD, and the CAT are not Limited by the Reservations and Conditions Placed on These Conventions by the Senate.

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

Thus, the Senate's inclusion of conditions and reservations in treaties goes beyond that role. The Senate picks and chooses which items of a treaty will bind the United States. 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 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 make, or the reservation is incompatible with the object and purpose of the treaty. Art. 19(a)-(c). The ICCPR specifically precludes derogation of Articles 6-8, 11, 15-16, and 18. Under the Vienna

Convention, the United States' reservations to these articles are invalid under the language of the treaty. See *Id.* Further, the ICCPR's purpose is to protect life and any reservation inconsistent with that purpose violates the Vienna Convention. Thus, the United States' reservations cannot stand under the Vienna Convention as well.

H. Ohio's Obligations Under the ICCPR are not Limited by the Senate's Declaration that it is not Self-Executing.

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

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

I. 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, 160-161 (1820). Regardless of the source "international law is a part of our law[.]" *The Paquete Habana*, 75 U.S. at 700.

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

The DHR guarantees equal protection and due process (Art. 1, 2, 7, 11), recognizes the right to life (Art. 3), prohibits the use of torture or cruel, inhuman, or degrading punishment (Art. 5) and is largely reminiscent of the ICCPR. Each of the guarantees found in the DHR are violated by Ohio’s statutory scheme. (See discussion supra). Thus, Ohio’s statutory scheme violates customary international law as codified in the DHR and cannot stand.

However, the DHR is not alone in its codification of customary international law. *Smith* directs courts to look to “the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law” in ascertaining international law. 18 U.S. (5 Wheat.) at 160-161. Ohio should be cognizant of the fact that its statutory scheme violates numerous declarations and conventions drafted and adopted by the United Nations and the OAS, which may, because of the sheer number of countries that subscribe to them, codify customary international law. See Id. Included among these are:

1. The American Convention on Human Rights drafted by the OAS and entered into force in 1978. It provides numerous human rights guarantees, including: equal protection (Art. 1, 24), the right to life, (Art. 4(1)), prohibition against arbitrary deprivation of life (Art. 4(1)), imposition of the death penalty only for the most serious crimes (Art. 4(2)), no re-establishment of death penalty once abolished (Art. 4(3)),

prohibits torture, cruel, inhuman, or degrading punishment (Art. 5(2)), and guarantees the right to a fair trial (Art. 8).

2. The United Nations Declaration on the Elimination of All Forms of Racial Discrimination proclaimed by U.N. General Assembly Resolution 1904 (XVIII) in 1963. It prohibits racial discrimination and requires that states take affirmative action in ending racial discrimination.
3. The American Declaration of the Rights and Duties of Man adopted by the Ninth International Conference of American States in 1948. It includes numerous human rights guarantees: the right to life (Art. 1), equality before the law (Art. 2), the right to a fair trial (Art. 16), and due process (Art. 26).
4. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment adopted by the U.N. General Assembly in Resolution 3452 (XXX) in 1975. It prohibits torture, defined to include severe mental or physical pain intentionally inflicted by or at the instigation of a public official for a purpose including punishing him for an act he has committed, and requires that the states take action to prevent such actions. Art. 1, 4.
5. Safeguards Guaranteeing Protection for 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 explana-

tion of the facts (4), due process, and the carrying out of the death penalty so as to inflict the minimum possible suffering (9).

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

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

9. 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. O.R.C. §§ 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 Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution, and international law.

Having seen so many death penalty cases-and the killers' callous disregard for human life-I have come to believe that no civilized level of punishment is a deterrent. If deterrence doesn't work, that leaves us only with the retribution; it's human nature to want to even the score, so why not put killers to death?

After all, do murderers show mercy to their victims? No. So then do they deserve mercy from us? Probably not. Our quest is for justice. But mercy rendered in the name of justice has a power to redeem greater than retribution has a power to cure.

Pfeifer, Justice Paul, "Death Penalty Not the Answer," *Brown County News Democrat*, February 11, 1999.

Kirkland's death sentences must be vacated.²

Proposition of Law No. 7

The accused's right to due process under the Fourteenth Amendment to the United States Constitution and Article I, § 16 of the Ohio Constitution is violated when the State's burden of persuasion is less than proof beyond a reasonable doubt.

During the trial phase, Anthony Kirkland's jury was instructed on the statutory definition of reasonable doubt under O.R.C. § 2901.05 (T.p. 1919).³ This charge, taken as a whole, did not adequately convey to jurors the stringent "beyond a reasonable doubt" standard. Because it is too lenient, the "willing to act" language of O.R.C. § 2901.05 did not guide the jury. The statutory definition of reasonable doubt is flawed because the "firmly convinced" language represents only a clear and convincing standard. Additionally, the trial court's use of the phrase "moral evidence" was improper. The jury convicted Anthony Kirkland on a standard below that required by the Due Process Clause of the Fourteenth Amendment. This is a fundamental, structural error that requires reversal of Kirkland's convictions. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993).

In *In re Winship*, 397 U.S. 358 (1970), the Supreme Court addressed the fundamental nature of the reasonable doubt concept. The court noted that "[t]here is always in litigation a margin of error" and stressed that "[i]t is critical that the moral force of the criminal law not be di-

² Similar claims have been denied on the merits by this Court, e.g. *State v. Stojetz*, 84 Ohio St. 3d 452, 705 N.E.2d 329 (1999), and this Court may summarily reject this claim on the merits if it disagrees with Kirkland's arguments on federal law. *State v. Poindexter*, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988). However, Kirkland does not concede that his claim is meritless under federal law.

³ The trial court gave a substantially similar instruction on reasonable doubt at the penalty phase. (T.p. 2220-2221). The trial court correctly omitted the "truth of the charge" phrase from its penalty phase definition of reasonable doubt.

luted by a standard of proof that leaves people in doubt whether innocent men are being condemned.” *Id.* at 364. To maintain confidence in our system of laws, the court continued, proof beyond a reasonable doubt must be held to be proof of guilt “with utmost certainty.” *Id.* Following *Winship*, the Supreme Court reversed a Louisiana defendant’s capital conviction and death sentence because the instruction on reasonable doubt could have led jurors to find guilt “based on a degree of proof below that required by the Due Process Clause.” *Cage v. Louisiana*, 498 U.S. 39, 41 (1990).

Likewise, the trial court’s definition of reasonable doubt allowed the jurors to find guilt on proof below that required the Due Process Clause. Although this Court has held that the statutory reasonable doubt definition is not an unconstitutional dilution of the State’s burden of proof. *State v. Nabozny*, 54 Ohio St. 2d 195, 202-203, 375 N.E.2d 784, 791 (1978), the Supreme Court, federal circuit courts, and lower Ohio courts have condemned the language in the statute that defines reasonable doubt as “proof of such character that an ordinary person would be willing to rely and act upon in the most important of his own affairs.”

1. Willing-to-act defect

In *Holland v. United States*, 348 U.S. 121, 140 (1954), the court indicated strong disapproval of the “willing to act” language when defining proof beyond a reasonable doubt. The United States Court of Appeals has also noted that “there is a substantial difference between a juror’s verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him.” *Scurry v. United States*, 347 F.2d 468, 470 (D.C. Cir. 1965). The *Scurry* court stated that human experience shows that a prudent person, called upon to act in his more important business or family affairs, would gravely weigh the risks and considerations tending in both directions. After weighing these considerations, however,

a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. *Id.* Indeed, several federal circuit courts have disapproved of the “willing to act” phrase and adopted a preference for defining proof beyond a reasonable doubt in terms of a prudent person who would hesitate to act when confronted with such evidence. See, e.g., *Monk v. Zelez*, 901 F.2d 885 (10th Cir. 1990); *United States v. Colon*, 835 F.2d 27 (2nd Cir. 1987); *United States v. Pinkney*, 551 F.2d 1241 (D.C. Cir. 1976); *United States v. Conley*, 523 F.2d 650 (8th Cir. 1975).

Ohio courts have also criticized the “willing to act” language of O.R.C. § 2901.05(D). In *State v. Frost*, No. 77AP-728, 1978 Ohio App. LEXIS 10525, slip op. at 8 (Franklin Ct. App. May 2, 1978), the court concluded that the final sentence of O.R.C. § 2901.05(D) should be eliminated or modified by adding the word “unhesitating” to the last sentence before the phrase “in the most important of his own affairs.” Ordinary people who serve as jurors are frequently required to make important decisions based upon proof of a lesser nature by choosing the most preferable action. This was recognized in *State v. Crenshaw*, 51 Ohio App. 2d 63, 65, 366 N.E.2d 84, 85 (1977), where the court stated that the “willing to act” language was the traditional test for the clear and convincing evidence standard of proof: “A standard based upon the most important affairs of the average juror...reflects adversely upon the accused.” Federal courts and several Ohio courts have recognized, the “willing to act” language in O.R.C. § 2901.05(D) does not meet the standard of proof beyond a reasonable doubt standard. This is because most people do not make important decisions based upon a reasonable doubt standard but rather are “willing to act” upon a lesser standard.

2. Firmly-convinced defect

The “firmly convinced” language in the first sentence of the Court’s instruction did not define the reasonable doubt standard. Rather, it defined the clear and convincing standard. In *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), this Court defined clear and convincing evidence as that “which will provide in the mind of the trier of facts a firm belief or conviction to the facts sought to be established.” That definition is similar to O.R.C. § 2901.05(D), where reasonable doubt is present only if jurors “cannot say they are firmly convinced of the truth of the charge.” The jurors were given a definition of reasonable doubt in this instruction that failed to satisfy the requirements of the Due Process Clause.

3. Moral-evidence defect

The trial court’s definition of reasonable doubt was flawed because it informed the jury that “[r]easonable doubt is not mere possible doubt because everything relate[d] to human affairs [or] moral evidence is open to some possible or imaginary doubt.” (T.p. 1919). The phrase “moral evidence” improperly shifted the focus of this jury to the subjective morality of Kirkland rather than the required legal quantum of proof.

In *Victor v. Nebraska*, 511 U.S. 1, 13 (1994), the court rejected a due process challenge to jury instruction that included the phrase “moral evidence.” But see *Id.* at 21 (Kennedy, J., concurring). The court found no error because the phrase “moral evidence” was proper when placed in the context of the jury instruction on reasonable doubt that was given:

[T]he instruction itself gives a definition of the phrase. The jury was told that “*everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt*” – in other words, that absolute Certainty is unattainable in matters relating to human affairs. *Moral evidence, in this sentence, can only mean empirical evidence offered to prove such matters* – the proof introduced at trial.

Id. at 13 (emphasis added).

Unlike *Victor*, the instruction in this case did not guide the jury by placing the phrase “moral evidence” within any proper context. In *Victor*, the jury was properly guided on the phrase “moral evidence” because it was conjunctively paired with the phrase “matters relating to human affairs.” *Id.* Here, “moral evidence” was disjunctively stated as an alternative to the phrase “relating to human affairs.” (T.p. 1919) Kirkland’s jury was not directed to consider “moral evidence” as evidence that is “related to human affairs.” Instead, his jury was instructed to consider both evidence related to human affairs “or moral evidence.” Compare T.p. 1919, 1306 with *Victor*, 511 U.S. at 13. Accordingly, the jury was allowed to convict Kirkland based on considerations of subjective morality rather than the quantum of evidentiary proof required by Due Process Clause. *Victor*, 511 U.S. at 21 (Kennedy J., concurring) (“[the] use of ‘moral evidence’ ...seems quite indefensible ... the words will do nothing but baffle”).

4. Conclusion

Juries in Ohio are convicting criminal defendants on a clear and convincing evidence standard. A majority of the federal courts agree that the “willing to act” language found in O.R.C. § 2901.05(D) represents the standard of proof below that required by the Due Process Clause. Furthermore, the “firmly convinced” language in the first sentence of O.R.C. § 2901.05(D) defines the presence of reasonable doubt in terms nearly identical to the accepted definition of clear and convincing evidence. Courts that have disapproved of the “willing to act” language have generally allowed it to be used only when the instruction, taken in its entirety, conveyed the true meaning of “reasonable doubt” as required by the Due Process Clause. See *Holland*, 384 U.S. at 140.

This is not, however, the case in Ohio. O.R.C. § 2901.05(D) defines reasonable doubt in terms far too similar to the definition of “clear and convincing” evidence. The “willing to act”

language in the last sentence of O.R.C. § 2901.05(D) is defective because reasonable doubt is also defined in a clear and convincing standard from the outset in the phrase “firmly convinced.” Moreover, the reference to “moral evidence” obfuscates each juror’s duty to focus upon the evidence at trial rather than on subjective considerations of morality. O.R.C. § 2901.05(D), as applied to this case, defines reasonable doubt by an insufficient standard. Accordingly, the instructions in Anthony Kirkland’s trial allowed his jury to find him guilty “based on a degree of proof below that required by the Due Process Clause.” *Cage*, 498 U.S. at 41.

Anthony Kirkland’s convictions must be reversed.⁴

Proposition of Law No. 8

Imposition of costs on an indigent defendant violates the spirit of the Eighth Amendment. U.S. Const. amends. VIII and XIV; Ohio Const. art. I, §§ 10, 16.

1. Kirkland Is Indigent-He Cannot Afford To Pay Court Costs.

The trial court determined Kirkland was indigent. This is demonstrated by the trial court’s appointment of both trial counsel and appellate counsel. Despite the trial court’s recognition of Kirkland’s impoverished status, costs of this litigation were imposed on him. (T.d. of B-0901629, 397; T.d. of B-0904028, 35). Counsel did not object to the imposition of costs, an issue raised separately as ineffective assistance of counsel in Proposition of Law No. 2.

⁴ Similar claims have been denied on the merits by this Court. *E.g.*, *State v. Van Gundy*, 64 Ohio St. 3d 230, 594 N.E.2d 604 (1992). However, under *State v. Poindexter*, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988), this Court has recognized the propriety of raising “settled” claims in death penalty appeals.

2. Ohio Law Permits Imposition And Collection Of Costs From An Indigent Defendant.

In *State v. White*, 103 Ohio St. 3d 580, 817 N.E.2d 393 (2004), this Court held that O.R.C. § 2947.23 requires assessment of costs against convicted defendants. However, this Court noted that payment could be waived for indigent defendants. *State v. Threatt*, 108 Ohio St. 3d 277, 278, 843 N.E.2d 164, 165 (2006) (internal citation omitted). But, a clerk of courts may “attempt to collect costs from indigent defendants.” *Id.* To summarize, this Court held in *White* that “costs must be assessed against and may be collected from indigent defendants.” *Id.* at 279, 843 N.E.2d at 166.

Kirkland respectfully requests that this Court reconsider its rulings in *White* and *Threatt*. Collection of costs from an incarcerated and indigent defendant violates the spirit of access to the courts. At the federal level, the *in forma pauperis* statute was “intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States, solely because...poverty makes it impossible...to pay or secure the costs of litigation.” *Denton v. Hernandez*, 504 U.S. 25, 31 (1992) (citing *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 342 (1948)) (internal quotation marks omitted). By analogy, the collection of costs against an indigent imposes a cost to defend against an action brought by the State; a fact that may dissuade defendants from requesting aid or even proceeding to trial. The result--a chilling effect on the defendant’s right to trial by jury.

Additionally, the Eighth Amendment is aimed at limiting the State’s power to punish. See *Austin v. United States*, 509 U.S. 602, 610 (1993). The Eighth Amendment precludes excessive bail and fines. See *Id.* It also precludes cruel and unusual punishments. The purpose of

the Eighth Amendment, putting the Bail Clause to one side, was to limit the government's power to punish. See Id.

Collection of costs from an indigent defendant is an additional punishment, one that is particularly cruel to those who are incarcerated and who have no hope of meeting the obligation. Inmates have no source of income, save low paying institutional jobs. Some receive support from outside the institution, but not all. This would be especially true of Anthony Kirkland, who, as his trial demonstrated, has virtually no support from family or friends. Moreover, inmates use their inmate accounts to obtain items many would deem to be necessities, including food and toiletries. While it may be proper to impose costs on an indigent criminal defendant, it imposes an unnecessarily high cost to collect those fees while an indigent defendant; it imposes an unnecessarily high cost to collect those fees while an indigent defendant is incarcerated. The better practice would be imposing costs, yet stay collection until the inmate is released from prison.

3. Conclusion.

The spirit of the Eighth Amendment is violated when costs are collected from an indigent, incarcerated defendant. This Court should reconsider its holdings in *White* and *Threatt*. This Court should modify those rulings to ensure collection is not attempted upon indigent, incarcerated inmates. So doing, this Court should stay the collection of costs against Kirkland.

Proposition of Law No. 9

A conviction based upon insufficient evidence is a deprivation of due process. U.S. Const. Amend. V & XIV; Ohio Const. Art. I, § 10.

Due process requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof." *Jackson v. Virginia* (1979), 443 U.S. 307, 316, 99 S. Ct.

2781, 2787. "The test for sufficiency of evidence is whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found the elements of the crime beyond a reasonable doubt." *State v. Allen* (1995), 73 Ohio St. 3d 626, 630, 653 N.E.2d 675, 682.

Anthony Kirkland was charged with both the attempted rape and aggravated robbery of Casonya Crawford. However, the State adduced insufficient evidence that Kirkland committed either crime.

As authorized in the Statement of Facts, supra, and in Proposition of Law No. 1, the sexually-related encounter with Kirkland and Crawford involved Kirkland soliciting Crawford to have sex for hire. Nothing in the record indicates that Kirkland attempted to force Crawford to have sex with him. He also denied raping her (T.p. 1782). As for the aggravated robbery, nothing demonstrates that Kirkland robbed Crawford of the personal items with which she was last seen alive. It is unknown what happened to those items after Crawford died. The cell phone was still in operation, but nothing linked it to Kirkland. The last thing known about the phone was that Crawford hung up on a call while she was interacting with Kirkland. Also, the removal of Crawford's shoes, if considered aggravated robbery at all, is not necessarily attributable to Kirkland.

Viewing the evidence in the light most favorable to the prosecution, there is insufficient evidence of the attempted rape and aggravated robbery of Casonya Crawford.

Kirkland's convictions for those noncapital offenses cannot stand.

Proposition of Law No. 10

Considered together, the cumulative errors set forth in Appellant's brief merit reversal.

If this Court determines that there were instances of error in this case, then it must determine the cumulative effect of these errors. *State v. Garner*, 74 Ohio St. 3d 49, 656 N.E. 2d 623 (1995). See also *State v. Williams*, 99 Ohio St. 3d 493, 794 N.E. 2d 27 (2003), and *State v. Brown*, 115 Ohio St. 3d 55, 69-70, 873 N.E. 2d 858 (2007). Should this Court determine that there is more than one instance of error that does not merit reversal, this Court must then analyze the cumulative effect of the errors to determine whether Kirkland's convictions and sentence should be reversed. Cumulative error committed during the trial court proceedings violated Kirkland's rights under the United States Constitution's Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as applicable provisions in the Ohio Constitution.

Conclusion

For each of the foregoing reasons, Anthony Kirkland's convictions and sentences must be reversed, and remanded, for additional relief consistent with the court's written opinion.

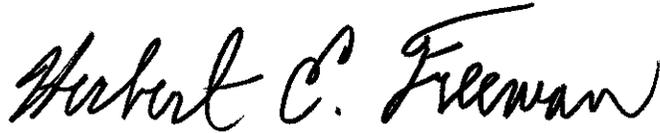
Respectfully submitted,

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Certificate of Service

I hereby certify that a true copy of this Merit Brief of Appellant Anthony Kirkland was forwarded by personal hand delivery to Joseph T. Deters and William E. Breyer, counsel for appellee, at their usual place of business on the filing date time stamped hereon.

A handwritten signature in cursive script that reads "Herbert E. Freeman". The signature is written in black ink and is positioned above a horizontal line.

Herbert E. Freeman (0005364)

Attorney for Appellant

IN THE SUPREME COURT OF OHIO

STATE OF OHIO
plaintiff - appellee

10-0854

CASE NO. _____

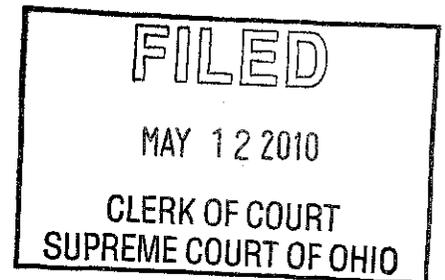
-vs-

Court of Common Pleas
Case No. B-0901629
Appeal from Hamilton County
Judge Charles Kubicki, Jr.

ANTHONY KIRKLAND
defendant - appellant

THIS IS A CAPITAL CASE

Notice of Appeal of Anthony Kirkland



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO
plaintiff - appellee

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-vs-

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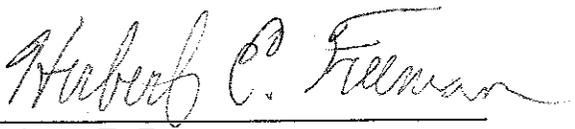
ANTHONY KIRKLAND
defendant - appellant

THIS IS A CAPITAL CASE

Notice of Appeal

Appellant Anthony Kirkland hereby gives notice of appeal to the Supreme Court of Ohio from the decision and judgment entry of the Hamilton County Court of Common Pleas, entered on 31 March 2010. See Exhibit A. This is a capital case, and the date of the offenses are 04 May 2006 and 07 March 2007. See Supreme Court Rule of Practice XIX, Section 1(A).

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Bruce K. Hust *per telephone authorization*

CERTIFICATE OF SERVICE

I certify that a duplicate original of this pleading was personally hand-delivered

to the usual place of business of the Hamilton County Prosecutor's Office on

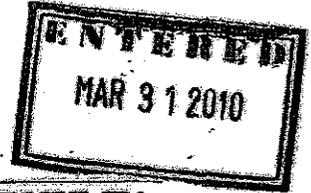
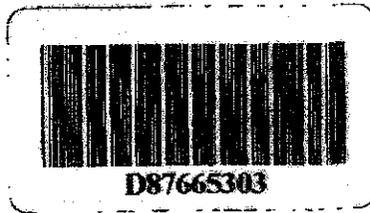
the filing date time-stamped hereon.



Herbert E. Freeman

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 03/31/2010
code: GJEI
judge: 232



Judge: CHARLES J KUBICKI JR

NO: B0901629

STATE OF OHIO
VS.
ANTHONY KIRKLAND

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

Defendant was present in open Court with Counsel A NORMAN AUBIN and WILLIAM WELSH on the 31st day of March 2010 for sentence.

The court informed the defendant that, as the defendant well knew, after defendant entering a plea of not guilty and after trial by jury as to counts #1, #2, #3, #4, #5, #8, #9, #10, #11, and #12 and entering a plea of guilty as to counts #6 and #7, the defendant has been found guilty of the offense(s) of:

- count 1: ATTEMPT (RAPE) (DISMISS SPECS #1, #2, #3), 2923-02A/ORCN,F2
- count 2: AGGRAVATED MURDER WITH SPECS #1 & #2 (DISMISS SPECS #3, #4, #5), 2903-01B/ORCN,CD, MERGED WITH COUNT #4
- count 3: AGGRAVATED ROBBERY (DISMISS SPEC #1), 2911-01A3/ORCN,F1
- count 4: AGGRAVATED MURDER WITH SPECS #1 & #2 (DISMISS SPECS #3, #4, #5), 2903-01B/ORCN,CD
- count 5: GROSS ABUSE OF A CORPSE, 2927-01B/ORCN,F5
- count 6: MURDER, 2903-02A/ORCN,SF
- count 7: GROSS ABUSE OF A CORPSE, 2927-01B/ORCN,F5
- count 8: ATTEMPT (RAPE) (DISMISS SPECS #1, #2, #3), 2923-02A/ORCN,F2
- count 9: AGGRAVATED MURDER WITH SPECS #1, #2, #3 (DISMISS SPECS #4, #5, #6), 2903-01B/ORCN,CD
- count 10: AGGRAVATED ROBBERY, 2911-01A3/ORCN,F1 AGGRAVATED MURDER WITH SPECS #1, #2, #3 (DISMISS SPECS #4, #5, #6), 2903-01B/ORCN,CD, MERGED WITH COUNT #9 GROSS ABUSE OF A CORPSE, 2927-01B/ORCN,F5

Defendant's counsel an opportunity to speak on behalf of the defendant and personally addressed the defendant and asked if the defendant wished to speak in the defendant's behalf, or present any information in

reasoned as follows:

DEPARTMENT OF CORRECTIONS

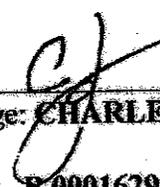
DEPARTMENT OF CORRECTIONS

as required by Crim. R 32(A)(2)

A-5

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 03/31/2010
code: GJEI
judge: 232


Judge: CHARLES J KUBICKI JR

NO: B 0901629

STATE OF OHIO
VS.
ANTHONY KIRKLAND

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

count 4: CONFINEMENT: DEPARTMENT OF CORRECTIONS
DEATH BY LETHAL INJECTION

count 5: CONFINEMENT: 12 Mos DEPARTMENT OF CORRECTIONS

count 6: CONFINEMENT: INDEFINITE TERM OF 15 Yrs - LIFE
DEPARTMENT OF CORRECTIONS

count 7: CONFINEMENT: 12 Mos DEPARTMENT OF CORRECTIONS

count 8: CONFINEMENT: 8 Yrs DEPARTMENT OF CORRECTIONS

count 9: CONFINEMENT: DEPARTMENT OF CORRECTIONS
DEATH BY LETHAL INJECTION

count 10: CONFINEMENT: 10 Yrs DEPARTMENT OF CORRECTIONS

count 12: CONFINEMENT: 12 Mos DEPARTMENT OF CORRECTIONS

COUNT #2 IS MERGED WITH COUNT #4 FOR THE PURPOSE OF
SENTENCING.

COUNT #11 IS MERGED WITH COUNT #9 FOR THE PURPOSE OF
SENTENCING.

SPECIFICATION #1 TO COUNT #9 IS MERGED WITH SPECIFICATION #3
TO COUNT #9 AT SENTENCING PHASE.

THE SENTENCES IN COUNTS #1, #3, #4, #5, #6, #7, #8, #9, #10, AND #12 ARE
TO BE SERVED CONSECUTIVELY TO EACH OTHER.

Defendant was notified of the right to appeal as required by Crim. R 32(A)(2)

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 03/31/2010
code: GJEI
judge: 232

Judge:  CHARLES J KUBICKI JR

NO: B0901629

STATE OF OHIO
VS.
ANTHONY KIRKLAND

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

THE TOTAL AGGREGATE SENTENCE IS TWO (2) DEATH SENTENCES AND TWO (2) INDEFINITE TERMS OF SEVENTY (70) YEARS TO LIFE IN THE DEPARTMENT OF CORRECTIONS.

THE DEFENDANT IS TO RECEIVE CREDIT FOR THREE HUNDRED EIGHTY NINE (389) DAYS TIME SERVED.

THIS SENTENCE IS TO BE SERVED CONSECUTIVELY TO THE SENTENCE IMPOSED IN CASE B0904028.

THE DEFENDANT IS TO PAY THE COURT COSTS.

PURSUANT TO R.C. 2947.08, THE DATE OF EXECUTION AS TO COUNTS #4 AND #9 SHALL BE THURSDAY, SEPTEMBER, 30, 2010.

PURSUANT TO R.C. 2950.01, THE DEFENDANT IS CLASSIFIED A TIER III SEX OFFENDER OR CHILD-VICTIM OFFENDER.

THE DEFENDANT HEREIN IS NOT ELIGIBLE FOR INTENSIVE PRISON PROGRAM, TRANSITIONAL CONTROL, JUDICIAL RELEASE, OR ANY OTHER EARLY RELEASE PROGRAM AND IS TO SERVE THIS SENTENCE IN ITS ENTIRETY.

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT

Defendant was notified of the right to appeal as required by Crim. R. 32(A)(2)

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 03/31/2010
code: GJEI
judge: 232


Judge: CHARLES J KUBICKI JR

NO: B 0901629

STATE OF OHIO
VS.
ANTHONY KIRKLAND

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

AS PART OF THE SENTENCE AS TO COUNTS #1, #3, #8, AND #10 IN THIS CASE, THE DEFENDANT SHALL BE SUPERVISED BY THE ADULT PAROLE AUTHORITY AFTER DEFENDANT LEAVES PRISON, WHICH IS REFERRED TO AS POST-RELEASE CONTROL, FOR FIVE (5) YEARS.

IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL SUPERVISION OR ANY CONDITION THEREOF, THE ADULT PAROLE AUTHORITY MAY IMPOSE A PRISON TERM, AS PART OF THE SENTENCE, OF UP TO NINE (9) MONTHS FOR EACH VIOLATION, WITH A MAXIMUM FOR REPEATED VIOLATIONS OF FIFTY PERCENT (50%) OF THE STATED PRISON TERM. IF THE DEFENDANT COMMITS A NEW FELONY WHILE SUBJECT TO POST-RELEASE CONTROL, THE DEFENDANT MAY BE SENT TO PRISON FOR THE REMAINING POST-RELEASE CONTROL PERIOD OR TWELVE (12) MONTHS, WHICHEVER IS GREATER. THIS PRISON TERM SHALL BE SERVED CONSECUTIVELY TO ANY PRISON TERM IMPOSED FOR THE NEW FELONY OF WHICH THE DEFENDANT IS CONVICTED.

AS TO COUNT #6, THE DEFENDANT IS NOT SUBJECT TO THE POST RELEASE CONTROL PROVISIONS OF OHIO LAW AS THIS IS A LIFE SENTENCE. PAROLE ELIGIBILITY FOR THIS OFFENDER IS GOVERNED BY OHIO REVISED CODE §2967.13(A)(1) AND THE DEFENDANT IS SO ADVISED.

Defendant was notified of the right to appeal as required by Crim. R 32(A)(2)

"A"

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 03/31/2010
code: GJEI
judge: 232

ENTERED
MAR 31 2010



Judge: *CJ* CHARLES J KUBICKI JR

NO: B 0904028

STATE OF OHIO
VS.
ANTHONY KIRKLAND

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

Defendant was present in open Court with Counsel A NORMAN AUBIN and WILLIAM WELSH on the 31st day of March 2010 for sentence. The court informed the defendant that, as the defendant well knew, the defendant had pleaded guilty, and had been found guilty of the offense(s) of:
count 1: MURDER, 2903-02A/ORCN,SF
count 2: GROSS ABUSE OF A CORPSE, 2927-01B/ORCN,F5

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:
count 1: CONFINEMENT: INDEFINITE TERM OF 15 Yrs - LIFE
DEPARTMENT OF CORRECTIONS

count 2: CONFINEMENT: 12 Mos DEPARTMENT OF CORRECTIONS

THE SENTENCES IN COUNTS #1 AND #2 ARE TO BE SERVED CONSECUTIVELY TO EACH OTHER AND CONSECUTIVELY TO THE SENTENCE IMPOSED IN CASE B0901629.

THE DEFENDANT IS TO RECEIVE CREDIT FOR ZERO (0) DAYS TIME SERVED.

THE DEFENDANT IS TO PAY THE COURT COSTS.

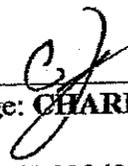
THE DEFENDANT HEREIN IS NOT ELIGIBLE FOR INTENSIVE PRISON PROGRAM, TRANSITIONAL CONTROL, JUDICIAL RELEASE, OR ANY OTHER EARLY RELEASE PROGRAM AND IS TO SERVE THIS SENTENCE IN ITS ENTIRETY.

Defendant was notified of the right to appeal as required by Crim. R 32(A)(2)

A-9

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 03/31/2010
code: GJEI
judge: 232


Judge: CHARLES J KUBICKI JR

NO: B 0904028

STATE OF OHIO
VS.
ANTHONY KIRKLAND

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

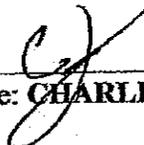
AS PART OF THE SENTENCE AS TO COUNT #2 IN THIS CASE, THE DEFENDANT MAY BE SUPERVISED BY THE ADULT PAROLE AUTHORITY AFTER DEFENDANT LEAVES PRISON, WHICH IS REFERRED TO AS POST-RELEASE CONTROL, FOR UP TO THREE (3) YEARS AS DETERMINED BY THE ADULT PAROLE AUTHORITY.

IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL SUPERVISION OR ANY CONDITION THEREOF, THE ADULT PAROLE AUTHORITY MAY IMPOSE A PRISON TERM, AS PART OF THE SENTENCE, OF UP TO NINE (9) MONTHS FOR EACH VIOLATION, WITH A MAXIMUM FOR REPEATED VIOLATIONS OF FIFTY PERCENT (50%) OF THE STATED PRISON TERM. IF THE DEFENDANT COMMITS A NEW FELONY WHILE SUBJECT TO POST- RELEASE CONTROL, THE DEFENDANT MAY BE SENT TO PRISON FOR THE REMAINING POST-RELEASE CONTROL PERIOD OR TWELVE (12) MONTHS, WHICHEVER IS GREATER. THIS PRISON TERM

Defendant was notified of the right to appeal as required by Crim. R 32(A)(2)

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 03/31/2010
code: GJEI
judge: 232

Judge:  CHARLES J KUBICKI JR

NO: B 0904028

STATE OF OHIO
VS.
ANTHONY KIRKLAND

JUDGMENT ENTRY: SENTENCE:
INCARCERATION

SHALL BE SERVED CONSECUTIVELY TO ANY PRISON TERM IMPOSED
FOR THE NEW FELONY OF WHICH THE DEFENDANT IS CONVICTED.

AS TO COUNT #1, THE DEFENDANT IS NOT SUBJECT TO THE POST
RELEASE CONTROL PROVISIONS OF OHIO LAW AS THIS IS A LIFE
SENTENCE. PAROLE ELIGIBILITY FOR THIS OFFENDER IS GOVERNED
BY OHIO REVISED CODE §2967.13(A)(1) AND THE DEFENDANT IS SO
ADVISED.

Defendant was notified of the right to appeal as required by Crim. R 32(A)(2)

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A-11

**COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

STATE OF OHIO	:	Case No. B 0901629
	:	
Plaintiff,	:	Judge Charles J. Kubicki, Jr.
	:	
vs.	:	
	:	SENTENCING OPINION
	:	R.C. 2929.03(F)
ANTHONY KIRKLAND	:	
	:	
Defendant.	:	

I. BACKGROUND

a. CASONYA CRAWFORD

On May 4, 2006, the defendant attacked, beat, attempted to rape, robbed and strangled to death 14 year old Casonya Crawford. The defendant then burned the body of Ms. Crawford. The body was recovered in a secluded area with no clothing except one sock.

b. ESME KENNEY

On March 7, 2009, the defendant attacked, beat, attempted to rape, robbed and strangled to death 13 year old Esme Kenney. The defendant then partially burned the body of Ms. Kenney. The body was recovered in a secluded area with no clothing except shoes and socks.

c. ADDITIONAL CRIMES

On June 14, 2006, the defendant strangled Mary Jo Newton to death. The defendant then burned the body of Ms. Newton. On December 22, 2006, the defendant stabbed Kimya Rolison in the neck causing her death. The defendant then burned the body of Ms. Rolison.

d. THE EVIDENCE

Shortly after the crimes against Ms. Kenney, the defendant was apprehended by police at the crime scene. The defendant had property belonging to Ms. Kenney. Forensic evidence, including Ms. Kenney's DNA on the defendant, supported the defendant's guilt. Ms. Kenney's body also showed signs of rape.

After several hours of police interviews, the defendant confessed to the crimes involving Ms. Kenney. The defendant also admitted to murdering Casonya Crawford and burning her

body. The defendant denied attempting to rape and robbing Ms. Crawford. The defendant also confessed to killing Ms. Newton and Ms. Rolison and burning their bodies.

2. THE INDICTMENTS

a. B0901629

On March 17, 2009, the defendant was indicted in case B0901629 and charged with the following offenses:

- Count 1: Attempt (Rape) with specifications R.C. 2923.02(A)
- Count 2: Aggravated Murder with specifications (CD) R.C. 2903.01(B)
- Count 3: Aggravated Robbery with specifications R.C. 2911.01(A)(3)
- Count 4: Aggravated Murder with specifications (CD) R.C. 2903.01(B)
- Count 5: Gross Abuse of a Corpse R.C. 2927.01(B)
- Count 6: Murder R.C. 2903.02(A)
- Count 7: Gross Abuse of a Corpse R.C. 2927.01(B)
- Count 8: Attempt (Rape) with specifications R.C. 2923.02(A)
- Count 9: Aggravated Murder with specifications (CD) R.C. 2903.01(B)
- Count 10: Aggravated Robbery with specifications R.C. 2911.01(A)(3)
- Count 11: Aggravated Murder with specifications (CD) R.C. 2903.01(B)
- Count 12: Gross Abuse of a Corpse R.C. 2927.01(B)

Counts 1 through 5 pertain to the victim, Casonya Crawford. Counts 6 and 7 pertain to the victim, Mary Jo Newton. Counts 8 through 12 pertain to the victim, Esme Kenney.

In addition to the death penalty specifications contained in counts 2, 4, 9, and 11, the indictment contained repeat violent offender specifications; sexually violent predator specifications; and sexual motivation specifications. The State of Ohio dismissed all of the non-death penalty specifications before the trial began.

b. B0904028

On June 22, 2009, the defendant was indicted in case B0904028 and charged with the following offenses:

Count 1: Murder R.C. 2903.02(A)

Count 2: Gross Abuse of a Corpse R.C. 2927.01(B)

Counts 1 and 2 apply to the victim, Kimya Rolison.

3. **THE TRIAL PHASE**

The indictments were consolidated for purposes of trial. However, after the jury was impaneled and before opening statements, the defendant pled guilty as charged to the murder and gross abuse of a corpse charges regarding the victim, Kimya Rolison in case B0904028.

At the same time, the defendant pled guilty to count 6, Murder and count 7, Gross Abuse of a Corpse in case B0901629. Both counts relate to the victim, Mary Jo Newton. Sentencing was deferred until after the trial.

Trial proceeded on the remaining counts in case B0901629 involving the two remaining victims, Casonya Crawford (counts 1-5) and Esme Kenney (counts 8-12). On March 12, 2010, the jury found the defendant guilty on all of the remaining counts, including all death penalty specifications.

4. **MERGER OF THE AGGRAVATING CIRCUMSTANCES**

For purposes of the sentencing phase, the Court merged the two "escape detection" specifications¹ with the "felony murders of attempted rape and aggravated robbery" specifications² contained in counts 9 and 11. The remaining specifications of "course of conduct"³ and the "felony murders of attempted rape and aggravated robbery"⁴ did not merge as they were not duplicative.⁵ The jury was instructed to consider each aggravated murder count and accompanying specifications separately.

5. **THE SENTENCING PHASE**

The sentencing phase of the trial began on March 16, 2010.

During the sentencing phase, the defendant presented the expert testimony of Dr. Scott Bresler, psychologist and clinical director of the Division of Forensic Psychiatry at the University of Cincinnati School of Medicine. The defendant also made an unsworn statement.

¹ Specification 1 to Counts 9 and 11; R.C. 2929.04(A)(3).

² Specification 3 to Counts 9 and 11; R.C. 2929.04(A)(7).

³ Specification 1 to Counts 2 and 4; Specification 2 to Counts 9 and 11; R.C. 2929.04(A)(5).

⁴ Specification 2 to Counts 2 and 4; Specification 3 to Counts 9 and 11; R.C. 2929.04(A)(7).

⁵ *State v. Frazier* (1991), 61 Ohio St. 3d 247, 256; *State v. Smith* (1997), 80 Ohio St.3d 89, 116; *State v. Palmer* (1997), 80 Ohio St.3d 543, 573-574; *State v. Robb* (2000), 88 Ohio St.3d 59, 85.

The defendant elected to proceed under R.C. 2929.04(B)(7), any other factors that weigh in favor of a sentence other than death. On March 17, 2010, the jury returned verdicts with death recommendations involving the aggravated murders of Casonya Crawford and Esme Kenney (counts 2, 4, 9 and 11).

6. SENTENCING – COURT PROCEDURES WHEN DEATH RECOMMENDED

The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.⁶ If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to R.C. 2929.03(D)(3).⁷

Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court ..., if, after receiving ... the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, ... that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender.⁸

Absent such a finding by the court ..., the court ... shall impose one of the following sentences on the offender: ..., one of the following:⁹ [I] life imprisonment without parole;¹⁰ ... life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;¹¹ ... life imprisonment with parole eligibility after serving thirty full years of imprisonment.¹²

7. AGGRAVATING CIRCUMSTANCES (AFTER MERGER)

a. COUNT 2 – CASONYA CRAWFORD

The aggravating circumstances applicable to Count 2 are:

- o The offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant.¹³
- o The offense was committed while the defendant was committing, attempting to commit, or fleeing immediately after committing or attempting to commit the offense of the May

⁶ RC § 2929.03 (D)(1)

⁷ RC § 2929.03 (D)(2)(c)

⁸ RC § 2929.03 (D)(3)

⁹ RC § 2929.03 (D)(3)(a)

¹⁰ RC § 2929.03 (D)(3)(a)(i)

¹¹ RC § 2929.03 (D)(3)(a)(ii)

¹² RC § 2929.03 (D)(3)(a)(iii)

¹³ Specification 1 to Count 2; R.C. 2929.04(A)(5).

4, 2006, rape of Casonya Crawford and the defendant was the principal offender in the commission of the aggravated murder.¹⁴

b. COUNT 4 – CASONYA CRAWFORD

The aggravating circumstances applicable to Count 4 are:

- The offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant.¹⁵
- The offense was committed while the defendant was committing, attempting to commit, or fleeing immediately after committing or attempting to commit the offense of the May 4, 2006, aggravated robbery of Casonya Crawford and the defendant was the principal offender in the commission of the aggravated murder.¹⁶

c. COUNT 9 – ESME KENNEY

The aggravating circumstances applicable to Count 9 are:

- The offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant.¹⁷
- The offense was committed while the defendant was committing, attempting to commit, or fleeing immediately after committing or attempting to commit the offense of rape of Esme Kenney and the defendant was the principal offender in the commission of the aggravated murder.¹⁸

d. COUNT 11 – ESME KENNEY

The aggravating circumstances applicable to Count 11 are:

- The offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant.¹⁹
- The offense was committed while the defendant was committing, attempting to commit, or fleeing immediately after committing or attempting to commit the offense of aggravated robbery of Esme Kenney and the defendant was the principal offender in the commission of the aggravated murder.²⁰

¹⁴ Specification 2 to Count 2; R.C. 2929.04(A)(7).

¹⁵ Specification 1 to Count 4; R.C. 2929.04(A)(5).

¹⁶ Specification 2 to Count 4; R.C. 2929.04(A)(7).

¹⁷ Specification 2 to Count 9; R.C. 2929.04(A)(5).

¹⁸ Specification 3 to Count 9; R.C. 2929.04(A)(7).

¹⁹ Specification 2 to Count 11; R.C. 2929.04(A)(5).

²⁰ Specification 3 to Count 11; R.C. 2929.04(A)(7).

8. MITIGATING FACTORS

Mitigating factors are factors about an individual or an offense that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate. Mitigating factors are factors that diminish the appropriateness of a death sentence. All of the mitigating factors presented must be considered. Mitigating factors include, but are not limited to, the nature and circumstances of the offense, the history, character and background of the defendant, and:

a. WHETHER THE VICTIM OF THE OFFENSE INDUCED OR FACILITATED THE OFFENSE - R.C. 2929.04(B)(1)

- The defendant did not request a jury instruction on the R.C. 2929.04(B)(1) mitigating factor or raise the issue in the sentencing phase. But during the trial phase, the defendant's statement to law enforcement was admitted. His statement included claims that Ms. Crawford threw the defendant's money back at him and that she kned him. The defendant also claimed that Ms. Kenney ran into him.

b. ANY OTHER FACTORS THAT WEIGH IN FAVOR OF A SENTENCE OTHER THAN DEATH - R.C. 2929.04(B)(7)

- PERSONALITY DISORDER During the sentencing phase, the defendant presented evidence that he has "an adjustment disorder with mixed emotional issues and conduct," and "he also suffers from ... an antisocial personality disorder." More specifically, the defendant presented evidence that he is a psychopath. Dr. Bresler also testified that the defendant has anger and rage directed at women. Dr. Bresler also talked about "Stockholm Syndrome" where an individual who has been abused by some antisocial individual begins to identify with and almost take on the persona of the life of that individual that perpetrates the abuse on them.
- REMORSE Dr. Bresler testified that "[a]fter the fact, [the defendant] will step back when he becomes a little calmer and try to justify why it is he did what he did. In other words, in his mind why it was okay to do it, so to speak. And he seems to have been able to do that almost with everyone of these people with the exception of one [Esme Kenney]"

Dr. Bresler also testified, "I think he tries to put together in his mind, you know, some kind of rationalization and I don't think it works for him, so oftentimes when he talks about her he'll cry." Later, referring to why the defendant went back and allegedly "talked to the bodies" of Ms. Crawford and Ms. Kenney, Dr. Bresler stated "I mean, he was pretty - I mean, he says he was pretty high. He says - I mean, he's conflicted about what he did, but, again, I don't know why."

- **ASSIST/COOPERATE WITH THE POLICE** The defendant confessed to murdering Ms. Crawford and Ms. Kenney. The defendant also confessed to murdering Ms. Newton and Ms. Rolison.
- **DEFENDANT TOOK RESPONSIBILITY FOR 2 NON-CAPITAL MURDERS** In addition to confessing to the two unsolved murders of Ms. Newton and Ms. Rolison, the defendant pled guilty to both murders.
- **ALCOHOL/DRUG ABUSE** Dr. Bresler indicated that the defendant engaged “in extensive substance abuse beginning in early teenage years.” Dr. Bresler opined that substance abuse complicates any issues the defendant may have. Dr. Bresler further stated that “[i]f there’s anger it could get rid of the road blocks that keep him from acting out on that anger, et cetera et cetera.” The defendant, during his confession, claimed he had consumed alcohol and/or consumed drugs prior to the Crawford and Kenney murders.
- **ABUSIVE CHILDHOOD** The defendant presented evidence, through the testimony of Dr. Bresler, that he had an abusive, violent and sadistic father. The defendant’s biological father, George Palmore, was alcohol dependent and extremely violent toward the defendant and his mother. In addition to physically abusing the defendant, the defendant was forced to watch his father beat and rape the defendant’s mother.
- **PROBABILITY OF NO RELEASE FROM PRISON** The defendant asked the jury to select the “life without parole” recommendation. The defendant also argued the jury should consider that the defendant was not going to be released from prison as a mitigating factor.
- **MERCY** The defendant, during his unsworn statement, took responsibility for his crimes and asked for mercy.
- **THE DEFENDANT WAS PRODUCTIVE WHILE IN PRISON ON ANOTHER MATTER** The defendant obtained a college degree while in prison. However, the State countered that while in prison, the defendant made several threats he would kill other inmates and prison staff. The defendant countered that there were only four reported incidents over approximately 17 years in prison.
- **THE DEFENDANT CANNOT CONTROL HIMSELF AND HIS ANGER** The defendant’s expert testified that the defendant, as a psychopath, “has poor behavioral controls and impulsivity.” Additionally, the defendant “can be extremely aggressive.” The defendant also made statements regarding his anger and rage.
- **THE DEFENDANT COULD BENEFIT SOCIETY** The defendant argued to the jury that he could be a case study for his personality disorders which might benefit society by learning how, in the future, to treat persons with similar disorders.

9. WEIGHING AGGRAVATING CIRCUMSTANCES AND MITIGATING FACTORS

No inference should be drawn from the order in which the mitigating factors and aggravating circumstances are discussed. The Court when weighing the aggravating circumstances against the mitigating factors considered the mitigating factors both individually and collectively against the aggravating circumstances that were proved beyond a reasonable doubt for each count separately against all of the mitigating factors raised by the defendant.

a. NO MITIGATING FACTORS APPEAR IN THE NATURE AND CIRCUMSTANCES OF THE OFFENSES

The nature and circumstances of the offenses are only considered to see if they provided any mitigating factors. Each offense is considered separately to determine whether any mitigating factors exist.

The defendant beat and strangled to death each of his two victims during a separate robbery and attempted rape of each victim. During the defendant's confession, he claimed Ms. Crawford threw his money he offered her back at him and she kneed him. The defendant also claimed Ms. Kenney ran into him.

Even if Ms. Crawford forcibly resisted her encounter with the defendant or Ms. Kenney accidentally ran into the defendant, as the defendant claims, those facts would not be mitigating. Ms. Kenney did not resist. Discounting the defendant's uncorroborated and self-serving claims about the victims' actions, the defendant admitted that Ms. Kenney did not deserve what he did to her.

Ms. Crawford allegedly threw the defendant's money back at him when he gave it to her just to "talk." However, such an insult from a 14 year old child deserves no weight in mitigation.²¹ The defendant also claims she kneed him. Even if true and unprovoked, the facts have very little mitigating value.

Accordingly, the Court finds that no mitigating factors appear in the nature and circumstances of the offenses. The Court also finds that there is no mitigating value with regard to a potential R.C. 2929.04(B)(1) mitigating factor. The Court does not hold the absence of R.C. 2929.04(B)(1) mitigating factor against the defendant. Instead, the Court only considered the possibility of the existence of such a factor for the potential benefit of the defendant since it was discussed by him during the trial phase.²²

²¹ *State v. Sapp* (2004), 105 Ohio St.3d 104

²² Consider *State v. Depew* (1988), 38 Ohio St.3d 275; *State v. Benner* (1988), 40 Ohio St. 3d 301.

b. ABUSIVE CHILDHOOD

The defendant's difficult childhood – an abusive father - is a mitigating factor.²³ However, he lived with his father only until he was 9 or 10.

Additionally, the Ohio Supreme Court has “seldom given decisive weight to” a defendant's unstable or troubled childhood.²⁴ Moreover, the defendant was in his late thirties when he killed Ms. Crawford and 40 years old when he killed Ms. Kenney. “In other words, he had reached ‘an age when * * * maturity could have intervened,’ and the defendant ‘had clearly made life choices as an adult before committing [the] murder[s].’”²⁵

Accordingly, the Court finds some mitigating value to the defendant’s abusive childhood. However, the value is significantly minimized given the defendant’s age when the offenses were committed.

c. ASSIST/COOPERATE WITH THE POLICE

“A defendant's confession and cooperation with law enforcement are mitigating factors.”²⁶ However, little weight in mitigation is assigned to the defendant's confession. The defendant initially lied to police, denying his own guilt and trying to blame someone named “Pedro.”²⁷ He did not confess until one of the investigating officers indicated he was being criminally charged and the defendant knew he was caught at the Kenney crime scene with Ms. Kenney’s property.²⁸ The defendant had previously denied the earlier murders when there was no evidence against the defendant.

The defendant’s confession to the additional murders deserves some mitigating value. But the value is diminished due to the fact that the defendant only confessed after he was caught for the Kenney murder.

²³ *State v. Perez* (2009), 124 Ohio St.3d 122; See, e.g., *State v. White* (1999), 85 Ohio.St.3d 433, 456, 709 N.E.2d 140.

²⁴ *State v. Perez* (2009), 124 Ohio St.3d 122; *State v. Hale*, 119 Ohio.St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 265.

²⁵ *State v. Perez* (2009), 124 Ohio St.3d 122; *State v. Campbell* (2002), 95 Ohio.St.3d 48, 53, 765 N.E.2d 334, quoting *State v. Murphy* (1992), 65 Ohio.St.3d 554, 588, 605 N.E.2d 884 (Moyer, C.J., dissenting).

²⁶ *State v. Perez* (2009), 124 Ohio St.3d 122; *State v. Bethel*, 110 Ohio.St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶ 191.

²⁷ *State v. Perez* (2009), 124 Ohio St.3d 122; Cf *State v. Fox* (1994), 69 Ohio.St.3d 183, 195, 631 N.E.2d 124 (defendant confessed only after initially denying involvement; confession entitled to no weight); *State v. Hoffner*, 102 Ohio.St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 119 (defendant confessed, but had previously misled police as to his involvement).

²⁸ *State v. Perez* (2009), 124 Ohio St.3d 122; Cf *State v. Fox* (1994), 69 Ohio.St.3d 183, 195, 631 N.E.2d 124 (defendant confessed only after initially denying involvement; confession entitled to no weight); *State v. Hoffner*, 102 Ohio.St.3d 358, 2004-Ohio-3430, 811 N.E.2d 48, ¶ 119 (defendant confessed, but had previously misled police as to his involvement).

Accordingly, the Court finds some mitigating value to the defendant's confession. On the other hand, his initial lying diminishes the weight of this factor. On balance, this factor is not impressive.

d. REMORSE

The record contains some evidence of remorse. In his confession, the defendant expressed some regret with regard to the Kenney murder. He said she did not deserve to die like that.

The sincerity and depth of the defendant's remorse is questionable. His tardy, half-hearted, and self-serving expressions of remorse are belied by his callous attitude just after the murder. When asked what he did after the Kenney murder, the defendant went to get some food because he was hungry. Also during his confession, the defendant seemed more concerned about himself. Any expression of remorse is further minimized by Dr. Bresler's testimony that, as a psychopath, the defendant lacks the ability to have remorse and is a pathological liar.

Remorse deserves very slight, if any, weight in this case.²⁹

e. PERSONALITY DISORDERS

The defendant's expert testified that the defendant suffers from personality disorders. However, Dr. Bresler makes clear that any personality disorders that the defendant may have do not justify or excuse the defendant's behavior. Accordingly, the Court finds some mitigating value to the defendant's personality disorders.

f. DEFENDANT TOOK RESPONSIBILITY FOR 2 NON-CAPITAL MURDERS

Similar to the Court's finding regarding the defendant's confession, the Court gives some value for taking responsibility for the murders of Ms. Newton and Ms. Rolison. However, the value is diminished by the defendant's initial denials. The value is further diminished by the fact that his guilty pleas were more due to trial strategy and this was a "mitigation case."

g. ALCOHOL/DRUG ABUSE

Dr. Bresler indicated that the defendant engaged in substance abuse since his teenage years. The defendant claimed he used alcohol and/or drugs prior to the murders. Nevertheless, the Court gives little mitigating value to the defendant's substance abuse.

h. PROBABILITY OF NO RELEASE FROM PRISON

The Court gives very little mitigating value to the fact that the defendant probably won't be released from prison.

²⁹ See *State v. Perez* (2009), 124 Ohio St.3d 122.

i. MERCY

The Court gives some mitigating value to the defendant's request for mercy.

j. THE DEFENDANT WAS PRODUCTIVE WHILE IN PRISON ON ANOTHER MATTER

The Court finds some value that the defendant obtained a college degree while in prison. However, the value is diminished by the fact that while in prison, the defendant made several threats he would kill other inmates and prison staff.

k. THE DEFENDANT CANNOT CONTROL HIMSELF AND HIS ANGER

The Court finds little or no value that the defendant has anger, impulsivity, and control issues. The defendant's expert testified that the defendant behavior issues are not an excuse or justification for the crimes he committed.

l. THE DEFENDANT COULD BENEFIT SOCIETY

The Court finds little, if any, value that the defendant could be a case study for his personality disorders which might benefit society by learning how to treat, in the future, persons with similar disorders.

m. WEIGHING THE AGGRAVATING CIRCUMSTANCES FOR EACH COUNT AGAINST THE MITIGATING FACTORS

Weighing the aggravating circumstances applicable to each count of the aggravated murders separately against these mitigating factors, the Court finds and concludes that the aggravating circumstances as to each count outweighs the mitigating factors by proof beyond a reasonable doubt.

Specifically, the Court finds that each count included a "course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant" specification. The R.C. 2929.04(A) (5) specification constitutes a grave aggravating circumstance that deserves great weight.³⁰

Additionally, each count contains a "felony murder" specification that involves either an attempt to commit rape (counts 2 and 9) or aggravated robbery (counts 4 and 11). Each of the "felony murder" specifications deserves great weight.

As for all four aggravated murder counts, each of the "course of conduct" specifications contained in each count alone is a sufficient aggravating circumstance to outweigh the mitigating factors. The same is true for each of the "felony murder" specifications contained in each count.

³⁰ See *State v. Sapp* (2004), 105 Ohio St.3d 104; *State v. Trimble* (2009), 122 Ohio St.3d 297; *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 80-81; *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶ 162-163; *State v. Clemons*, 82 Ohio St.3d at 456-457, 696 N.E.2d 1009.

When weighing the aggravated circumstances for each count against the mitigating factors, the aggravating circumstances not only outweigh the mitigating factors by proof beyond a reasonable doubt, the mitigating factors pale by comparison.

i. Count 2 – Casonya Crawford

As to Count 2, the two aggravating circumstances attached to Ms. Crawford's murder constitute grave circumstances. The defendant's murder of Ms. Crawford included a course of conduct involving the murder of two or more people. The defendant's murder of Ms. Crawford after attempting to rape her is a particularly egregious circumstance. In contrast, the Court finds that as to each of these aggravating circumstances, the defendant's mitigating evidence has little significance.

The aggravating circumstances applicable to Count 2 outweigh the mitigating factors by proof beyond a reasonable doubt. Therefore, the Court finds, beyond a reasonable doubt, that the death sentence as to count 2 is appropriate.

ii. Count 4 – Casonya Crawford

As to Count 4, the two aggravating circumstances attached to Ms. Crawford's murder constitute grave circumstances. The defendant's murder of Ms. Crawford included a course of conduct involving the murder of two or more people. The defendant's murder of Ms. Crawford after robbing her is an extremely serious circumstance. In contrast, the Court finds that as to each of these aggravating circumstances, the defendant's mitigating evidence has little significance.

The aggravating circumstances applicable to Count 4 outweigh the mitigating factors by proof beyond a reasonable doubt. Therefore, the Court finds, beyond a reasonable doubt, that the death sentence as to count 4 is appropriate.

iii. Count 9 – Esme Kenney

As to Count 9, the two aggravating circumstances attached to Ms. Kenney's murder constitute grave circumstances. The defendant's murder of Ms. Kenney included a course of conduct involving the murder of two or more people. The defendant's murder of Ms. Kenney after attempting to rape her is a particularly egregious circumstance. In contrast, the Court finds that as to each of these aggravating circumstances, the defendant's mitigating evidence has little significance.

The aggravating circumstances applicable to Count 9 outweigh the mitigating factors by proof beyond a reasonable doubt. Therefore, the Court finds, beyond a reasonable doubt, that the death sentence as to count 9 is appropriate.

iv. Count 11 – Esme Kenney

As to Count 11, the two aggravating circumstances attached to Ms. Kenney's murder constitute grave circumstances. The defendant's murder of Ms. Kenney included a course of conduct involving the murder of two or more people. The defendant's murder of Ms. Kenney after robbing her is an extremely serious circumstance. In contrast, the Court finds that as to each of these aggravating circumstances, the defendant's mitigating evidence has little significance.

The aggravating circumstances applicable to Count 11 outweigh the mitigating factors by proof beyond a reasonable doubt. Therefore, the Court finds, beyond a reasonable doubt, that the death sentence as to count 11 is appropriate.

10. CONCLUSION AND SENTENCE

After consideration of all of the relevant evidence, the defendant's statement, arguments of counsel, legal authority and for the reasons and findings set forth in this Sentencing Opinion, the Court finds, by proof beyond a reasonable doubt that the applicable aggravating circumstances the defendant was found guilty of committing outweigh the mitigating factors. Therefore, the Court concurs with the jury's recommendation and orders sentence as follows:

i. Count 2 – Casonya Crawford

As to Count 2, for the offense of Aggravated Murder, a special felony, in violation of R.C. 2903.01(B) with specifications 1 and 2, in violation of R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7), the offense is merged for purposes of sentencing in light of the sentence imposed in Count 4. Otherwise, the Court would impose a sentence of death.

ii. Count 4 – Casonya Crawford

As to Count 4, for the offense of Aggravated Murder, a special felony, in violation of R.C. 2903.01(B) with specifications 1 and 2, in violation of R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7), the Court hereby sentences the defendant, Anthony Kirkland, to death.

iii. Count 9 – Esme Kenney

As to Count 9, for the offense of Aggravated Murder, a special felony, in violation of R.C. 2903.01(B) with specifications 2 and 3, in violation of R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7), the Court hereby sentences the defendant, Anthony Kirkland, to death.

iv. Count 11 – Esme Kenney

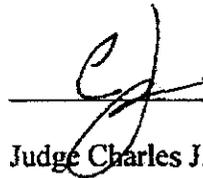
As to Count 11, for the offense of Aggravated Murder, a special felony, in violation of R.C. 2903.01(B) with specifications 2 and 3, in violation of R.C. 2929.04(A)(5) and R.C. 2929.04(A)(7), the offense is merged for purposes of sentencing in light of the sentence imposed in Count 9. Otherwise, the Court would impose a sentence of death.

All counts are to be served consecutively to each other and all other counts contained in this case and B0904028.

i. Sentence Execution Date

Pursuant to R.C. 2947.08, the date of execution as to Counts 4 and 9 shall be Thursday, September 30, 2010.

IT IS SO ORDERED.

 3.31.10

Judge Charles J. Kubicki, Jr.

PREAMBLE

PREAMBLE

We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution.

ARTICLE I: BILL OF RIGHTS

INALIENABLE RIGHTS.

§1 All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

(1851)

RIGHT TO ALTER, REFORM, OR ABOLISH GOVERNMENT, AND REPEAL SPECIAL PRIVILEGES.

§2 All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

(1851)

RIGHT TO ASSEMBLE.

§3 The people have the right to assemble together, in a peaceable manner, to consult for the common good; to instruct their representatives; and to petition the General Assembly for the redress of grievances.

(1851)

BEARING ARMS; STANDING ARMIES; MILITARY POWER.

§4 The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

(1851)

TRIAL BY JURY.

§5 The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the

rendering of a verdict by the concurrence of not less than three-fourths of the jury.

(1851, am. 1912)

SLAVERY AND INVOLUNTARY SERVITUDE.

§6 There shall be no slavery in this state; nor involuntary servitude, unless for the punishment of crime.

(1851)

RIGHTS OF CONSCIENCE; EDUCATION; THE NECESSITY OF RELIGION AND KNOWLEDGE.

§7 All men have a natural and inalienable right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the General Assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

(1851)

WRIT OF HABEAS CORPUS.

§8 The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.

(1851)

BAIL

§9 All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great and except for a person who is charged with a felony where the proof is evident or the presumption great and who where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and

ARTICLE I: BILL OF RIGHTS

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

The General Assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(b) of the Constitution of the State of Ohio.

(1851, am. 1997)

TRIAL FOR CRIMES; WITNESS.

§10 Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

(1851, am. 1912)

RIGHTS OF VICTIMS OF CRIME.

§10a Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process, and, as the General Assembly shall define and provide by law, shall be accorded rights to reasonable and appropriate notice, information, access, and protection and to a meaningful role in the criminal justice process. This section does not confer upon any person a right to appeal or modify any decision in a criminal proceeding, does not abridge any other right guaranteed by the Constitution of the United States or this constitution, and does not create any cause of action for compensation or damages against the state, any officer, employee, or agent of the state or of any political subdivision, or any officer of the court.

(1994)

FREEDOM OF SPEECH; OF THE PRESS; OF LIBELS.

§11 Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

(1851)

TRANSPORTATION, ETC. FOR CRIME.

§12 No person shall be transported out of the state, for any offense committed within the same; and no conviction shall work corruption of blood, or forfeiture of estate.

(1851)

QUARTERING TROOPS.

§13 No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, except in the manner prescribed by law.

(1851)

SEARCH WARRANTS AND GENERAL WARRANTS.

§14 The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describ-

ARTICLE I: BILL OF RIGHTS

ing the place to be searched and the person and things to be seized.

(1851)

NO IMPRISONMENT FOR DEBT.

§15 No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.

(1851)

REDRESS FOR INJURY; DUE PROCESS.

§16 All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

(1851, am. 1912)

NO HEREDITARY PRIVILEGES.

§17 No hereditary emoluments, honors, or privileges, shall ever be granted or conferred by this State.

(1851)

SUSPENSION OF LAWS.

§18 No power of suspending laws shall ever be exercised, except by the General Assembly.

(1851)

EMINENT DOMAIN.

§19 Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

(1851)

DAMAGES FOR WRONGFUL DEATH.

§19a The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law.

(1912)

PROTECT PRIVATE PROPERTY RIGHTS IN GROUND WATER, LAKES AND OTHER WATERCOURSES.

§ 19b. (A) The protection of the rights of Ohio's property owners, the protection of Ohio's natural resources, and the maintenance of the stability of Ohio's economy require the recognition and protection of property interests in ground water, lakes, and watercourses.

(B) The preservation of private property interests recognized under divisions (C) and (D) of this section shall be held inviolate, but subservient to the public welfare as provided in Section 19 of Article I of the Constitution.

(C) A property owner has a property interest in the reasonable use of the ground water underlying the property owner's land.

(D) An owner of riparian land has a property interest in the reasonable use of the water in a lake or watercourse located on or flowing through the owner's riparian land.

(E) Ground water underlying privately owned land and nonnavigable waters located on or flowing through privately owned land shall not be held in trust by any governmental body. The state, and a political subdivision to the extent authorized by state law, may provide for the regulation of such waters. An owner of land voluntarily may convey to a governmental body the owner's property interest held in the ground water underlying the land or nonnavigable waters located on or flowing through the land.

(F) Nothing in this section affects the application of the public trust doctrine as it applies to Lake Erie or the navigable waters of the state.

(G) Nothing in Section 1e of Article II, Section 36 of Article II, Article VIII, Section 1 of Article X, Section 3 of Article XVIII, or Section 7 of Article XVIII of the Constitution shall impair or limit the rights established in this section.

(2008)

POWERS RESERVED TO THE PEOPLE.

§20 This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers, not herein delegated, remain with the people.

(1851)

Amendment 2 - Right to Bear Arms. Ratified 12/15/1791.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment 3 - Quartering of Soldiers. Ratified 12/15/1791.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment 4 - Search and Seizure. Ratified 12/15/1791.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 5 - Trial and Punishment, Compensation for Takings. Ratified 12/15/1791.

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 offense 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.

Amendment 6 - Right to Speedy Trial, Confrontation of Witnesses. Ratified 12/15/1791.

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 7 - Trial by Jury in Civil Cases. Ratified 12/15/1791.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment 8 - Cruel and Unusual Punishment. Ratified 12/15/1791.

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

Amendment 9 - Construction of Constitution. Ratified 12/15/1791.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment 10 - Powers of the States and People. Ratified 12/15/1791.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment 11 - Judicial Limits. Ratified 2/7/1795.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment 12 - Choosing the President, Vice-President. Ratified 6/15/1804.

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.

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.

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.

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.

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

Amendment 15 - Race No Bar to Vote. Ratified 2/3/1870.

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

2. The Congress shall have power to enforce this article by appropriate legislation.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2 - Civilian Power over Military, Cabinet, Pardon Power, Appointments

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3 - State of the Union, Convening Congress

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4 - Disqualification

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

2903.01 Aggravated murder.

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

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

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

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

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

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

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

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

(G) As used in this section:

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

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

Effective Date: 05-15-2002

2929.02 Murder penalties.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Effective Date: 10-19-1981

2929.022 Sentencing hearing - determining existence of aggravating circumstance.

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

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

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

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

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

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

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

(B) At the sentencing hearing, the panel of judges, if the defendant was tried by a panel of three judges, or the trial judge, if the defendant was tried by jury, shall, when required pursuant to division

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

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

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

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

2929.023 Raising the matter of age at trial.

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

Effective Date: 10-19-1981

2929.03 Imposition of sentence for aggravated murder.

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

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

(a) Life imprisonment without parole;

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

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

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

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

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

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

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 of the

Revised Code, the trial court shall impose sentence on the offender as follows:

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

(i) Life imprisonment without parole;

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

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

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

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

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

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

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

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

(iii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or

information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

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

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

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

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

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

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence,

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

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

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

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

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

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

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

(i) Life imprisonment without parole;

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

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

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

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

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

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

(a) Life imprisonment without parole;

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

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

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

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

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

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

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

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

2929.04 Death penalty or imprisonment - aggravating and mitigating factors.

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

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

(2) The offense was committed for hire.

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

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

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

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

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

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

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to

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

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

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

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

- (1) Whether the victim of the offense induced or facilitated it;
- (2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
- (3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;
- (4) The youth of the offender;
- (5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;
- (6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;
- (7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

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

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

three judges against the aggravating circumstances the offender was found guilty of committing.

Effective Date: 05-15-2002

A-47

2929.05 Supreme court review upon appeal of sentence of death.

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

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

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

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

Effective Date: 07-29-1998

2947.23 Costs and jury fees - community service to pay judgment.

(A)(1) In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs. At the time the judge or magistrate imposes sentence, the judge or magistrate shall notify the defendant of both of the following:

(a) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.

(b) If the court orders the defendant to perform the community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.

(2) The following shall apply in all criminal cases:

(a) If a jury has been sworn at the trial of a case, the fees of the jurors shall be included in the costs, which shall be paid to the public treasury from which the jurors were paid.

(b) If a jury has not been sworn at the trial of a case because of a defendant's failure to appear without good cause, the costs incurred in summoning jurors for that particular trial may be included in the costs of prosecution. If the costs incurred in summoning jurors are assessed against the defendant, those costs shall be paid to the public treasury from which the jurors were paid.

(B) If a judge or magistrate has reason to believe that a defendant has failed to pay the judgment described in division (A) of this section or has failed to timely make payments towards that judgment under a payment schedule approved by the judge or magistrate, the judge or magistrate shall hold a hearing to determine whether to order the offender to perform community service for that failure. The judge or magistrate shall notify both the defendant and the prosecuting attorney of the place, time, and date of the hearing and shall give each an opportunity to present evidence. If, after the hearing, the judge or magistrate determines that the defendant has failed to pay the judgment or to timely make payments under the payment schedule and that imposition of community service for the failure is appropriate, the judge or magistrate may order the offender to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the judge or magistrate is satisfied that the offender is in compliance with the approved payment schedule. If the judge or magistrate orders the defendant to perform community service under this division, the defendant shall receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed shall reduce the judgment by that amount. Except for the credit and reduction provided in this division, ordering an offender to perform community service under this division does not lessen the amount of the judgment and does not preclude the state from taking any other action to execute the judgment.

(C) As used in this section, "specified hourly credit rate" means the wage rate that is specified in 26 U.S.C.206(a)(1) under the federal Fair Labor Standards Act of 1938, that then is in effect, and that an employer subject to that provision must pay per hour to each of the employer's employees who is

subject to that provision.

Effective Date: 03-24-2003; 05-18-2005; 2008 HB283 09-12-2008

2949.22 Method of execution of death sentence.

(A) Except as provided in division (C) of this section, a death sentence shall be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death. The application of the drug or combination of drugs shall be continued until the person is dead. The warden of the correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed.

(B) A death sentence shall be executed within the walls of the state correctional institution designated by the director of rehabilitation and correction as the location for executions, within an enclosure to be prepared for that purpose, under the direction of the warden of the institution or, in the warden's absence, a deputy warden, and on the day designated by the judge passing sentence or otherwise designated by a court in the course of any appellate or postconviction proceedings. The enclosure shall exclude public view.

(C) If a person is sentenced to death, and if the execution of a death sentence by lethal injection has been determined to be unconstitutional, the death sentence shall be executed by using any different manner of execution prescribed by law subsequent to the effective date of this amendment instead of by causing the application to the person of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death, provided that the subsequently prescribed different manner of execution has not been determined to be unconstitutional. The use of the subsequently prescribed different manner of execution shall be continued until the person is dead. The warden of the state correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the sentence of death is executed.

(D) No change in the law made by the amendment to this section that took effect on October 1, 1993, or by this amendment constitutes a declaration by or belief of the general assembly that execution of a death sentence by electrocution is a cruel and unusual punishment proscribed by the Ohio Constitution or the United States Constitution.

Effective Date: 11-21-2001

2953.21 Post conviction relief petition.

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

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

(c) As used in divisions (A)(1)(a) and (b) of this section, "former section 2953.82 of the Revised Code" means section 2953.82 of the Revised Code as it existed prior to the effective date of this amendment.

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

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

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

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded

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

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

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

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

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

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

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

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

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

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

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

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

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

Amended by 128th General Assembly File No. 30, SB 77, § 1, eff. 7/6/2010.

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

RULE 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. In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where 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.

(E) Misdemeanor cases involving petty offenses. In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty.

The counsel provisions of Crim.R. 44(B) and (C) apply to division (E) of this rule.

ARTICLE IV. RELEVANCY AND ITS LIMITS

RULE 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[Effective: July 1, 1980.]

RULE 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible.

[Effective: July 1, 1980.]

RULE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay

(A) Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) Exclusion discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

[Effective: July 1, 1980; amended effective July 1, 1996.]

Staff Note (July 1, 1996 Amendment)

Rule 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay

The amendment modifies the title of the rule to reflect its content. As originally adopted, Evid. R. 403 varied from its federal counterpart by excluding "waste of time" as a separate or independent ground for excluding otherwise relevant and admissible evidence. The title of the Ohio rule, however, was not modified to reflect this difference between the Ohio and federal texts. The amendment substitutes "undue delay" in place of the original title's reference to "waste of time" as a ground of exclusion, so that the title will more accurately reflect the content of the Ohio text. The amendment is intended only as a technical correction; no substantive change is intended.

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

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

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

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

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

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

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

