ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	Case No. 2010-1105
-vs-	:	Appeal taken from Butler County Court of Common Pleas
GREGORY OSIE,	:	Case No. CR2009020302
Appellant.	:	**This is a death penalty case**

MERIT BRIEF OF APPELLANT GREGORY OSIE

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STATEMENT OF FACTS

David Williams' murder and Osie's arrest

In the early morning hours of February 14, 2009, David Williams was stabbed to death in his Butler County home. Soon after the discovery of Williams's body, Osie became a suspect in the murder. On February 14th two detectives arrested him at his home and took him to the police station where they interrogated him. Tr. 9/11/09 p. 7-9. Osie admitted to being at Williams' home and stabbing the victim in self-defense.

The detectives interviewed Osie for about twenty to thirty minutes before they turned on the tape recorder. Trial Ex. 55. At that point, Osie admitted to the detectives that he went to the victim's house to talk him out of filing charges against his girlfriend Robin Patterson. He told the police that they began to argue and fight in the kitchen. As they fought, Osie grabbed a knife from the kitchen and stabbed Williams. Id. at p. 3. Osie further admitted to grabbing several items after Williams died to make it look like a robbery. Id. at p. 35.

The detectives were able to easily manipulate additional information from Osie during the interrogation. Once Osie professed his love for Patterson to detectives, the detectives suggested that they would involve her in the investigation unless he fully cooperated. Id. at p. 31. After that, Osie confessed to taking Williams's television and cell phone. Id. at p. 33. Osie claimed that he took the knife and threw it in the river.[1] Id. at p. 37.

Detectives commenced a second interrogation at 9:07 p.m. Trial Ex. 55, Part II, p. 2. The detectives interviewed him again in an attempt to get Osie to admit to taking items from Williams' home and to admit to more of the details of how Williams was killed. Tr. 9/11/09 p. 32, 36-37.

[1] Through further investigation, detectives resolved that this was not true.

On June 23, 2009, Osie's trial counsel filed a Motion to Suppress statements made by Osie to detectives of the Butler County Sheriff's Office. A hearing regarding the Motion to Suppress was held on September 11, 2009. Tr. 9/11/09. After holding a hearing on the issue, the trial court concluded that Osie's statements were voluntary.

Indictment and Pretrial Litigation

Osie was indicted on two counts of aggravated murder, and one count each of aggravated burglary, aggravated robbery, and tampering with evidence. Attached to each of the aggravated murders counts were three capital specifications: Osie killed Dave Williams to prevent his testimony at trial in violation of R.C. § 2929.04(A)(8) and that Osie killed Dave Williams during the commission of aggravated robbery and aggravated burglary in violation of R.C. § 2929.04(A(7). The case was assigned to Judge Noah E. Powers and trial attorneys David Washington and Greg Howard were appointed to represent Osie.

Trial counsel filed a motion requesting that the Court appoint Christopher Pagan as the mitigation specialist. Tr. 9/11/09 p. 55. The Court expressed concern about appointing Pagan because the judge was owed money by Mr. Pagan. Tr. 11/9/2009 p. 4-5. Id. A second hearing was held on November 9, 2009 to discuss appointing Pagan. Again Judge Powers expressed concern about appointing Pagan. The prosecutor also objected to appointing Mr. Pagan. Id. at p. 7. Ultimately Judge Powers decided that he could not personally appoint him because of the financial matter. Judge Powers referred the matter to Judge Sage to make the formal appointment. Id. at p. 5.

On November 13, 2009, the parties appeared in front of Judge Sage concerning the appointment of Mr. Pagan. Trial counsel informed Judge Sage that Mr. Pagan currently

represents clients that Judge Powers represented when he was in private practice, which created a conflict in appointing Mr. Pagan. Tr. 11/13/2009 p. 3-4.

The State again objected to the appointment of Mr. Pagan, citing the fact that if the case went to a three-judge panel and Pagan was called to testify, it would create a situation where Judge Powers would have to recuse himself. Id. at p. 5. To circumvent this issue, defense counsel advised the court that he did not expect to waive jury, and that he would not be calling Pagan to testify. Id. at p. 5-6. This seemed to satisfy Judge Sage, and he granted the motion. Id. at p. 6.

Despite counsel's representation to the court that Osie would not be waiving jury, on March 31, 2009, trial counsel appeared with Osie and waived his right to a jury. Tr. 3/31/10. Initially, the Court expressed concern that the jury waiver was not signed in open court; so the Court engaged in a colloquy with Osie. Tr. 3/31/10 p. 3-4. Defense counsel told the court he had met with his client the night before and obtained his jury waiver. Id. at p. 4-5. Ultimately the court, satisfied with his waiver, accepted it. Id. at p. 13-14.

The Trial

Osie's trial began on April 19, 2010. Defense counsel gave the opening statement on behalf of Osie, which amounted to two paragraphs. Trial Tr. Vol. I p. 16. The State presented evidence regarding the events that transpired the days before and after Dave Williams' murder.

Nick Wiskur was a business partner with the victim Dave Williams. At some point, they discovered money missing. Trial Tr. Vol. I p. 24. Both he and Williams were aware of a forged check that was cashed at a convenience store. He believed that Osie was the individual who cashed the forged check. Id. at p. 24. Wiskur testified he received a call from Osie denying that he was the one who cashed the check. Id. at p. 30. Wiskur also provided testimony about what

he heard Williams say on the telephone during a conversation with Osie, and what he was told by Williams afterwards.[2] Wiskur did not testify that Williams was going to file charges against Osie.

Donald Simpson, Mr. Osie's cellmate in the county jail, provided testimony about conversations he had with Osie. Trial Tr. Vol. II p. 95-96. The morning of Simpson's testimony, the State revealed to the defense that Simpson had a felony criminal record, which had not been previously disclosed. Id. at p. 106-107.[3] Simpson claimed while he was in jail that he and Osie spoke about the charges quite often. Id. at p. 97. He testified that Osie told him that Dave Williams was going to press charges against Patterson because she stole $18,000 from the business' payroll. Id. at p. 99.

Simpson testified that Osie told him that Patterson asked him to go speak to Williams and talk him out of filing charges. Id. He said Osie told him that he and Patterson had used cocaine that evening, and he went to Williams's house around 1:30 - 2:00 a.m. Id. at p. 99-100.

Simpson then testified to the details of the murder to which Osie supposedly confessed. Trial Tr. Vol. II p. 100. Simpson did not testify that Osie went over there to kill him, or even that he decided once there to kill him to silence him. Simpson only testified that during the argument with William, Osie got mad, punched Williams, and grabbed a knife. Id. Then Simpson related that Osie took the television, checks, and a credit card to make it look like a break-in had happened. Id. at p. 102. He said Osie tried to use the credit card at Meijer to buy a diamond ring for Patterson. Id.

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[2] This was over the objections of trial counsel, founded in both hearsay and the confrontation clause. Trial Tr. Vol. I p. 33-44.

[3] When asked by the judges whether trial counsel would have done anything differently if they had received the records prior to trial, David Washington told the court that they "certainly would have given the name or given information to the private investigator to investigate…". Id. at p. 108.

Simpson's final claim was that Osie asked him to go pick up the murder weapon—a hunting knife. Id. at p. 103. When the State searched the area indicated by Simpson, they did find a knife, but it was not a hunting knife, nor did it have a handle. Trial Ex. 53. When it was tested, the knife could not be forensically linked to the crime. Trial Tr. Vol. II p. 154.

Tim Purvis, a friend of both Patterson and Osie, testified that he was with Patterson on the night of February 13, 2009 and was with her around until the next morning. Tim testified that around 5:00 a.m. Osie called to speak to Patterson. Trial Tr. Vol. I p. 54-55. After the phone call, Patterson looked at her text messages and then they went to sleep. Id. at p. 54-55, 66. The State presented evidence of text messages sent by Osie to Patterson to establish Osie's guilt. Trial Ex. 38. Between 1:39 a.m. and 9:20 a.m. Osie sent Patterson numerous text messages and tried to call Patterson fifty-two times. Trial Tr. Vol. III p. 314.

Finally, the State presented evidence to demonstrate that Osie took Dave Williams' credit card and bought gifts for Patterson at Meijer. Trial Tr. Vol. II p. 130-131. At Meijer, a charge was attempted on Williams' credit card to purchase lingerie, flowers, a card, and a ring for Patterson. See Trial Ex. 42. That credit card was declined at 6:24 a.m. Id.

The State also admitted correspondence written by Osie to Patterson while he was in jail. The State argued that statements made in the letter demonstrated that Osie killed Williams to prevent him from pursuing charges against Patterson. Trial Tr. Vol. II p. 261-62.

The defense did not contest that Osie killed Dave Williams, only that it did not rise to the level of aggravated murder. Trial Tr. Vol. III p. 300. The two main issues were whether Osie acted with prior calculation and design, and whether Dave Williams was a witness to a crime.

After deliberations, the three-judge panel found Mr. Osie guilty of the second count of aggravated murder (felony murder) and found him guilty of the lesser-included offense of

murder on the first count. Id. at p. 347. He was also found guilty of all three of the specifications as to count two, as well as the counts of aggravated burglary, aggravated robbery, and tampering with evidence. Id.

The Mitigation Hearing

The mitigation hearing began on April 28, 2010. The defense's mitigation presentation consisted of five witnesses: Jim Egbert, a pastor who knew Osie as a child; Paul Rudemiller, a camp director, who knew Osie before he got married; Brian Osie, Osie's son; Kenny Osie, Greg's brother; and Patricia Osie, Greg's mother. Osie's brother provided testimony that they had two parents who were loving but strict. Mit. Vol. I p. 82. The family was close and would get together to celebrate special occasions and holidays. The family lived in a tough neighborhood. Many of the kids did not graduate from high school and some did not make it out of grade school. Id. at p. 65. Despite the rough neighborhood environment, the family, including Osie, was involved in church and community programs. Id. at p. 57, 65. Osie was a senior in high school when he married his girlfriend Kathy because she got pregnant. Id. at p. 121. From all accounts, Osie worked, took care of his family, and had no involvement with the criminal justice system. Id. at p. 73.

Osie's family testified to two significant occurrences that seemed to change Osie. First was his divorce from Kathy. Kenneth Osie testified that the divorce from his wife was very hard on him and Osie's son Brian testified that Osie missed his mother. Id. at p. 89, 104. The other event that significantly altered Osie's behavior was the death of his father. Osie was fairly close to his father. Id. at p. 123. After Osie's father died, his family noticed a change in him. Id. at p. 90, 123. Osie stopped regularly participating in family events. Id. at p. 95. He was not as close to his family as he was before his father's death. Id.

Osie led a fairly normal life and was an asset to both his family and his community. Osie's family testified that they continue to love and support Osie despite his conviction of aggravated murder and will continue to have a presence in his life. Id. at p. 71, 97, 111, 128. On the other hand, Osie suffered a number of setbacks that caused his otherwise good behavior to change and impacted his ability to make good decision.

After his father died Osie also began using drugs. Id. at p. 90, 109, 130. Osie's drug use significantly altered the court of Osie's life. Brian, who stayed with his father when he was home from college, saw signs of drug use and even saw Osie snort cocaine. Id. at p. 109. As Osie's drug use escalated, he became involved with Robin Patterson. Osie's relationship with Robin was extremely destructive and volatile. Their relationship revolved around drugs and alcohol and ultimately led to criminal behavior. Id. at p. 107-08. Robin had significant influence over the decisions Osie made.

Brian had many conversations with his father trying to get him to stop taking drugs. Id. at p. 109. But, he would not stop. Even when confronted by both Kenneth and Brian, Osie refused to acknowledge his problems. Id. at p. 93-94. Eventually Osie's drug use was so bad Brian moved out of the home. Brian had taken the car keys from his intoxicated father to prevent him from chasing after Robin. Brian's actions angered Greg, who, for the first time in Brian's life, physically threatened him. Id. After he left, things only got worse. Id. at p. 109. Osie's substance abuse problems escalated after the death of his father and led him to engage in destructive behavior that left him unrecognizable to his family.

Osie's family testified that after he began abusing drugs, they began to notice money missing from their mother's account. Id. at p. 94. Osie's mother testified that after she gave her account information to a lady from the "car company," money started disappearing from her

checking account. Id. at p. 126-27. Up until the point he began using cocaine, Osie was a productive member of society. Defense counsel presented evidence that Osie was a good person and argued that a life sentence was a more appropriate punishment. Tr. 4/29/10, p. 155-164. Defense counsel argued that the mitigation evidence presented on Osie's behalf weighed in favor of a life sentence. On May 3, 2010, the three-judge panel sentenced Osie to death without providing Osie his right to allocution. Tr. 5/3/10, p. 10. Osie timely filed his Notice of Appeal and is now before this Court on his direct appeal of right.

ARGUMENT

PROPOSITION OF LAW NO. I

A CAPITAL DEFENDANT'S RIGHT TO DUE PROCESS, HIS RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT AND TO ALLOCUTION UNDER STATE LAW IS VIOLATED WHEN, THE DEFENDANT IS NOT GIVEN AN OPPORTUNITY TO SPEAK BEFORE THE DEATH PENALTY IS IMPOSED. U.S. CONST. AMENDS. V, VIII, XIV.

A. Facts.

After hearing all of the evidence presented at trial, the Butler County Common Pleas Court found Osie guilty of aggravated murder with death penalty specifications. A mitigation hearing was held at which Osie presented mitigation evidence. After presentation of the mitigation phase evidence, but before closing arguments, the court inquired whether Osie had anything he wanted to say by way of allocution. Following that question the court asked, "Does he understand that he can make an unsworn statement here today?" Mit. Vol. II p. 144. Defense counsel told the court that he did not want to make an unsworn statement. The court proceeded with closing arguments and then went into deliberations. Id. at p. 176. Several days later, the court held a sentencing hearing. During that hearing, the three judge panel went over the evidence presented during the mitigation phase and sentenced Osie to death without hearing any statements from Osie or advising him of his right to make such a statement. Tr. 5/3/10 p. 10. The trial court did not provide defense counsel with an opportunity to speak on Osie's behalf either. The only matter the court advised Osie of during this hearing was his right to appeal. Id. at p. 12.

A week after Osie's sentencing, the court held a second sentencing hearing. The court held the second sentencing hearing because "[it] failed to advise the defendant regarding the application of post-release control to the sentence imposed by the Court in this matter." Tr.

5/10/10 p. 3. Because the court erred in applying post-release control, it believed "that **sentence or a portion thereof was void.**" The court advised Osie that he "must be resentenced **to correct that error, the same to include an advice on the application of post-release control to this matter.**" Id. (emphasis added). Only at this second sentencing hearing, where the court's sole goal was to correct the error on the post-release matter, did the court ask Osie if he wished to say anything. Osie declined and the court proceeded to resentence Osie on all of the counts and specifications.

Osie was effectively denied his right to allocution by being sentenced to death without being provided an opportunity to speak on his own behalf. Accordingly, his death sentence must be vacated. On remand, Osie must be resentenced on the capital counts after he is afforded his right of allocution.

B. Ohio Criminal Rule 32(A)(1) confers an absolute right to allocution.

Ohio R. Crim. P. 32 (A)(1) confers an absolute right of allocution by clearly specifying:

"At the time of imposing sentence, the court shall do all of the following:

> (1) Afford counsel an opportunity to speak on behalf of the defendant **and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment."**

Ohio R. Crim. P. 32(A)(1) (emphasis added).

This Court has consistently held that the provisions in Crim. R. 32(A) are mandatory in capital cases. Accordingly, error results when the trial court fails to ask the defendant if he wants to speak "before the imposition of sentence" on a capital count. State v. Reynolds, 80 Ohio St. 3d 670, 684, 687 N.E.2d 1358, 1372 (1998). Failure to comply with Crim. R. 32(A) constitutes reversible error. State v. Campbell, 90 Ohio St. 3d 320, 325-26, 738 N.E.2d 1178, 1189-90 (2000); State v. Green, 90 Ohio St. 3d 352, 359, 738 N.E.2d 1208, 1221 (2000).

C. Osie was not afforded an opportunity to speak on his behalf before sentencing.

A review of the sentencing transcript makes it clear that Osie was not provided with an opportunity to speak before he was sentenced to death. The court only permitted Osie to speak when it brought him back to correct the post-release control error. But, the court made it clear to Osie that it was there only to correct that part of the sentence which was void because of the improper advice on the application of post-release control. Tr. 5/10/10 p. 3. Because the trial court specifically stated that the resentencing was for the post-release control issue, the opportunity to speak was directed only towards the non-capital counts and was too ambiguous to comply with the requirements of Crim. R. 32(A).

In Green, the trial court sentenced Green on both his capital and noncapital offenses. The Court asked Green whether he had anything to say prior to the Court imposing sentence on his noncapital offense. Green's counsel commented on the firearm specification, but Green said nothing further. The court then imposed its sentence for all of the offenses including aggravated murder. This Court found that the trial court erred in not explicitly asking Green, in an inquiry directed only to him, whether he had anything to say before he was sentenced. Green, 90 Ohio St.3d at 359, 738 N.E.2d at 1221. This Court further noted that the trial court's reference to the counts on which Green could speak was ambiguous. "The context suggests that the court may have solicited comment only on the noncapital offenses. Instead, the trial court should have specifically asked Green if he had anything to say about the capital counts as well as the other offenses." Id.

Like the trial court in Green, the context of the trial court's request here suggested that the court was only soliciting comment on the post-release control issue. Osie's trial court should have asked him if he wished to speak about the capital counts. Upon resentencing to correct its

error, the trial court should have unambiguously asked if Osie had anything to say before he was sentenced on his capital counts.

The trial court's inquiry about allocution during the mitigation phase has no consequence to the resolution of this issue. Although Osie was asked whether he wished to make a statement during the mitigation hearing, that was a separate issue from his right to make a statement during sentencing. The language of Criminal Rule 32 confers a right of allocution that is contemporaneous with the actual sentencing hearing. As the Court warned in Reynolds, "[t]he penalty phase in a capital case is not a substitute for a defendant's right of allocution." Reynolds, 80 Ohio St. 3d at 684, 687 N.E.2d at 1372-73.

D. The failure to comply with Crim. R. 32(A) was not harmless

The facts of Osie's case are readily distinguishable from instances where this Court has Court found the denial of allocution harmless. For example, in Reynolds, the defendant made an unsworn statement at the penalty phase, defendant addressed the trial court in a letter before sentencing, and counsel spoke on the defendant's behalf at sentencing. Id. Unlike Reynolds, Osie did not make an unsworn statement or a statement in writing before his death sentence was imposed and his counsel made no argument on his behalf. See Reynolds, 80 Ohio St. 3d at 684, 687 N.E.2d at 1372-73.

Osie's case is similar to the violations that occurred in Green and Campbell. In those cases, this Court concluded that the failure to afford the defendant an opportunity to speak was not harmless and resulted in reversible error. Campbell, 90 Ohio St. 3d at 325-26, 738 N.E.2d at 1189-90; Green, 90 Ohio St. 3d at 359, 738 N.E.2d at 1221. Although Osie was provided with an opportunity to speak at the second sentencing, the request was not unambiguously directed to his capital count; reversible error has occurred here.

E. The failure to grant the right of allocution has constitutional implications.

The right of allocution is important because it gives the defendant his last chance to obtain mercy and to obtain an individualized consideration from the sentencer. United States v. Myers, 150 F.3d 459, 463 (5th Cir. 1998). "An inquiry under Crim. R. 32(A) is much more than an empty ritual: it represents a defendant's last opportunity to plead his case or express remorse." Green, 90 Ohio St. 3d at 359-60, 738 N.E. 2d at 1221. The question of whether to extend mercy is "central" to the capital sentencing determination. Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985).

Additionally, all valid capital sentencing schemes must afford individualized sentencing to the defendant. See Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Lockett v. Ohio, 438 U.S. 586, 604 (1978). Because the right of allocution provides the defendant with his last chance for mercy, and for individualized sentencing, it follows that a denial of allocution unduly restricts the sentencer's consideration of all relevant mitigation. This violates the rule in Lockett. See 438 U.S. at 604; Skipper v. South Carolina, 476 U.S. 1, 8 (1986).

F. Conclusion.

Osie's right of allocution was violated, thereby undercutting the constitutional reliability of his death sentence. Osie's right against cruel and unusual punishment under the Eighth Amendment to the United States Constitution was violated when he was precluded from speaking on his behalf on the issue of capital punishment. This error also denied him his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

Notwithstanding constitutional error, reversible error occurred under the holdings in Green and Campbell because Osie was denied his right of allocution. Osie's death sentence must be vacated and case remanded for resentencing.

PROPOSITION OF LAW NO. II

WHEN THE HEARSAY STATEMENTS OF THE VICTIM ARE INTRODUCED AGAINST THE DEFENDANT AND USED AS SUBSTANTIVE EVIDENCE OF THE DEFENDANT'S GUILT, THE ADMISSION OF THOSE HEARSAY STATEMENTS VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION AND WERE ADMITTED IN VIOLATION OF EVID. R 804(B)(6). GILES V. CALIFORNIA, 554 U.S. 353 (2008); CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004); STATE V. HAND, 107 OHIO ST. 3D 378, 392, 840 N.E.2d 151 (2006).

A. Introduction

The panel admitted Williams's hearsay through Nick Wiskur's testimony and used that hearsay as proof of Osie's guilt. Here, the Confrontation Clause and Evid. R. 804(B)(6) prohibited the admission of Williams' statements because Osie did not procure Williams' unavailability. Osie forfeited his right to confrontation only if he had designed to procure Williams' future unavailability, which he did not do. Therefore, the trial court erred by admitting those statements.

B. Argument

1. The admission of Williams' statements violated the Confrontation Clause.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." U.S. Const. amend. VI. Under the Confrontation Clause, hearsay of the deceased victim may not be admitted against the defendant. Davis v. Washington, 547 U.S. 813, 833 (2006). The only exception to this is when the defendant, by his or her own wrongdoing, forfeits that right. *Id.* As the Court explained, this is an equitable doctrine, designed to prevent the defendant from experiencing a windfall due to his or her own wrongdoing. Id.

Two years after Davis, the Court elaborated on this rule and held that a criminal defendant's Sixth Amendment right to confrontation is not violated by admitting statements of an unavailable witness when the defendant has "engaged in conduct designed to prevent the witness from testifying." Giles v. California, 554 U.S. 353, 359 (2008). It is only where the witness is "detained" or "kept away" by the "means or procurement" of the defendant that the forfeiture-by-wrongdoing exception to hearsay applies. Id., at 359-360. But the core of the inquiry is whether the conduct was designed to keep the witness from testifying. Id., at 360.

Here, the State did not prove that Osie's conduct was designed to prevent Williams from ever testifying. Rather, the evidence demonstrates that the discussion became an argument that then got out of hand. Once they began arguing, one of the men pulled the knife, which then led to a tragic outcome. Regardless of whether the State proved that Osie intended to kill Williams, it failed to present sufficient evidence that Osie's plan that night was to keep Williams from testifying. Rather, it was more likely that the decision to stab Williams' was done in the heat of the moment. In any event, the evidence produced at trial fails to show Osie planned to make Williams' unavailable when he went to his house that evening.

Because the State failed to demonstrate that Osie designed to procure Williams' unavailability, the trial court erred in applying the forfeiture doctrine and allowing the admission of the hearsay. Accordingly, the Court should find Osie's rights under the Confrontation Clause violated and reverse the judge of the three-judge panel.

2. The admission of the statement was prohibited under Evid.R. 804(B)(6).

a. Ohio's rule is narrower than its federal counterpart, and it does not permit the admission of Williams' hearsay.

The trial court determined that the statements were admissible under Ohio Rule of Evidence 804(B)(6), which provides that a statement is not hearsay if it is: "A statement offered

against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying..." But admission of these statements were in error; they subsequently prejudiced Osie; and, as a result, his conviction should be reversed.

Even when a defendant killed the person whose statement is sought to be admitted, the State must still show that the purpose of the defendant was to prevent that person from testifying. Giles, 554 U.S., at 361-62 (2008). The proponent of the statement has the burden, by a preponderance of the evidence, of establishing that the purpose of the defendant was to cause the witness to be unavailable to testify. State v. Hand, 107 Ohio St. 3d 378, 391, ¶ 84.

In admitting a statement under Ohio Rule 804(B)(6), the court must conclude that the party engaged in wrongdoing that resulted in the witness's unavailability, and that the purpose was to cause the witness to be unavailable at trial. Ohio R. Evid. 804(B)(6) (2001 Staff Notes).[4]

The Staff Notes point out that the Ohio rule is "patterned" after the federal rule, but that it is different in a few respects. Ohio R. Evid. 804(B)(6) (2001 Staff Notes). First, the text of the rule is significantly different than the text of the federal rule. The federal rule holds that a

[4] Under the federal rule, a party must demonstrate only that *one* purpose of the party was to procure the unavailability of the witness. Davis v. Washington, 547 U.S. 813, 833 (2006). Under the Ohio rule, the text implies that the *entire* purpose has to be to procure the unavailability of the witness; Ohio 804(B)(6) provides that when "*the* purpose" of the party is to prevent the witness from testifying, the statement of the witness will be admissible. Ohio R. Evid. 804(B)(6) (emphasis added). Had the Ohio legislature intended the Ohio rule to follow closely with the federal rule in this respect, it would simply have inserted "*a* purpose" instead of "*the* purpose." Id. (emphasis added). Though the Ohio legislature was intending to "pattern" its rule after the federal rule, the deliberate choice to change the wording indicates a different intent. The Staff Notes to the Ohio Rule indicate that, for a statement to be admissible, only one purpose of the defendant has to relate preventing the witness from testifying. However, this directly contradicts the plain, literal language of the Rule. Based on a literal reading of the Rule, and because the *sole* intent of the party must be to procure the unavailability of the witness, the Ohio Rule is therefore narrower and will admit hearsay in fewer circumstances than the federal rule will.

statement is not excluded by the hearsay rule if it is: "[A] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Fed. R. Evid. 804(B)(6).

The Ohio rule, in relevant part, provides that a statement is not hearsay if it is: "A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying." Ohio R. Evid. 804(B)(6). Ohio's rule is more narrow in that it requires that the wrongdoing of the defendant be aimed at preventing the witness from testifying. By comparison, the text of the federal rule states only that the defendant must have caused the unavailability, regardless if it was aimed at keeping a witnesses from testifying.

Beyond the text of the rule itself, the Staff Notes to the Ohio rule provide that it "applies to actions taken after the event to prevent a witness from testifying." Ohio R. Evid. 804(b)(6) (citing Fed. R. Evid. 804(b)(6) (Committee Notes)). Further, Committee Notes disclaim that this exception will apply in homicides, "the [Ohio] rule does not apply to statements of the victim in a homicide prosecution concerning the homicide, including a felony-murder case." Ohio R. Evid. 804(b)(6) (2001 Staff Notes). Therefore, even if a party can show that statements of the defendant should be admitted under the traditional "wrongdoing" exception, the Ohio Rule excludes the statement of a victim concerning the homicide in the prosecution of a homicide.

This exception avoids an anomalous result. Otherwise, when a homicide victim and a Rule 804 witness are the same person, the statement would be admitted. As the Ninth District pointed out it is difficult to conclude that a defendant killed the victim to prevent that victim from testifying at the victim's own murder trial. State v. McCarley, No. 23607, 2008 Ohio App. LEXIS 472 (Summit Ct. App. Feb. 13, 2008). The McCarley court concluded the following:

"Thus, when a homicide victim and a Rule 804 witness are the same person, the forfeiture by wrongdoing provision generally cannot be used to admit that person's statements in their own trial." Id. Additionally, the Supreme Court specifically cited to Ohio's rule, in Giles, as support for the rule that it announced in that case. Giles, 554 U.S., at 367 fn2 (2008). At a minimum, this suggests that the Supreme Court believed that the Ohio rule offered at least as much protection as the historical limitation they ultimately grounded in the Confrontation Clause.

3. The trial court erred by not properly applying the rule; thus, it improperly admitted Williams' statements.

The trial court erred by admitting statements of Dave Williams against Greg Osie under the guise of Ohio Rule 804(B)(6). Not only did the trial court improperly apply the rule, it failed to follow the standard set forth by 804(B)(6). As the Staff Notes to 804(B)(6) establish, the rule does not allow admission of statements of the victim concerning the homicide in a homicide prosecution. Ohio R. Evid. 804(B)(6) (2001 Staff Notes). On this ground, the trial court erred by admitting the statements.

Furthermore, the trial court failed to apply the correct standard. This Court has established that a trial court, in admitting a statement under 804(B)(6), must find by a preponderance of the evidence that the purpose of the defendant was to make the witness unavailable to testify. State v. Hand, 107 Ohio St.3d 378, 392, ¶ 87. The trial court recognized that the specification for killing a witness is different than the standard in 804(B)(6) for admitting out-of-court statements, but it then failed to identify the proper standard. (Tr. 4/21/2010 p. 267).

The third specification charged that the defendant "purposely killed [Dave Williams] to prevent [Williams'] 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." R.C. § 2929.04(A)(8). The Bill of Particulars identified the "offense to which the victim was a witness" as the possibility of "criminal charges" being filed against Robin Patterson. Bill of Particulars, filed 04/24/2009. Because the prosecution merely relied on the possibility that Williams would be a witness at possible criminal proceedings, it did not meet its burden by a preponderance of the evidence.

Nor could the prosecution simply rely on proving that Osie intentionally killed Williams. Under 804(B)(6), the standard that the evidence must meet is whether the witness is unavailable because the defendant committed the wrongdoing "for the purpose of preventing the witness from attending or testifying." "Purposely killing" (from R.C. 2929.04) is different than purposefully "preventing the witness from…testifying" (from Ohio R. Evid. 804(B)(6)). The prosecution was required to prove beyond a reasonable doubt that the defendant "purposely killed" Dave Williams to purposefully prevent Williams' testimony in another matter. R.C. § 2929.04(A)(8)—not just that Osie purposefully killed Williams.

The prosecution was also required to prove by a preponderance of the evidence that the defendant committed wrongdoing toward Dave Williams "for the purpose of preventing [Williams] from…testifying." Ohio R. Evid. 804(B)(6). The trial court was correctly advised by the prosecution that it needed to establish the third specification beyond a reasonable doubt, but it was not made clear that it needed to apply the preponderance of the evidence standard to the 804(B)(6) issue. (Tr. 4/21/2010 p. 267-270).

Instead, the prosecution noted that the burden for admissibility involved examining its relevance and probative value. (Tr. 4/21/2010 p. 267). The prosecution noted that the two standards have some "similarities," but also argued that they do not "go hand in hand." Id. After

stating that 804(B)(6) "has a very clear standard," the prosecution failed to specify what that standard is. Id. at 268-70. It only pointed out that not "everything admitted into evidence is proof beyond a reasonable doubt." Id. at 268. Thus, not only did the court fail to state what standard it had to apply, it was explicitly given an incorrect standard to apply. Id.

Furthermore, 804(B)(6) specifically prohibits certain testimony of a victim in the homicide prosecution of that victim. The Staff Notes provide that "the rule does not apply to statements of the victim in a homicide prosecution concerning the homicide[.]" Ohio R. Evid. 804(B)(6) (2001 Staff Notes). The prosecution attempted only to introduce statements concerning the homicide, which the Rule specifically prohibits. Therefore, the trial court erred in admitting the statements of Dave Williams.

4. The trial court erred by failing to conduct an 804(B)(6) Hearing

The trial court failed to conduct a hearing regarding the 804(B)(6) issue. The court briefly addressed the issue twice when requested by the defendant. First, the defendant requested to be heard during the testimony of Nick Wiskur. (Tr. 4/19/2010 p. 34-44). The defendant also requested to be heard immediately subsequent to the State resting. (Tr. 4/21/2010 p. 258). This occurred two days after the issue was initially raised. Id. Rather than granting a hearing to allow additional witnesses to testify, the court only heard arguments from the attorneys. Id. at 258-72 (see also Tr. 4/19/2010 p. 34-44).

A separate 804(B)(6) hearing is necessary in order to avoid prejudicing the defendant. In State v. Hand, the trial court conducted an evidentiary hearing outside the presence of the jury. 107 Ohio St. 3d 378, 391, ¶ 85. This protection is imperative to the defendant's right to a fair trial. Even though the case was tried before a three-judge panel, the two non-presiding judges should have been absent from the room when discussing non-admissible evidence.

The defendant should be entitled to a hearing regarding this testimony, to be attended only by the presiding judge, rather than all three members of the three-judge panel. This is so because the third specification and the 804(B)(6) issue are so similar. Refusing to admit testimony under 804(B)(6) would seriously jeopardize the State's ability to prove the third specification. The presence of the two non-presiding judges may have led the trial court to consider impermissible evidence in determining the sufficiency of the evidence for the third specification. If the trial court had conducted such a hearing, it would have determined that the State did not establish by a preponderance of the evidence that 804(b)(6) permitted the statements of Dave Williams. The error in admitting Dave Williams' statements under 804(B)(6) therefore prejudiced the defendant.

C. Conclusion

The trial court improperly admitted statements of Dave Williams through the testimony of Nick Wiskur. Ohio Evidence Rule 804(B)(6) specifically excludes statements of a victim in a homicide prosecution concerning the homicide. The statements of Dave Williams concerned the homicide and should therefore not have been admitted. Furthermore, the trial court never stated what standard it applied in admitting the statements under 804(B)(6), and may have applied an improper standard based on the relevance and probative value of the statements. At the very least, the trial court should have conducted a hearing at which additional witnesses could have been consulted. These errors violated the defendant's Sixth Amendment right to confront all witnesses against him, and he respectfully asks this court to reverse the judgment below.

PROPOSITION OF LAW NO. III

WHERE THE STATE FAILS TO PRESENT EVIDENCE THAT THE WITNESS WAS KILLED TO PREVENT THEIR TESTIMONY IN A CRIMINAL PROCEEDING, THERE IS CONSTITUTIONALLY INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR R.C. § 2929.04(A)(8) AND THE RESULTING CONVICTION VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Introduction

Osie was charged with aggravated murder. Attached to the aggravated murder charge was the witness murder death specification. R.C. § 2929.04(A)(8) elevates an aggravated murder to a capital charge when:

> 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.

Under R.C. § 2929.04(A)(8), the State was required to prove that the victim was a witness to an offense who was purposed killed to prevent the victim's testimony in any criminal proceedings. At trial, the State failed to present evidence that Mr. Williams was involved in a criminal proceeding and thus failed to meet its burden of proof on this capital specification. As a result, Osie was denied his rights to a fair trial, due process and a reliable sentencing determination as guaranteed under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. Argument

A criminal conviction cannot stand unless it is based on proof beyond a reasonable doubt of all essential elements of the crime. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970).

"The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. In assessing sufficiency of the evidence, the court must determine, after viewing the evidence in a light most favorable to the prosecution, whether any rational trier of fact could have reasonably found guilt beyond a reasonable doubt as to each specific element of the crime charged. Jackson v. Virginia, 443 U.S. 307, 319 (1979). At the close of trial, Osie's counsel made a Motion for Acquittal which was denied. See Tr. Trial Vol. 2, p. 272-273

1. The mere possibility of future criminal proceedings is insufficient to sustain a conviction; therefore, the three-judge panel erred in finding Osie guilty of this specification.

A conviction under R.C. § 2929.04(A)(8) requires that the victim be involved in a criminal proceeding and is killed to prevent the witness' testimony. Although Williams was a potential witness against Robin Patterson, regarding her theft, a criminal proceeding had not begun. Because no criminal proceeding had begun, Williams was not a witness and thus could not have been killed to prevent his testimony.

Although § R.C. 2929.04(A)(8) does not define the meaning of "criminal proceeding," this Court recently did just that when interpreting R.C. § 2901.04(A). State v. Malone, 121 Ohio St. 3d 244, 903 N.E.2d 614 (Ohio 2009). In Malone, this Court determined that although not defined in the statute, the phrase is used throughout the Revised Code. The Court concluded that it meant "a formal process involving a court." Id., p. 247. Based on that meaning, this Court held that until a "criminal proceeding" is initiated, a person cannot be charged with witness intimidation under R.C. 2901.04(A). Id. at p. 248. The Court reasoned that the statute "requires a witnesses involvement in a criminal action or proceeding, not his or her potential involvement." Id.

Here, Malone applied and renders the judgment of the three-judge panel unsustainable. At the time of Williams' death, he had not reported his suspicions that Robin Patterson was stealing to the police. See Tr. Trial Vol. 1, p. 23-25. No criminal proceeding regarding Patterson's theft was underway; indeed, no criminal proceedings have ever been initiated against Patterson. And Williams' death is not the reason. He was not the only witness that could have testified at her prosecution. Nick Wiskur, a member of the company, could have testified about Patterson's alleged theft. The absence of pending criminal proceedings should have thwarted the prosecution of Osie under this specification because at the time of Williams' death he was, at most, potentially involved in a possible future prosecution. Under Malone, this status as a "potentially involved witness" is insufficient.

Prior to Malone, the Court has not construed the meaning of "criminal proceeding" so narrowly. State v. Conway, 109 Ohio St. 3d 412, 848 N.E.2d 810 (2006). In Conway, the Court took a broader view and said that a criminal proceeding does not have to be pending under R.C. § 2929.04(A)(8). Id., at 421-422. There the Court relied on what it called the plain language of the statute to reach this conclusion, despite undertaking no analysis on what criminal proceeding meant. Id. In the time since Conway, the Court has had the chance to revisit the meaning of "criminal proceeding" in interpreting R.C. 2901.04(A), where it undertook a through and complete analysis. Malone, 121 Ohio St. at 248. And the Court's definition of "criminal proceeding" in Malone is binding in this matter and applies equally to R.C. § 2929.04(A)(8).

First, the term "criminal proceedings," when read *in pari materia* with R.C. § 2901.04(A) and the rest of the Revised Code, means the same thing in R.C § 2929.04(A)(8) that it means elsewhere. See IBM v. Levin, 125 Ohio St. 3d 347, 352, 928 N.E.2d 440 (Ohio 2010). There is nothing in the language of this statute that suggests the Court should hunt for an alternate

meaning of the phrase "criminal proceeding." Second, as a practical matter in capital cases, R.C § 2929.04(A)(8) operates as a superior crime to R.C. § 2901.04(A); so, this Court's holding in Malone is *stare decisis*—meaning the three-judge panel erred by not following it and acquitting Osie of this specification. Finally, even if this Court determined it was not bound by its prior decision, the reasoning of Malone applies with equal force to this matter.

As this Court stated in Malone, "Ohio's statutory scheme does protect witnesses in a potential criminal action from the threats of a perpetrator; it simply does not do so through R.C. § 2921.04." Malone, 121 Ohio St. 3d at 248. Thus, charging Osie under this specification was improper, and the panel should have acquitted him of that charge. Accordingly, the Court should follow Malone and reverse the three-judge panel's conclusion that Osie was guilty of this specification.

2. The evidence is insufficient to find that Osie's purpose in killing Williams was to prevent him from testifying at some later proceeding.

Aside from the legal question raised above, the evidence presented was insufficient to support the three-judge panel's conclusion that Osie was guilty. There is simply no evidence that Osie intended to kill Williams to prevent his testimony at a later trial. R.C. § 2929.04(A)(8) requires more than just the murder of a witness; it requires that the witness be "purposefully killed to prevent the victim's testimony * * *." This clause must be interpreted to have some meaning, otherwise it is superfluous. Rather than render a portion of a statute meaningless, the court should endeavor to give meaning to all words. Ohio Water Service Co. v. Ressler, 173 Ohio St. 33, 180 N.E.2d 3 (Ohio 1962).

Assuming *arguendo* the State presented evidence that Osie killed Williams; that there was a pending criminal proceeding; and that Williams was going to be a witness in that proceeding, there is no evidence Osie killed Williams to prevent him from ever testifying. In

fact, the only evidence presented suggests it was an argument between the two men that got out of hand.

The day before the murder, Osie and Williams talked about Robin's theft. See Trial Tr. Vol. II, p. 23-26. The prosecution never contested Osie's statement to the police that he went there only to talk to Williams. Osie did not take a weapon there; he did not break in; and according to his confession, Osie did not grab the knife until the fight began.

C. Conclusion

The State failed to present evidence that Williams was involved in a criminal proceeding and failed to prove that Greg's purpose in killing Williams was to prevent his testimony. The State failed to meet its burden of proof on this capital specification. As a result, Osie was denied his rights to a fair trial, due process and a reliable sentencing determination as guaranteed under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

PROPOSITION OF LAW NO. IV

WHERE THE TRIAL COURT FAILS TO MERGE CAPITAL SPECIFICATIONS, THE RESULTANT SENTENCE IS IMPROPER BECAUSE THE WEIGHING PROCESS IS TAINTED WITH THE CONSIDERATION OF IMPROPER AGGRAVATING FACTORS.

A. Law

"[W]here two or more aggravating circumstances arise from the same or indivisible course of conduct and are thus duplicative, the duplicative aggravating circumstances will be merged for purposes of sentencing." State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984); State v. Spisak, 36 Ohio St. 3d 80, 84, 521 N.E.2d 800 (1988). The Court is guided by the principles of merger in reaching this decision. If, for example, aggravated burglary and kidnapping are allied offenses of similar import, merger is required. See Jenkins, 15 Ohio St. 3d at 197, fn. 27. "Allied offenses of similar import are those offenses whose elements correspond to such a degree that the commission of one offense will result in the commission of the other." State v. Mitchell, 6 Ohio St. 3d 416, 418, 453 N.E.2d 593 (1983). If a defendant is convicted of allied offenses of similar import, the Court must examine his conduct to determine "whether the offenses were committed separately or with a separate animus as to each." Mitchell, 6 Ohio St. 3d at 418.

Merely because two specifications can be indicted and found from the facts does not mean that they represent separate aggravating circumstances for purposes of determining the appropriateness of death as a sentence. Aggravating circumstances in a capital case are required in order to narrow the class of aggravated murders to those eligible for death. Zant v. Stephens, 462 U.S. 862 (1983); Barclay v. Florida, 463 U.S. 939 (1983).

Proving two or more specifications out of the same course of conduct does not additionally proscribe any more severe conduct but merely loads the scales in the weighing process so that no amount of mitigation could outweigh the specifications.

The Jenkins court recognized that the duplication of aggravating circumstances impermissibly tipped the weighing process in favor of death and defeated the constitutional requirement of reliability in capital sentencing determinations:

> 'The use in the penalty phase of both these special circumstance allegations thus artificially inflates the particular circumstances of the crime and strays from the high court's mandate that the state 'tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.' Godfrey v. Georgia, 446 U.S. 420, 428 (1980). The United States Supreme Court requires that the capital-sentencing procedure must be one that 'guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death.' Jurek v. Texas, 428 U.S. 26 at 273-274 (1976). That requirement is not met in a system where the jury considers the same act or an indivisible course of conduct to be more than one special circumstance.' Id. at 798.

Jenkins, 15 Ohio St. 3d at 196.

B. Facts

The State's theory in its case against Osie was that he went to Williams' home that night in an effort to prevent Williams from bringing theft charges against his girlfriend, Robin Patterson. The State maintained that he possessed that intent prior to arriving at Williams' home.

Osie was found guilty of three specifications:

- Specification 1: That Defendant purposely caused the death of David Williams while he was committing or attempting to commit the offense of aggravated burglary and was the principal offender in the aggravated murder. O.R.C. § 2929.04(A)(7);

- Specification 2: That Defendant purposely caused the death of David Williams while he was committing or attempting to commit the offense of aggravated robbery and was the principal offender in the aggravated murder. O.R.C. § 2929.04(A)(7);

- Specification 3: That Defendant purposely caused the death of David Willaims, the victim of the aggravated murder, who was a witness to an offense, to prevent David Williams' 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 David Williams was a witness. O.R.C. § 2929.04(A)(8).

On April 27, 2010, Osie's trial counsel filed a motion for merger of specifications and merger of counts. On April 28, 2010, the trial court granted trial counsel's motion as to the merger of the counts but denied the motion as to the merger of the specifications.

C. Argument

In the present case, the trial court weighed three separate aggravating circumstances. But, prior to that weighing, the trial court should have merged the R.C. § 2929.04(A)(7) specification as to aggravated burglary and the R.C. § 2929.04(A)(8) specification. Two of the arguments the prosecutor advanced during closing arguments were based on the contention that Osie went to Williams' home with a plan to kill him. Trial Tr. Vol. I. p. 284, 287. If Osie entered the house with the purpose to kill Williams, then the specifications have to merge because the specifications arose from the same indivisible course of conduct and are impermissibly duplicative. Osie possessed the same animus for both specifications. According to the State's theory the entering of the victim's home and the homicide was one act and one intent. The specifications arose from the same indivisible course of conduct and are impermissibly duplicative.

Recently, the Court addressed the same factual situation and found that these specifications must merge. In State v. Fry, the defendant was also convicted of a specification for aggravated burglary and a specification for trying to prevent the victim from testifying in a criminal proceeding. 125 Ohio St. 3d 163, 192, 926 N.E.2d 1239 (2010). In Fry, the trial court

merged the R.C. § 2929.04(A)(7) specification with the R.C. § 2929.04(A)(8) specification prior to sentencing. Id. The state challenged this decision.

This Court found that Fry's purpose in entering the home was to kill the witness either in retaliation or to prevent the witness from testifying. Id. at 192. Based on this fact, the Court held that merger was necessary, because "Fry's actions in killing [the victim] during an aggravated burglary and killing her because she was a witness were 'inextricably intertwined, and thereby constituted one indivisible course of conduct.'" Id. (citing State v. Garner, 74 Ohio St. 3d 49, 54, 656 N.E.2d 623 (1995)).

Here, the two of the theories advanced by the prosecutor are indistinguishable from the operative facts in Fry. Thus, the trial court erred by not merging the two specifications. See Proposition of Law No. V.

In the past, the Court has held that remand is unnecessary because the Court itself can undertake the reweighing. Fry, 125 Ohio St.3d at 192, 926 N.E.2d 1239. But, recently the Court has stated that when the merger is appropriate the proper remedy is to remand the case back to the trial court and direct the prosecution to elect which of the charges it will have the defendant sentenced on. State v. Whitfield, 124 Ohio St. 3d 319, 324, 922 N.E.2d 1982 (2010). Thus, the proper remedy is to remand the case to have the prosecution make the proper election, regarding which specification it will go forward on. Moreover, the deficiencies in this case are too severe to correct by simply reevaluating the evidence. State v. Green, 90 Ohio St. 3d 352, 364, 738 N.E.2d 1208, 1224 (2000).

D. Conclusion

The failure of the trial court to address and merge the felony-murder specifications pursuant to R.C. § 2929.04(A)(7) resulted in a sentence that was in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

PROPOSITION OF LAW NO. V

WHEN A TRIAL COURT FAILS TO EXPLAIN WHY IT IMPOSED THE DEATH PENALTY, IMPROPERLY DIMINISHES MITIGATION EVIDENCE AND TREATS THE (A)(8) SPECIFICATION AS A SUPER SPECIFICATION, THE CAPITAL DEFENDANT IS DEPRIVED OF THE RIGHT TO INDIVIDUALIZED SENTENCING AND OF HIS LIBERTY INTEREST IN THE STATUTORY SENTENCING SCHEME IN VIOLATION OF RIGHTS AS GUARANTEED BY U.S. CONST. AMENDS. V, VIII, AND XIV; OHIO CONST. ART. I, §§ 9 AND 16.

A. Trial court opinion.

On May 3, 2010, after hearing the presentation of the mitigation phase evidence and the closing arguments of counsel, the three judge panel sentenced Osie to death. Tr. 5/3/10 p. 10. Pursuant to the requirements of R.C. § 2929.03(F), the court filed its opinion detailing the court's reasons for sentencing Osie to death. Sentencing Opinion. In its sentencing decision, the trial court recited the evidence presented at trial, listed some of the mitigating evidence presented by the defense and listed the aggravated circumstances of the case. The trial court then sentenced Osie to death. Sentencing Opinion at 13. The trial court's opinion is inadequate and does not comply with the requirements of R.C. § 2929.03(F) because the court failed to merge aggravating circumstances; it failed to explain why it imposed the death penalty; it improperly diminished the value of mitigating factors; and it improperly inflated the value of the aggravating circumstances. These errors denied Osie the individualized sentencing guaranteed by the Eighth and Fourteenth Amendments to the United State Constitution. Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (plurality opinion); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Zant v. Stephens, 462 U.S. 862, 879 (1983).

B. Trial court opinion requirements.

R.C. § 2929.03(F) provides the requirements for a trial court opinion:

> The court or the panel of three judges, when it imposes a 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.

This Court has concluded that this statute requires the trial court to articulate its reasoning for sentencing a capital defendant to death. State v. Maurer, 15 Ohio St. 3d 239, 237, 473 N.E.2d 768, 778 (1984). The failure of a trial court to comply with this requirement deprives a reviewing court of the "trial court's perceptions as to the weight accorded all relevant circumstances." Id. Thus, this Court cautioned that, in a close case, the failure of a trial court to comply with the R.C. § 2929.03(F) requirements could make a difference in the manner in which a reviewing court makes its determination. Id.

C. Deficiencies in the trial court opinion.

In the present case, the trial court failed to conform its opinion to the requirements of R.C. § 2929.03(F). In addition, the trial court improperly conducted its weighing process. These errors deprived Osie of the independent review he is entitled to under state and federal law. Thus, his death sentence cannot stand.

1. Trial court failed to merge the (A)(7) and (A)(8) specifications.

The panel's weighing process was tainted by its weighing and consideration of an additional capital specification. Because the panel failed to merge the 2929.04(A)(7) and 2929.04(A)(8) specification, it weighed three capital specification, when the panel was only permitted to weigh two for the aggravated murder count. It is clear that the panel placed an impermissible "thumb on death's side of the scale" in violation of the Eighth and Fourteenth Amendments. See Stringer v. Black, 503 U.S. 222, 232 (1992).

In State v. Davis, 38 Ohio St. 3d 361, 372, 528 N.E.2d 925, 936 (1988), this Court found that when a trial court "improperly weighs aggravating circumstances which it finds the appellant guilty of committing against the mitigating factors", independent review cannot be used to cure the action. Id. In Davis the trial court, like the court in the present case, weighed invalid aggravating circumstances against valid mitigating evidence. The reason that independent review in Davis was prohibited was because this Court could not know if the result of the weighing process by the three-judge panel would have been different had the impermissible aggravating circumstances not been present. Id. See also, State v. Green, 90 Ohio St. 3d 352, 364, 738 N.E.2d 1208, 1224 (2000) ("deficiency in the case too severe to correct by simply reevaluating the evidence"). In the present case, the three-judge panel improperly cumulated the weight of the aggravating circumstances.

Because the trial court was permitted to weigh an additional aggravating circumstance against the mitigation evidence presented by Osie, the weight of the aggravating circumstances was improperly inflated and the sentencing determination is unreliable.

2. The trial court failed to specify why the aggravating circumstances in Osie's case outweighed the mitigating factors.

The trial court in its opinion reviewed the evidence presented at trial and listed the mitigation evidence raised by Osie. The trial court then stated, "The Panel has weighed the three specific aggravating circumstances against all of the mitigating facts and mitigating evidence...After weighing the specific aggravating circumstances against the mitigating factors, the members of the Panel unanimously find that the State of Ohio has proved beyond a reasonable doubt that the specific aggravating circumstances that the Defendant was found guilty of committing outweigh the mitigating factors." Sentencing Opinion at 12.

Regardless of its reason, the trial court in this case did not offer an explanation of why the aggravating circumstance was found to outweigh the mitigating factors Osie presented at sentencing. Rather, the trial court simply declared that it decided to impose a death sentence -- a declaration devoid of any explanation at all. Ohio and federal law requires more. Such an opinion which is devoid of any explanation violates the requirements of R.C. § 2929.03(F) that the trial court explain why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.

Osie was prejudiced by the trial court's failure to explain its reasons for sentencing Osie to death. The trial court, by forcing itself to explain **why** death is appropriate, is forced to expunge inappropriate considerations from its reasoning. By failing to do this, the trial court lost its last opportunity to perform this expungement. Thus, the odds were increased that unconstitutional criteria affected the trial court's weighing. The failure of the trial court to comply with 2929.03(F) requirements should make a difference in this case. Id. at 234, 473 N.E.2d at 778.

3. The trial court improperly diminished relevant mitigating evidence.

Osie presented evidence of his cocaine addiction. The trial court recognized that Osie probably had used cocaine on the day preceding the homicide and may have been under its effects at the time of the offense. Evidence of drug use is relevant mitigating evidence for the trial court to consider when assessing Osie's sentence. But the court improperly diminished the value of Osie's drug use. The trial court held:

> Hence, the Panel believes that Defendant probably had used cocaine on the day preceding the homicide, and that he may have been under its effects at the time the offense occurred. However, given the fact that Defendant's consumption of the drug was voluntary on his part, the Panel gives its mitigating value minimal weight.

Sentencing Opinion at p. 11.

This Court has recognized substance dependence as a mitigating factor. State v. Rojas, 64 Ohio St. 3d 131, 143, 592 N.E.2d 1376, 1387 (1992). See, e.g., State v. Reynolds, 80 Ohio St. 3d 670, 686, 687 N.E.2d 1358, 1374 (1998). Substance abuse should be weighed as a mitigating factor in the same way that any other disease is weighed. State v. Haight, 98 Ohio App. 3d 639, 649 N.E.2d 294, 315 (1994) (equating alcoholism to disease for purposes of mitigation). The trial court improperly diminished the role drugs played in the Osie's actions and did not give this compelling mitigation evidence the weight it deserved.

4. Trial court improperly gave too much weight to killing of witness specification.

In addition to minimizing the mitigation evidence presented by Osie, the trial court placed a significant amount of weight on the specification that the witness was killed to prevent testimony in a criminal proceeding. The trial court's weighing process was further skewed by the fact that it accorded such exceptional weight to the (A)(8) aggravating circumstance: Specifically, the court found:

> The panel finds most compelling this specification, that Defendant killed Mr. Williams to prevent his testimony in a criminal proceeding...It represents a threat, an attack, not only upon the victim, but upon the criminal justice system itself. Defendant silenced Mr. Williams to subvert justice, to prevent Mr. Williams from lawfully seeking justice and redress in the Court of this State. This specification the panel gives its most weight, great weight.

Sentencing Opinion at p. 7. The Court created a "super" aggravating circumstance that no amount of mitigation could outweigh. Such special consideration of the (A)(8) specification echoes the prosecution argument that nothing can mitigate the killing of a witness. See Proposition of Law No. III. The trial court appeared to give this aggravating circumstance super weight and seemed to indicate that part of the rationale behind the extra weight given to the

specification was that the justice system was an additional victim of the crime. This was improper. The Eighth Amendment forbids the automatic imposition of the death penalty for any crime. Woodson v. North Carolina, 428 U.S. 280 (1976). By giving this specification such substantial weight, the panel created a situation where the death penalty became an automatic result of the weighing process. This violates the Eighth Amendment as well as Osie's Fourteenth Amendment due process right to have his death sentence determined according to Ohio's statutory scheme. This Court must reverse Osie's death sentence and remand for sentencing.

D. Conclusion.

Capital punishment is only constitutional if the law of the state limits those cases which are eligible for the death penalty by guiding the sentencer's discretion with specifically enumerated factors that may be considered in favor of death. Gregg v. Georgia, 428 U.S. 153 (1976). If the sentencer is not acting under this "guided discretion," then the imposition of the death penalty is considered both arbitrary and void. Furman v. Georgia, 408 U.S. 238 (1972). When a sentencer eschews the state's statutory framework its discretion is unguided and the resulting death penalty is rendered in violation of the constitution.

The sentencing opinion filed by the trial court in the instant case improperly weighed the aggravating circumstances and mitigation evidence and failed to explain why it was sentencing Osie to death. The trial court abandoned the statutory framework for capital punishment, and instead imposed its sentence with unguided discretion based upon arbitrary and capricious factors in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Gregg, 428 U.S. 153. The cumulative effect of these errors reflect serious violations of the statutory deliberative process.

Therefore, Osie's death sentences must be reversed, and this matter must be remanded for new sentencing proceedings. State v. Davis, 38 Ohio St. 3d 361, 372, 528 N.E.2d 925, 936 (1988); State v. Green, 90 Ohio St. 3d 352, 364, 738 N.E.2d 1208, 1224 (2000).

PROPOSITION OF LAW NO. VI

GREGORY OSIE'S DEATH SENTENCE MUST BE VACATED BY THIS COURT AS INAPPROPRIATE BECAUSE THE EVIDENCE IN MITIGATION WAS NOT OUTWEIGHED BY THE AGGRAVATING CIRCUMSTANCES. U.S. CONST. AMENDS. VIII, XIV.

A. Introduction.

Ohio Revised Code § 2929.05(A) requires this Court to determine the appropriateness of the death penalty in every capital case it reviews. The statute directs appellate courts to "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." Id. This Court has defined mitigation as being "not a justification or excuse of the offense in question, but [that] which in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." State v. Steffen, 31 Ohio St. 3d 111, 127, 509 N.E.2d 383 (1987).

The statute requires this Court to make an independent review of the record and decide for itself, without any deference given to the trial court's opinion, whether it believes that this defendant should be sentenced to death. State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984); State v. Maurer, 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984). A review of the record in this case merits the independent conclusion that the death sentence is not appropriate for Gregory Osie.[5]

[5] On its face, this Proposition of Law appears to contradict Osie's arguments of ineffective assistance of counsel raised in Proposition of Law No. XII. As this Court has held, issues of trial counsel's ineffectiveness are best resolved in the postconviction proceedings. State v. Keith, 79 Ohio St. 3d 514, 684 N.E.2d 47 (1997). Appellant is aware that a postconviction investigation is being conducted, which is uncovering additional mitigation evidence that should have been

B. Mitigation Evidence

Ohio Revised Code § 2929.04(B) gives 10 categories into which mitigating evidence may fall: Nature and circumstances of the offense; defendant's character, history and background; and the seven specifically enumerated factors. Osie submitted mitigation evidence which was relevant to several of these enumerated factors.

1. Osie's character, history and background were mitigating evidence.

First, this Court is required to review a capital defendant's "history, character and background" to determine if any mitigating factors can be discovered. Ohio Revised Code § 2929.04(B). These mitigating factors are extremely important as a defendant's background and upbringing is relevant to the determination of whether a sentence of death is appropriate. A great deal of the mitigation evidence presented on Osie's behalf dealt with his character, history, and background. Osie's brother provided testimony that they had two parents who were loving but strict. Mit. Vol. I p. 82. The family was close and would get together to celebrate special occasions and holidays. The family lived in a tough neighborhood; many of the kids did not graduate from high school and some did not make it out of grade school. Id. at p. 65. Despite the rough neighborhood environment, the family, including Osie, was involved in church and community programs. Id. at p. 57, 65. Osie was a senior in high school when he married his girlfriend Kathy because she got pregnant. Id. at p. 121. From all accounts, Osie worked, took care of his family and had no involvement with the criminal justice system. Id. at p. 73.

Osie's family testified to two significant occurrences that seemed to change Osie. First was his divorce from Kathy. Kenneth Osie testified that the divorce from his wife was very hard

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presented to the trial court. Nonetheless, Osie maintains that the aggravating circumstances do not outweigh the mitigating factors that were presented at his sentencing hearing.

on him, and Osie's son, Brian, testified that Osie missed his mother. Id. at p. 89, 104. The other event that significantly altered Osie's behavior was the death of his father. Osie was fairly close to his father. Id. at p. 123. After Osie's father died, his family noticed a change in him. Id. at p. 90, 123. Osie stopped regularly participating in family events. Id. at p. 95. He was not as close to his family as he was before his father's death. Id.

A review of this evidence demonstrates that Osie led a fairly normal life and was an asset to both his family and his community. Osie's family testified that they continue to love and support Osie despite his conviction of aggravated murder, and will continue to have a presence in his life. Id. at p. 71, 97, 111, 128. This Court has recognized that the love and support of family member is a mitigating factor. State v. Fox, 69 Ohio St. 3d 183, 195, 631 N.E. 124, 129 (1994). On the other hand, Osie's background also demonstrated that he suffered a number of setbacks that caused his otherwise good behavior to change and impacted his ability to make good decision. Osie's life and background cannot be summarily dismissed and deserves to be given weight.

2. Substance Abuse

After his father died Osie also began using drugs. Id. at p. 90, 109, 130. Osie's drug use significantly altered the course of Osie's life. Brian, who stayed with his father when he was home from college, saw signs of drug use and even saw his father snort cocaine. Id. at p. 109. As Osie's drug use escalated, he became involved with Robin Patterson. Osie's relationship with Robin was extremely destructive and volatile. Their relationship revolved around drugs and alcohol. Id. at p. 107-08.

Brian had many conversations with his father trying to get him to stop taking drugs. Id. at p. 109. But, he would not stop. Even when confronted by both Kenneth and Brian, Osie

refused to acknowledge his problems. Id. at p. 93-94. Eventually Osie's drug use was so bad Brian moved out of the home. Brian had taken the car keys from an intoxicated Osie to prevent him from chasing after Robin. Brian's actions angered Greg, who, for the first time in Brian's life, physically threatened him. Id. After Brian left, things only got worse. Id. at p. 109. Osie's substance abuse problems escalated after the death of his father and led him to engage in destructive behavior that left him unrecognizable to his family.

This Court has recognized a capital defendant's substance dependence as a mitigating factor. See, e.g., State v. Rojas, 64 Ohio St. 3d 131, 143, 592 N.E.2d 1378, 1387 (1992); State v. Reynolds, 80 Ohio St. 3d 670, 686, 687 N.E.2d 1358, 1374 (1998). Substance abuse should be weighed as a mitigating factor in the same way that any other disease is weighed. State v. Haight, 98 Ohio App. 3d 639, 649 N.E.2d 294, 315 (1994) (equating alcoholism to disease for purposes of mitigation). Moreover, the evidence demonstrates that alcohol and cocaine played a heavy role in Osie's criminal behavior and the events leading up to the murder. Osie's family testified that after he began abusing drugs, they began to notice money missing from their mother's account. Id. at p. 94. Osie's mother testified that after she gave her account information to a lady from the "car company," money started disappearing from her checking account. Id. at p. 126-27. The evidence presented at trial further demonstrated that Robin stole money from her employee and that she wrote fraudulent checks to Osie. After a day of binge drinking and abusing cocaine, Osie went to the victim's home to discuss possible criminal charges against Robin. Tr. 9/11/09 p. 28. Given the unfluence Osie's substance abuse had in altering his behavior, this Court should give this mitigation evidence great weight.

3. Lack of criminal history

In addition to considering Osie's substance abuse, this Court should consider and give weight to Osie's lack of a criminal history. R.C. § 2929.04(B)(5) specifies that an "offender's lack of a significant history of prior criminal convictions and delinquency adjudications" be weighed in mitigation. The testimony presented during Osie's hearing demonstrated that Osie was, up until the point he began using cocaine, a productive member of society. This evidence is mitigating under O.R.C. § 2929.04(B)(5) and is entitled to weight in this Court's consideration. State v. Palmer, 80 Ohio St. 3d 543, 687 N.E.2d 685 (1997).

4. Additional Mitigating Factors

Finally, this Court should consider any other mitigation evidence that would be relevant as to whether Osie should be sentenced to death. O.R.C. § 2929.04(B)(7). Some of the evidence Osie detailed in the character, background and history portion of this argument may appropriately be considered under this section. Additional mitigating factors in Osie's case include his confession and cooperation with the police, which saved them a prolonged investigation, see State v. Rojas, 64 Ohio St. 3d at 131, 143, 592 N.E.2d 1376, 1387 (1992) (assistance to police is a mitigating factor).

Finally, this Court should consider the fact that Robin had significant influence over the decisions Osie made, and that his desire, as he told State's witness Simpson, was to convince Mr. Williams not to pursue criminal charges against Robin. Although Osie's desire to protect Robin was certainly misplaced, the evidence demonstrates that it played a significant role in the murder. The evidence presented by the State was that after the murder, Osie went to Meijer to purchase lingerie for Robin and then texted her for the rest of the evening. After Osie was arrested, he wrote numerous letter to Robin that demonstrated his irrational devotion to her and his continued

desire to protect her. This Court should review this evidence and give weight to the fact that Osie infatuation with Robin played a role in the murder, and that and the murder was the result of an argument that got out of control.[6]

C. Aggravating circumstances

The aggravating circumstances attached to the aggravated murder count in this case were:

- Specification 1: That Defendant purposely caused the death of David Williams while he was committing or attempting to commit the offense of aggravated burglary and was the principal offender in the aggravated murder. O.R.C. § 2929.04(A)(7);

- Specification 2: That Defendant purposely caused the death of David Williams while he was committing or attempting to commit the offense of aggravated robbery and was the principal offender in the aggravated murder. O.R.C. § 2929.04(A)(7);

- Specification 3: That Defendant purposely caused the death of David Willaims, the victim of the aggravated murder, who was a witness to an offense, to prevent David Williams' 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 David Williams was a witness. O.R.C. § 2929.04(A)(8).

This Court must weigh the aggravating circumstances against the totality of the mitigating evidence. State v. Cooey, 46 Ohio St. 3d 20, 544 N.E.2d 895 (1989). Moreover, this Court should merge the number one and number three specifications. See Proposition of Law No. IV.

The aggravating circumstances in Osie's case do not overcome the mitigating factors presented by Osie. In assessing the weight of the aggravating circumstances in Osie's case, it is important to note that this Court is required not to give any deference to the fact that the trial court found Osie guilty of the aggravating circumstances. Instead, this Court is directed by statute that it "shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances that the trial jury or the panel of three

[6] It is significant to note that the panel acquitted Osie of committing the murder with prior calculation and design.

judges found the offender guilty of committing...." Ohio Rev. Code § 2929.05(A). In the present case, there was insufficient evidence to support a conviction of all of the aggravated circumstances. See, Propositions of Law Nos. II, XI and XIII. This effects the legitimacy of the finding of guilt as to the specifications.

D. Weighing aggravating circumstances against mitigating factors.

In addition, this Court must independently examine the factors and decide for itself whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. O.R.C. § 2929.05. While certainly the murder of Mr. Williams was a tragic act, which deserves outrage, this Court must confine its consideration of the arguments in favor of death to the aggravating circumstances. When weighed against the mitigation evidence presented by Osie regarding his substance abuse and his character before becoming involved with cocaine, this Court should find that the aggravating circumstances do not outweigh the mitigation evidence in this case.

The evidence presented at trial demonstrate that Osie went to the victim's home with the intent to talk him out of pressing charges against Robin. He did not go to the victim's home with the intent to kill him. And he did not go there with the intent to rob the victim or enter his home to commit a crime. This signficiantly minimizes the weight the aggravating circumstances in this case. Even if the evidence presented by the State is believed to be true, the evidence demonstrates that intent behind the aggravated circumstances was not formed until the fight with the victim began. When weighed against the mitigation evidence in this case, this Court should determine that the death sentence is not appropriate in Osie's case.

E. Conclusion.

Our law requires "a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). The Eighth Amendment requires individualized sentencing of capital defendants. Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). There is no instance where individualized sentencing is more important than in the realm of capital punishment. Death is a "qualitatively different" punishment. Id. at 305. Mitigation is necessary to humanize the defendant and to show that he is more than a member "of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Id. at 304.

Osie's individual mitigating factors demonstrate that the death penalty is not appropriate in this case. This Court should vacate Gregory Osie's death sentence through its independent reweighing.

PROPOSITION OF LAW NO. VII

THE TRIAL COURT'S ADMISSION OF ATTORNEY WORK PRODUCT OBTAINED FROM OSIE'S CELL, VIOLATED HIS RIGHT TO DUE PROCESS AND HIS RIGHT TO COUNSEL. U.S. CONST. AMENDS. VI, XIV; OHIO CONST. ART. 1, §§ 10, 16.

A. Law.

Material drafted in response to his attorney's request in order to further his defense is protected under the attorney work product privilege. See Bishop v. Rose, 701 F.2d 1150 (6th Cir. 1983); see also United States v. Clark, No. CR-3-99-086 (1&2), 2002 U.S. Dist. LEXIS 20645 (S.D. Ohio, Oct. 2, 2002).

"Furthermore, it is well recognized that a duty rests on the trial court, as well as on the defendant's counsel, to take special care to see that an accused's rights are properly protected." State v. Johnson, 24 Ohio St. 3d 87, 91, 494 N.E.2d 1061, 1065 (1986) (citing Powell v. Alabama, 287 U.S. 45 (1932)).

B. Facts.

Osie was arrested at his home on February 14, 2009. He was transported to the Butler County Sheriff's office and detained through the end of his trial. At his arraignment, on March 13, 2009, Greg Howard and David Washington were appointed to represent Osie.

A hearing was held on September 11, 2009 regarding motions filed by Osie's trial counsel. At that time, the prosecutor alerted the trial court that Osie's cell at the jail had been searched by detectives from the Butler County Sheriff's Office. Defense counsel stated that the evidence that had been seized in the search was material that Osie was "preparing to assist in the defense of this matter." Tr. 9/11/09 p. 61. The detectives turned over the material to prosecutors who copied it and provided it to defense counsel in discovery. Id. at p. 64. Osie's trial counsel asserted that the material was attorney work product and therefore inadmissible. Id.

C. Argument.

Defense counsel informed the court that due to Osie's incarceration, it was impossible to meet with him every day to discuss his defense. Id. at p. 63. So, he and Washington directed Osie to write down anything that he thought may aid in his defense, thereby making those notes attorney work product. Id.

The trial court responded to counsel's concerns by scolding the prosecutor and threatening to house Osie elsewhere if Osie's cell were searched again. Id. at p. 64-65. The court advised counsel that although Osie may not have a reasonable expectation of privacy while incarcerated, he is still entitled to due process. Id. at p. 65. The court went on to analogize the situation to taking the prosecutor's entire file and turning it over to the defense. Id. at p. 66. The court, however, seemed to focus on the future conduct of the sheriff's office, rather than on remedying the harm that had already been done to Osie's defense. The court ordered the prosecution to turn over everything that was obtained in the search of Osie's cell and not just what they anticipated using at trial. Id. at p. 67.

Defense counsel inquired as to whether the court needed a separate motion to consider the search of Osie's cell and notified the court that the defense could have such a motion ready by the following Monday. Id. at p. 106. The court responded that it had "already made a ruling on it," and to file a new motion if the defense wanted the court to "reconsider." Id. at p. 107. The court then reverts to admonishing the sheriff's office, stating: "...there's a line drawn in the sand so to speak as to what they can take out of this man's cell, and they're not going to take out work product." Id. However, the court made no mention of suppressing the material that had already been seized.

The issue was revisited on November 18, 2009, at the hearing on jury excuses. The prosecutor advised the court that after research ("a quick glossary review of federal cases"), he surmised that reversible error occurs when prosecutors view the defense's attorney work product. Tr. 11/18/09 p. 13. The prosecutor further admitted a Sixth Amendment violation occurred if anyone from the state truly viewed something that was work product material. Defense counsel responded to Oster's statements by noting that the violation had already occurred—that defense counsel received attorney work product documents in their discovery packet, necessarily meaning that someone from the State had viewed them. Id. at p. 14-15.

The court again expressed frustration with the sheriff's office and invited Osie's trial counsel to file a motion to bring further issues to the court's attention. Yet, the court again failed to do anything to remedy the situation. The issue was never raised again.

There is no question that, given the trial court's prompts, Osie's trial counsel should have filed an additional motion to suppress the material improperly seized during the search of his cell. See Proposition of Law No. XII. However, despite trial counsel's neglect, the trial court should have rejected the admission of the material as the gatekeeper of the evidence. Johnson, 24 Ohio St. 3d at 91, 494 N.E.2d at 1065 "[A] trial judge must exercise extreme caution to ensure that full justice is accorded to the accused."

D. Conclusion.

The material seized from Osie's jail cell was admitted into evidence in violation of his right to due process and his Sixth Amendment right to counsel. He was prejudiced by this admission. The trial court had a duty as the gatekeeper of the evidence to ensure that Osie's rights were protected, and it failed in performing that duty.

PROPOSITION OF LAW NO. VIII

A CAPITAL DEFENDANT IS DENIED HIS SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS TO A FAIR TRIAL AND RELIABLE SENTENCING AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 9 AND 16 OF THE OHIO CONSTITUTION WHEN A PROSECUTOR FAILS TO TIMELY COMPLY WITH THE REQUIREMENTS SET FORTH IN BRADY V. MARYLAND, 373 U.S. 83 (1963).

A. Prosecutor Fails to Disclose Exculpatory Evidence.

Before Osie's trial, counsel filed pretrial motions requesting relevant exculpatory evidence in actual or constructive possession of the prosecutor. Tr. 9/11/09 p. 50-53, 70-71. In response to the Motion for Discovery, the trial court ordered the prosecutor to turn over all evidence as it was uncovered. Id. at p. 52. Nevertheless, the prosecutor withheld relevant exculpatory evidence until right before and during the trial. The prosecutor's actions limited defense counsel's ability to effectively challenge the evidence against Osie.

1. BCI report.

In September, 2009, the prosecutor represented to the trial court that there was a backlog at the Bureau of Identification and Investigation (BCI) that was affecting their ability to test physical evidence Osie's case. Tr. 9/11/09 p. 51; 12/18/09 p. 9-17. The prosecutor stated that BCI had a strict limit of five on the number of pieces of evidence that can be submitted on each case at one time. Tr. 12/18/09 p. 10. The prosecutor guaranteed the trial court that the BCI results would be turned over to Osie's trial counsel as the tests were conducted. Id. at p. 14.

On April 8, 2010, less than two weeks prior to the start of trial, the prosecutor sent a letter to Osie's trial counsel, enclosing a BCI report relating that no usable prints had been found on a white box containing the possible murder weapon. This report was dated April 13, 2009, almost a full year prior to the April 8th letter. In the letter, the prosecutor asserts that he had just been

made aware of the existence of the report. While the BCI test results could correctly be properly characterized as neutral, this evidence, "because of its neutrality, tend[s] to be favorable to the accused." Patler v. Slayton, 503 F.2d 472, 479 (4th Cir. 1974). Moreover, this Court should at least consider the potential effect of this evidence on the court's verdict in combination with the other Brady material. Simmons v. Beard, 590 F.3d 223, 237 (3rd Cir. 2009).

2. Felony record of key State's witness

At another point during the trial, the State called Donald Simpson, Osie's cellmate in the county jail, to testify about conversations he and Osie had while incarcerated. Trial Tr. Vol. II p. 95-96. The morning of Simpson's testimony, the State revealed to the defense that Simpson had a felony criminal record, which had not been previously disclosed. Id. at p. 106-107. Prosecutors are required to disclose witnesses' felony records under Ohio R. Crim P. 16(B)(1)(b). The prosecutors in Osie's case recognized this duty, yet they argued that they had only recently found out that Simpson had felonies on his criminal record.

Simpson's testimony was essential to the State's case. The State argued that Simpson helped establish the motive for the murder and thus established the elements of one of the death penalty specifications. He testified that Osie told him that Williams was going to press charges against Robin because she stole $18,000 from the business' payroll. Id. at p. 99. Simpson testified that Osie told him that Robin asked him to go speak to Williams and talk him out of filing charges. Id.

Simpson further provided testimony about the events leading up to the murder as well as to details of the murder to which Osie supposedly confessed. Simpson stated that Osie told him that he and Robin had used cocaine that evening, and he went to Williams' house between 1:30 - 2:00 a.m. Id. at p. 99-100. Simpson testified that Osie got mad, punched Dave, and grabbed a

knife. Id. Then Simpson related that Osie took the television, checks, and a credit card to make it look like a break-in had happened. Id. at p. 102. He said Osie tried to use the credit card at Meijer to buy a diamond ring for Robin. Id.

Osie's trial counsel argued that it was unreasonable to believe that the prosecutor had only just been made aware of Simpson's felony record. When asked by the judges whether trial counsel would have done anything differently if they had received the records prior to trial, trial counsel, told the court that they "certainly would have given the name or given information to the private investigator to investigate..." Id. at p. 108. Counsel argued that the defense was prejudiced by not having an opportunity to further investigate Simpson. Id. at p. 107-108.

B. Delayed disclosure of exculpatory evidence amounted to violation of Brady.

The United States Supreme Court in Brady v. Maryland, 373 U.S. 83, 87 (1963), set forth a straight forward rule regarding the suppression of evidence favorable to a defendant:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment respective of the good faith or bad faith of the prosecution.

Id. Through this ruling, the Supreme Court made it clear that it would not tolerate the withholding of favorable evidence to the defendant by the prosecutor. The State, through the prosecuting attorney, has a duty to disclose to the defense all material evidence favorable to the accused. Kyles v. Whitley, 514 U.S. 419, 433 (1995); United States v. Bagley, 473 U.S. 667, 674 (1985); Brady, 373 U.S. at 87. The duty to disclose encompasses impeachment evidence and is evaluated under the same standard as exculpatory evidence. Bagley, 473 U.S. at 676.

Disclosure of Brady material first made during (or right before) the defendant's case is of lesser utility to defense counsel and violates due process. The Sixth Circuit recently addressed the implications of the government's belated disclosure of Brady materials in United States v.

Burke, 571 F.3d 1048 (10th Cir. 2009). The court recognized that it had never explicitly decided "whether and under what circumstances, such a belated disclosure of Brady material would violate due process." Id. at p. 1053. Still, the court recognized that there must be some limitation on disclosure delay in order to protect the principles articulated in Brady. "It would eviscerate the purpose of the Brady rule and encourage gamesmanship were we to allow the government to postpone disclosures to the last minute, during trial." Id. at p. 1054.

The court further recognized that delayed disclosure of evidence could potentially alter defense strategy. "If a defendant could never make out a Brady violation on the basis of the effect of delay on his trial preparation and strategy, this would create dangerous incentives for prosecutors to withhold impeachment or exculpatory information until after the defense has committed itself to a particular strategy during opening statement or until it is too late for the defense to effectively use the disclosed information." Id. The court concluded that the delayed disclosure of impeachment or exculpatory evidence could result in the violation of a defendant's due process rights.

In a similar case, the Twelfth District Court of Appeals reversed and remanded a case in which the prosecutor failed to disclose a confidential informant contract and a pending felony case against an informant. State v. Couch, No. CA2001-06-132, 2002 Ohio App. LEXIS 3411 (Butler Ct. App. June 28, 2002) *12-14. The court held in Couch that "nondisclosure of this evidence until trial was underway denied the defense the ability to develop the evidence with the proper witnesses." Id. at ¶29.

Had the State complied with its duty to turn over exculpatory evidence, defense counsel could have been more prepared in presenting Osie's defense. Osie was prejudiced by the improper withholding of Simpson's felony record and the improper withholding of the BCI

report. If Osie's trial counsel had earlier knowledge of this information, they would have been able to develop a more thorough challenge of Simpson's allegations that he was collecting a knife that Osie had discarded. They also may have reconsidered advising Osie to waive a jury trial, because a jury may have been more susceptible to an argument discrediting Simpson on the basis of his felony record. It is "difficult [to] assimilate new information, however favorable, when a trial already has been prepared on the basis of the best opportunities and choices then available." Burke, 571 F.3d at 1054 citing Leka v. Portuondo, 257 F.3d 89, 101 (2nd Cir. 2001).

C. Conclusion.

The prosecutor's failure to timely provide the BCI results and the felony record of Simpson prejudiced Osie. The information was exculpatory and could have resulted in a different result or different strategic defense had defense been provided with the information earlier. To force the defendant to bear the costs of the State's failure without recource would offend the notion of fair trial that underlies the Brady principle. Burke, 571 F.3d at 1054.

PROPOSITION OF LAW NO. IX

WHEN A CAPITAL DEFENDANT WAIVES HIS RIGHT TO A JURY TRIAL, REVISED CODE § 2945.06 REQUIRES THAT THE PRESIDING JUDGE OF THE COURT, NOT THE JUDGE TO WHOM THE CASE IS ASSIGNED, SELECT THE OTHER MEMBERS OF A THREE-JUDGE PANEL TO HEAR AND DECIDE A CAPITAL MURDER TRIAL.

The selection of the three-judge panel in Osie's case failed to comport with Ohio law. The presiding judge of the Butler County Common Pleas Court did not select the panel members, as is required by statute. Rather, the judge who was originally assigned to preside over the potential jury trial selected the other two judges of the panel. This process violated the Ohio statute which dictates that the presiding judge of the county common pleas court select the panel members. R.C. § 2945.06.

A. Law

Revised Code § 2945.06 sets forth the law concerning jury waivers and three-judge panels:

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

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

There is a difference between the judge presiding over the trial and the presiding judge of the court. In every case there is a judge presiding over that particular case, who does things such as rules on motions, presides over the trial, instruct the jury, and render a judgment. On the other

hand, the duties of the presiding judge of the court are not limited to individual cases but also include matters of interest to the entire Common Pleas court. Thus, if "presiding judge" refers to the assigned judge, it would render the last clause of the statute meaningless. If he or she always has the power to assign the other judges, there is no need to delegate that duty to "the presiding judge or chief justice of that court" and certainly no need to get assignments from the Chief Justice of the Supreme Court of Ohio.

B. Facts

On April 17, 2009, in open court, Judge Noah E. Powers, the judge assigned to Osie's case directed his bailiff to pick balls out of a bottle, each with a number on it corresponding to a specific Butler County Common Pleas Court judge. Both of Osie's trial counsel were present, as well as two prosecuting attorneys. Judges Oney and Pater were selected, as the other two judges for the panel.

Almost a full year later, on March 31, 2010, Osie signed a jury waiver. The waiver included the language:

> I, Gregory Osie, the defendant in the above captioned cause, hereby knowingly, intelligently, and voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a three Judge panel of the Court of Common Pleas of Butler County, Ohio.

This was memorialized in an entry on March 31, 2010. At the time of Osie's trial, the administrative judge for the Butler County Court of Common Pleas was Judge Michael J. Sage. Although the March 31 entry bears the signature of the administrative judge, he took no part in the actual designation of the other two judges.

C. Argument

In State v. Eley, the Ohio Supreme Court ruled that "R.C. 2945.06 provides that the three-judge panel is to be composed of three judges: the judge presiding at the time in the trial of

criminal cases and two judges to be designated by that judge or by the presiding judge or chief justice of that court." Eley, 77 Ohio St. 3d 174, 184, 672 N.E.2d 640 (1996). Judge Powers was not the presiding judge of the Butler County Court of Common Pleas at the time Osie was indicted, when the judges were selected for the panel, or on the date the jury waiver was filed. Because Judge Powers was not the presiding judge for the Butler County Court of Common Pleas, he did not have the authority to select the judges who would serve on the panel.

When a three-judge panel is assembled improperly, the "trial court lacks jurisdiction to try the defendant without a jury." State v. Pless, 74 Ohio St. 3d 333, 339, 658 N.E.2d 766 (1996). O.R.C. § 2945.05 grants a defendant the right to waive a jury. This Court requires "strict compliance" with the requirements of a valid jury waiver. Pless, 74 Ohio St. 3d at 339. Absent strict compliance, a trial court may not try a defendant without a jury. State ex rel. Jackson v. Dallman, 70 Ohio St.3d 261, 262, 638 N.E.2d 563, 565 (1994).

"R.C. 2945.05 and 2945.06 must consequently be construed *in pari materia*" State ex rel. Collins v. Leonard, 80 Ohio St. 3d 477, 478, 687 N.E.2d 443 (1997). Judge Powers was not the presiding judge for Butler County. His decision to select the other judges himself did not comply strictly with R.C. 2945.06; therefore, the panel did not have authority to hear Osie's case. The question is not the subject matter jurisdiction of the court, but the panel's authority to rule in Osie's case. A panel lacking authority cannot proceed to a valid judgment. State v. Swiger, 125 Ohio App. 3d 456, 463, 708 N.E.2d 1033 (1998) citing Morrison v. Bestler, 239 Va. 166, 387 S.E.2d 753, 755 (1990). A judgment from a panel assembled by a court acting beyond its statutory authority is voidable. Swiger, 125 Ohio App. 3d at 462, 708 N.E.2d at 1037.

"The right to a jury is fundamental and is guaranteed by the Fourteenth Amendment." Haliym v. Mitchell, 492 F.3d 680, 698 (6th Cir. 2007) citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

This is all the more important when an individual's life is at stake in the proceeding. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five justices recognizing a distinct, continuing, "life" interest protected by the Due Process Clause in capital cases). All measures must be taken to prevent arbitrary, cruel, and unusual results in a capital trial. See Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976).

D. Conclusion

The court's improper selection of judges to the panel did not follow the requirements of R.C. § 2945.06. Thus, when the panel heard the case, it was not in accordance with the statute designed to guarantee Osie's constitutional rights.

PROPOSITION OF LAW NO. X

A JURY WAIVER AND GUILTY PLEA ARE NOT MADE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WHEN THE CAPITAL DEFENDANT IS NOT ADEQUATELY INFORMED OF HIS RIGHTS AND THE APPLICABLE LAW, AND WHEN HE SUFFERS FROM MENTAL ILLNESS AND IS MEDICATED AT THE TIME HE WAIVES HIS RIGHTS. THUS, A TRIAL COURT ERRS BY ACCEPTING A PLEA WITHOUT FIRST DETERMINING WHETHER THE CAPITAL DEFENDANT IS COMPETENT TO RELINQUISH HIS CONSTITUTIONAL RIGHTS. U.S. CONST. AMENDS. VI, VIII, XIV.

A. Introduction

The trial court erred in accepting Osie's waiver of his Sixth Amendment right to a jury trial, because his waiver was not made knowingly, intelligently, or voluntarily. Trial by jury is the regular, and, by far, the more preferable mode of disposing of issues of fact in felony criminal cases. Patton v. United States, 281 U.S. 276, 312 (1930). The trial court must jealously preserve this right. Id. A criminal defendant may waive a constitutional right as long as the waiver is voluntary, knowing, and intelligent. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Whether there is "an intelligent, competent, self-protecting waiver of a jury trial by an accused must depend upon the unique circumstances of each case." Adams v. United States ex. rel. McCann, 317 U.S. 269, 278 (1942). Factors to be considered include "the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

B. The trial court failed to determine whether the waiver was knowing, intelligent, and voluntary.

Osie signed a waiver of his right to a jury trial before the court determined whether he was competent to do so. Tr. 5/31/10 p. 3. Only after the signed waiver was presented to the court did the presiding judge even attempt to determine Osie's ability to waive his right to a jury trial. Id. The exchange was far from precise and was oftentimes confusing.

This Court has held that a trial court "must insure that the accused's decision to waive such right is made with a sufficient awareness of the relevant circumstances and likely consequences of his waiver." State v. Ruppert, 54 Ohio St. 2d 263, 271, 375 N.E.2d 1250, 1255 (1978) (citing Brady v. United States, 397 U.S. 742, 748 (1970)).

The standards governing a waiver of constitutional rights must be all the more exacting in a capital case where the defendant's life is put into issue by the state's indictment. See Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five Justices recognized a distinct "life" interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests).

In this case, the court failed to ask essential questions to determine whether the waiver was voluntary. The trial court failed to ask whether Osie was on any medication or inquire about his mental health. At the point Osie waived his jury trial, the court was aware that the State had seized numerous from Osie's jail cell. A review of these letters demonstrated that Osie's thought process was strange and erratic. Trial Exhibit 64. The letters would have led anyone to have concerns about Osie's mental health. A capital defendant does not make a knowing, intelligent, and voluntary waiver of his right to trial by jury when he is known to have a history of mental illness and mental challenges and the court fails to make an adequate inquiry. State v. Haight, 98 Ohio App. 3d 639, 664, 649 N.E.2d 294, 310 (1994). The court should have questioned Osie in a manner that would have helped determine whether Osie was in fact competent to waive his legal rights.

In addition, the court failed to inquire into Osie's background, IQ, or level of education-information relevant to whether he could knowingly and intelligently waive his constitutional rights. Because the court asked Osie several questions about his understanding of legal

proceedings, it was essential that the court had some understanding of Osie's ability to understand these, at times, complex issues. The court did not try to determine whether Osie appreciated the right he was waiving. Instead, the court engaged in long-winded explanations. It seemed sufficient to the court that Osie merely answered the court's questions affirmatively without elaborating:

> The Court: And you also understand that the jury would listen to the evidence in the case, all of the evidence in the case, any evidence the State wishes to present and any evidence that you wish to present along with any evidence your attorneys want to present in this case. And that jury would listen to both parts of the trial, and I'll talk to you about that in a minute, but we'll deal with the—with what we generally call the trial portion of the case, that dealing with your guilt or innocence. You understand that?
>
> Defendant: Yes.
>
> The Court: And you understand that that jury would listen to all of the evidence in the case, and unless they were unanimous in their belief that the prosecuting attorneys on behalf of the State of Ohio had proven your guilt beyond a reasonable doubt, that's the requisite degree of proof with respect to a jury trial, and to the unanimous satisfaction of each of those twelve jurors, they would all have to agree that the prosecution had done so, you could not be found guilty of the charges against you or any of the specifications that are attached thereto. You understand that?
>
> Defendant: Yes.

Later Osie seemed confused when the court asked how many judges had to vote in order to find Osie guilty. Id. at 8. Osie answered twelve. Id. at 9. The court did clarify that the court was referring to the panel rather than the jury, but then continued with the questioning. The court concluded its questioning and accepted Osie's jury waiver. Id. at p. 13.

C. Law.

Acquiescence in the loss of fundamental rights may not be presumed, and courts are obliged to establish that any waiver of fundamental rights are in fact made knowingly and voluntarily. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). In cases of purported waiver, "[e]very reasonable presumption should be made against the waiver, especially when it relates to a right or privilege deemed so valuable as to be secured by the Constitution." Simmons v. State, 75 Ohio St. 346, 352, 79 N.E.2d 555, 557 (1906). The circumstances of Osie's jury waiver show that it did not overcome the high burden that the Constitution requires.

Although this Court has held that there is no requirement for a trial court to interrogate a defendant to determine whether he is fully apprised of the right to a jury trial, State v. Jells, 53 Ohio St. 3d 22, 559 N.E.2d 464, syllabus, ¶1 (1990), the trial court is still constitutionally obliged to accept only knowing and voluntary waivers. See also State v. Fitzpatrick, 102 Ohio St. 3d 321, 326, 810 N.E.2d 927, 934 (2004) (no requirement for a trial court to interrogate a defendant on right to jury trial, but defendant must have some knowledge of the nature of the right). Under Ohio law, the trial court had no obligation to interrogate Osie, but the inquiry made here failed to establish that he was aware of and understood his rights; that is, the court's inquiry failed to establish that Osie waived his right to a jury trial knowingly, intelligently, and voluntarily.

A capital defendant's right to trial by jury is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 5 of the Ohio Constitution. Osie could not be deprived of this right absent an intelligent, knowing, and voluntary waiver. Ohio R. Crim. P. 23(A); O.R.C. § 2945.05; Adams v. United States, ex rel. McCann, 317 U.S. 269 (1942). Because his waiver did not comport with those requirements, it is invalid.

D. Conclusion.

The court had an obligation to make a full inquiry into Osie's mental state because it affected his ability to make a knowing, intelligent, and voluntary plea, but the court failed to do so. The fact that a defendant—particularly someone who has a history of substance abuse—responds to the court's leading questions that his plea is being made knowingly, intelligently, and voluntarily does not make it so. The unique characteristics of the defendant must be considered and explored. The trial court did not ask the relevant questions to determine whether Osie was capable of relinquishing his rights and pleading guilty. The court did not consider the totality of the circumstances surrounding the plea. This Court must reverse the trial court's acceptance of Osie's jury waiver and remand this case for a new trial.

PROPOSITION OF LAW NO. XI

WHERE A THREE-JUDGE PANEL CONCLUDES THAT THE HOMICIDE DID NOT TAKE PLACE DURING A ROBBERY AND THAT THE THEFT OFFENSE OCCURRED SEPARATELY AND SUBSEQUENT TO THE HOMICIDE, THEN THE EVIDENCE IS CONSTITUTIONALLY INSUFFICIENT TO SUSTAIN A CONVICTION FOR AGGRAVATED ROBBERY; THUS, THE RESULTING CONVICTION VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

A. Introduction

Osie was charged with aggravated murder and aggravated robbery. Attached to the aggravated murder count was the capital specification that the murder took place during the commission of aggravated robbery. R.C. 2929.04(A)(7). Pursuant to the specification, the State had to prove the element of aggravated robbery. The aggravated robbery statute requires that the defendant use (or threaten to use) force to further the theft offense. Here, the three-judge panel concluded that the theft occurred subsequent to the homicide and with independent motivation. The panel concluded that the theft occurred to make the homicide look like a burglary gone awry. Consequently, the evidence is insufficient to sustain the conviction.

B. Argument

1. The panel could not lawfully find Osie guilty of aggravated robbery after it found that his decision to steal from Williams occurred after the homicide and was done solely as a cover-up.

The issue in this case is a narrow and unique one. Unlike many capital cases, this case was heard by a three-judge panel. Accordingly, the sentencing opinion memorializes some of the factual findings that the panel relied on to convict Osie of aggravated robbery. So, the panel's opinion gives this Court a framework to undertake its review of whether the evidence

was sufficient. This is in contrast to jury cases where the reviewing court cannot know what the jurors specifically concluded and must afford them great deference.

Because this is a sufficiency claim, Osie does not take issue with the factual findings of the panel. Rather, Osie contends that the panel erroneously applied the law to those findings. Specifically, the panel held that the aggravated robbery "was more related to the cover-up, in terms of trying to make the murder look like a burglary gone awry." Sentencing Opinion, p. 6. This factual finding precludes convicting Osie on the aggravated robbery specification because Osie never committed an aggravated robbery.

R.C. § 2911.01 states the following:

> A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following: (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it; * * * (3) Inflict, or attempt to inflict, serious physical harm on another."

There is no dispute that a theft offense occurred, nor does Osie dispute whether the panel could have found that either subsection one or three applied here. But based on the panel's conclusion that the theft offense was separate in time and done with a different intent than homicide, the conviction cannot stand. The resolution of this issue turns in large measure over the statute's use of the word "committing."

Courts, whenever possible, are supposed to give words their plain and ordinary meaning. State ex rel. R. Bauer & Sons Roofing & Siding v. Industrial Commission, 84 Ohio St. 3d 62, 66, 701 N.E.2d 995 (1998). Further, the court should endeavor to give meaning to all words. Ohio Water Service Co. v. Ressler, 173 Ohio St. 33, 180 N.E.2d 2 (1962). With those canons of construction in mind, the use of the present tense of "commit" operates here to narrow the time during which one of the elements in the subsections must take place. In

other words, the defendant's use of force must occur during the commission of the theft offense.[7] Here, the attack on Williams preceded the theft; it happened independent to the theft; and it was not motivated by the theft. Thus, Osie did not commit an aggravated robbery.

Certainly, this Court has interpreted "committing a theft offense" to be inclusive of a significant amount of time. See State v. Rojas, 64 Ohio St. 3d 131, 139, 592 N.E.2d 1376 (1992) (holding the commission of the theft could have taken as long as three hours). Similarly, this Court has concluded that whether the asportation occurs before or after the use of force is immaterial. State v. Smith, 61 Ohio St. 3d 284, 290, 574 N.E.2d 510 (1991). But regardless of the how long the Court finds that theft is ongoing, the theft offense (which forms the basis of the robbery charge) must begin prior to the use of force. This is because robbery is a more serious form of theft. As the 1974 committee comment to R.C. § 2911.01 makes clear, what separates theft from robbery is the "element of actual or threatened personal harm to the victim; and that the degree of actual or potential harm involved should determine the seriousness of a robbery."

Even when reviewing the evidence in a light most favorable to the prosecution, this conviction cannot stand. See Jackson v. Virginia, 443 U.S. 307, 319 (1979). Again, what separates this case from others is the finding made by the panel that the theft occurred to cover-up the crime. Ordinarily, there are some facts in the record that this court finds could reasonably support the jury's verdict. See State v. Benge, 75 Ohio St. 3d 136, 142-143, 661 N.E.2d 1019 (1996) (relying on defendant's statement to another person that he killed her for her bank card); State v. Lewis, 67 Ohio St. 3d 200, 205, 616 N.E.2d 921 (1993) (relying on

[7] The statute also prohibits the use of force while immediately fleeing after the commission of the offense, but that is not at issue here.

defendant's statement he "sort of" intended to rob the victim); and State v. Smith, 61 Ohio St. 3d 284, 290 (1991) (finding defendant intended to rob the victim before stabbing her based his statements). See also State v. Rojas, 64 Ohio St. 3d 131, 139 (1992) (inferring the intent to rob from the fact the defendant did so).

In the present case, Osie's intent to commit the robbery could be inferred from the fact he took Williams' property at the conclusion of the homicide. Rojas, 64 Ohio St. 3d at 139. But the panel's opinion makes it clear that the judges rejected that permissible inference. Moreover, by concluding that the theft was done only as a cover up, the panel severed the necessary link between the theft and using force to further the commission of the theft. Thus, the panel's finding is irreconcilable with its verdict and must be reversed.

2. Osie is not guilty of the aggravated robbery specification under R.C. § 2929.04(A)(7) because the homicide was not committed while either committing a robbery or fleeing afterward.

R.C. § 2929.04(A)(7) states the following: "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 * * *." In construing the meaning of "while" in this section, this Court held that it "does not indicate * * * that the killing must occur at the same instant as the [underlying felony], or that the killing must have been caused by [it], but, rather, indicates that the killing must be directly associated with the [underlying felony] as part of one continuous occurrence * * *." State v. Cooey, 46 Ohio St. 3d 20, 23, 544 N.E.2d 895 (1989), quoting State v. Cooper, 52 Ohio St. 2d 163, 179-180, 370 N.E.2d 725 (1977).

Similarly, this court rejected the claim that the intent to commit the felony precede the murder: "Neither the felony-murder statute nor Ohio case law requires the intent to commit

the felony to precede the murder in order to find a defendant guilty of a felony-murder specification." State v. Williams, 74 Ohio St. 3d 569, 660 N.E.2d 724 (1996). Osie asks this Court to reconsider the scope of Williams and prohibit its application in situations where the murder happens before the felony and the three-judge panel specifically finds that the intent to commit the requisite felony did not occur until after the murder.

The plain language of the statute requires that the murder must occur "while" the felony was committed, attempted, or while fleeing immediately afterward. Thus, the statute mandates a temporal order, i.e. the predicate felony should begin before the murder. For example, if a store clerk is killed at any time during a holdup, then the felony murder rule would understandably apply. The result would be the same if a burglar broke into a home to steal, encountered the resident, and killed the victim before stealing anything. And in most cases before this court, there is ample evidence to support a jury verdict that the felony began before the murder. But, again, this case is different because of the express finding from the panel that murder and theft were committed with independent intents.

Beyond the plain reading of the statute, the rule in Williams is a minority rule and lacks grounding in the historical purpose of the felony murder rule. The Williams case was criticized by the Maryland Court of Appeals as representing the minority rule, and it specifically cited to Williams as a case it ultimately disagreed with. State v. Allen, 387 Md. 389, 400 (Md. 2005). Maryland had adopted the same approach as Williams in 1995, but 10 years later it abandoned it as logically inconsistent. Id. at 400. In its analysis, the Maryland Court of Appeals followed the reasoning employed by the Supreme Court of Tennessee, which held that "If an accused had no intent to commit the underlying felony at the time of

the killing, the basis for the felony-murder rule does not apply." Id. at 400, citing State v. Buggs, 995 S.W.2d 102, 106-07 (Tenn. 1999).

The policy reason behind abandoning the minority rule is the following:

> [Because] felony-murder rule is a legal fiction in which the intent and the malice to commit the underlying felony is "transferred" to elevate an unintentional killing to first-degree murder, we are reluctant to extend the doctrine to include cases in which there was no intent to commit the felony at the time of the killing. Thus, in a felony-murder case, intent to commit the underlying felony must exist prior to or concurrent with the commission of the act causing the death of the victim.

Id., 400-401, citing State v. Buggs, 995 S.W.2d 102, 106-07 (Tenn. 1999). The Maryland Court of Appeals continued, this time citing to the Supreme Court of Pennsylvania:

> When an actor engages in one of the statutorily enumerated felonies and a killing occurs, the law, via the felony-murder rule, allows the finder of fact to infer the killing was malicious from the fact that the actor engaged in a felony of such a dangerous nature to human life because the actor, as held to a standard of a reasonable man, knew or should have known that death might result from the felony. Additionally, a greater penalty is imposed for murder of the second degree or felony murder, than that imposed for murder of the third degree even though the latter also is malicious. In so providing, the law seeks to add a greater deterrent to engaging in particularly dangerous felonies.
>
> But, where an actor kills prior to formulating the intent to commit the underlying felony, we cannot say the actor knew or should have known death might occur from involvement in a dangerous felony because no involvement in a dangerous felony exists since the intent to commit the felony is not yet formulated. Also, the greater deterrent is not necessary, and the rule has no application.

Id. at 401-402, citing Commonwealth v. Legg, 417 A.2d 1152, 1154 (Pa. 1980). The reasoning of majority jurisdictions apply equally here—perhaps even more so because this Court is faced with the panel's finding that the intent to commit the theft occurred after the homicide. Osie could not have formed the intent to steal prior to the murder because without the murder there was obviously no reason to try to cover it up. In that case, there is no valid policy reason to apply Williams here. Therefore, the Court should reverse the panel's

judgment that Osie is guilty of the aggravated robbery specification under R.C. § 2929.04(A)(7).

C. Conclusion.

A robbery offense must begin prior to the murder. Although the Court has permitted fact finders to infer from the theft that the robbery was intended, the three-judge panel rejected that inference and found that the theft took place after the murder, and that the intention of the theft was to cover up the murder. Thus, the panel could not correctly conclude that the homicide took place during a robbery, as required by R.C. 2929.04(A)(7). Accordingly, the Court should vacate the judgment below.

PROPOSITION OF LAW NO. XII

A DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHEN COUNSEL'S PERFORMANCE, DURING THE CULPABILITY AND PENALTY PHASES OF HIS CAPITAL TRIAL, IS DEFICIENT TO THE DEFENDANT'S PREJUDICE. U.S. CONST. AMEND. VI; OHIO CONST. ART. I, § 10.

Defense counsel's performance failed to meet the prevailing standards of practice. As a result, Osie's rights as guaranteed by the Sixth and Fourteenth Amendments and Article I, §§ 10 and 16 of the Ohio Constitution were violated.

A. Defense errors in trial phase.

1. Pretrial.

Prior to the culpability phase, Osie's trial counsel were ethically and legally obligated to investigate thoroughly the facts and law in his case and to file all necessary or relevant documents or motions.

Counsel breached this pretrial duty of investigation and preparation in the following manner:

1) Failed to retain an investigator, when the trial court approved a motion for funds to retain an investigator. Defendant's Motion C; Tr. 4/17/09 p. 6.

2) Failed to file a motion to suppress the admission of attorney work product, when this is a clear violation of Bishop v. Rose, 701 F.2d 1150 (6th Cir. 1983). See Proposition of Law No. VII.

3) Failed to object to the admission of Osie's selectively recorded statement. See Proposition of Law No. XVIII.

4) Failed to request a competency evaluation, when Osie demonstrated a disjointed understanding of the proceedings and discovery revealed unhealthy personal relationships. See Tr. 9/11/09 p. 109; Tr. 3/18/10 p. 11; see also Trial Exhibit 64.

5) Failed to retain a proper mitigation specialist.

6) Failed to ensure that the three-judge panel was created in accordance with R.C. § 2945.06. See Proposition of Law No. IX.

7) Failed to ensure that Osie had a proper understanding of the jury waiver and its subsequent consequences. See Proposition of Law No. X.

2. Trial.

In addition to the duty to perform pretrial preparation, trial counsel for Osie had a duty to in the culpability phase of the proceedings to prevent the admission of all objectionable testimony and exhibits, and to correct an improper verdict. Osie's trial counsel failed to protect Osie's rights in the following manner:

1) Failed to request that witness statements be sealed for appellate review. Trial Tr. Vol. I p. 22, 61-62; Trial Tr. Vol. II p 105-106.

2) Failed to object to numerous instances of prosecutorial misconduct. See Proposition of Law No. XIV.

3) Failed to object to the admission of attorney work product, when this is a clear violation of Bishop v. Rose, 701 F. 2d 1150 (6th Cir. 1983). See Proposition of Law No. VII.

Counsel who try capital cases and who meet the prevailing standards for defense counsel in capital cases would not have made such errors. Trial counsel's errors and omissions, and their cumulative effect, denied Osie his right to counsel in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995).

B. Defense errors in mitigation.

The sentencing phase is likely to be "the stage of the proceeding where counsel can do his or her client the most good." Glenn v. Tate, 71 F.3d 1204, 1207 (6th Cir. 1995) (quoting Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989)). In order to have a reliable sentencing determination the sentencer must focus on the individual characteristics of the defendant and

circumstances of the crime. Lockett v. Ohio, 438 U.S. 586 (1978). It is defense counsel's obligation to humanize and personalize their client: to have the jurors see not merely a murderer, but a person in who we see the "diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

In determining prevailing professional norms, the United States Supreme Court looks to the ABA Guidelines for the standards of conduct for defense counsel in capital cases. Rompilla v. Beard, 545 U.S. 374, 374-377 (2005); Wiggins, 539 U.S. at 524; Hamblin v. Mitchell, 354 F.3d 482, 486 (6th Cir. 2003).

> In deciding which witnesses and evidence to prepare concerning penalty, counsel's considerations should include considering witnesses "who would present positive aspects of the client's life, or would otherwise support a sentence less than death," and demonstrative evidence such as photos *** and documents that would humanize the client or portray [him] positively.

1989 ABA Guidelines 10.11 F. 1 & 5. See Marshall v. Hendricks, 307 F.3d 36, 103 (3rd Cir. 2002) ("The purpose of investigation [for the penalty phase] is to find witnesses to help humanize the defendant, given that a jury has found him guilty of a capital offense."); see also Mayes v. Gibson, 210 F.3d 1284, 1288 (10th Cir. 2000) (mitigation evidence "affords an opportunity to humanize and explain – to individualize a defendant outside the constraints of the normal rules of evidence"). Further, counsel should present to the sentencing entity **all** reasonable available mitigation, including the defendant's "complete social history" unless there are strong strategic reasons not to do so. 1989 ABA Guidelines 11.8.6.

As demonstrated below, defense counsel's behavior was not "reasonable considering all the circumstances." Strickland, 466 U.S. at 688. Prior to the mitigation phase, counsel breached their duty of effective representation by advising Osie to waive his right to a jury trial and failing

to advise him of all the relevant circumstances and likely consequences of a jury waiver in the mitigation phase of a capital trial. See Proposition of Law No. X.

Defense counsel offered only the testimony of a few family members and friends. Although these witnesses referenced his substance abuse, counsel presented no expert testimony to explain the effects of cocaine on Osie's behavior. Counsel must conduct a thorough investigation into their client's background. Williams v. Taylor, 529 U.S. 362, 397 (2000) (internal citation omitted); Austin v. Bell, 126 F.3d 843, 848 (6th Cir. 1997). Osie had the right to present and to have the jury consider all of the mitigating evidence available in his case. Strickland, 466 U.S. at 706 (Brennan, J., concurring in part and dissenting in part) (citing to Eddings v. Oklahoma, 455 U.S. 104 (1982)). However, this right means very little when trial counsel fails to look for and present mitigating evidence. Strickland, 466 U.S. at 706 (citing Comment, 83 Colum.L.Rev. 1544, 1549 (1983)); See e.g. Burger v. Zant, 718 F.2d 979 (11th Cir. 1983). Trial counsel did not take the necessary time or expense to prepare a case sufficient to convince the court that the aggravating circumstance did not outweigh the mitigating factors, their ineffectiveness effectively sealing Osie's fate.

Osie's counsel failed to explore the wealth of available mitigation. Providing the court with information about the client's background, education, mental and emotional stability, family relations, and the like are all relevant in mitigation. It was counsel's job to find, prepare, and present this information to the jury, but they failed in this task. See Williams, 529 U.S. at 397; Austin, 126 F.3d at 848.

Appellant's trial counsel also failed to do the following during the mitigation phase of Osie's trial:

1) Failed to ensure Osie was afforded his right to allocution. See Proposition of Law No. I.

2) Failed to object to numerous instances of prosecutorial misconduct. See Proposition of Law No. XIV.

The matters listed in the preceding paragraph as well as other matters, would have been raised by counsel who try capital cases and who meet the prevailing standards for defense counsel in capital cases.

C. Ineffective Assistance of Counsel.

The errors and omissions of Osie's appointed counsel violated his Sixth Amendment right to effective representation in the culpability phase of his trial.

The Sixth Amendment right to counsel applies to the states through the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335 (1963). The test for whether that right to counsel has been violated is found in Strickland v. Washington, 466 U.S. 668 (1984). The reviewing court must determine if counsel's performance was deficient. Id. at 687. If counsel's performance was deficient, the court must determine if the deficiency prejudiced the accused. Id. To establish prejudice, the accused need not establish outcome determinative error. Id. Instead, the accused is prejudiced if the reviewing court loses confidence in the fairness of the trial. Id.

Strategic choices by appointed counsel are virtually unassailable. Id. at 690. Strickland makes clear, however, that a reasonable investigation of both the facts and the applicable law is required before a court may deem counsel's choice strategic. Id. at 691. Further, under Strickland, appointed counsel in a criminal case has a "duty to advocate the defendant's cause" as well as "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688. Federal courts have consistently recognized that

Strickland's duties to advocate and to employ "skill and knowledge" include the necessity for trial counsel to object or otherwise preserve federal issues for review. See e.g., Gravley v. Mills, 87 F.3d 779, 785 (6th Cir. 1996); Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994). Cf. Freeman v. Lane, 962 F.2d 1252, 1259 (7th Cir. 1992) (appellate counsel ineffective for abandoning viable federal claim; cause and prejudice for default established).

When assessing the performance prong in a capital case, the American Bar Association's Guidelines for the Appointment of Counsel in Death Penalty cases are highly instructive of what is required of appointed counsel. See Wiggins v. Smith, 539 U.S. 510, 524 (2003).

Both the verdict and sentence are unreliable in the present case because of trial counsel's many failures outlined in this Proposition of Law. Each claim is sufficient in and of itself to establish that Osie's trial counsel were ineffective. Further, trial counsel's failures deprived Osie of a fair trial. "In addition to finding prejudice from individual deficiencies," the "cumulative impact" of Osie's trial counsel's many deficiencies was prejudicial. Harris v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995).

D. Conclusion.

Osie has shown throughout his brief that trial counsel failed to act as the competent counsel envisioned by Strickland. Also, trial counsel failed to object and thus preserve numerous errors at trial, which are red-flagged in this proposition as well as other propositions of law contained within this brief. If this Court determines that any of the errors raised in this brief were not adequately preserved, this Court should find that counsel's performance was deficient. As a result, under Strickland, trial counsel's errors, individually, and cumulatively, deprived Osie of a fair trial, the result of which was unreliable. Osie's sentence and conviction should be reversed and the cause remanded for a new trial. Alternatively, Osie's sentence should be

reversed due to trial counsel's serious errors preparing for and during the penalty phase, and this cause should be remanded for a new sentencing hearing.

PROPOSITION OF LAW NO. XIII

R.C. § 2929.04(A)(7) IS UNCONSTITUTIONAL WHERE THE SAME ACTS THAT CONSTITUTE THE CHARGE OF AGGRAVATED MURDER ARE ALSO USED TO NARROW THE CLASS OF DEATH ELIGIBLE DEFENDANTS.

A. The aggravating circumstances of R.C. § 2929.04(A)(7) does nothing more than duplicate the elements of felony murder found in R.C. § 2903.01(B).

The two constitutional ways to satisfy the narrowing requirement is either by narrowing at the guilt phase or the aggravating circumstances phase. Lowenfield v. Phelps, 484 U.S. 231 (1988). Ohio's scheme does not narrow at the guilt phase; so, the narrowing must occur at the aggravating circumstances stage. But, in a case such as this one, the evidence supporting the charge of aggravated burglary is introduced during the guilt phase, which means the jury also makes its finding regarding those facts at thate stage. So, when the jury reviews the aggravating circumstances, there is nothing further to consider. The mere fact a burglary occurred makes the defendant both eligible for death and already guilty of an aggravating circumstance. Thus, no constitutionally mandated narrowing occurs.

In this case, especially, there is no narrowing; in fact, the opposite is true—a single act has an expansive legal effect. Here, Osie's single action, done in the heat of the moment, should not simultaneously satisfy six different elements[8]; thus making the defendant eligible for the death penalty. See State v. Fry, 125 Ohio St. 3d 163, 203-204, 926 N.E.2d 1239 (Ohio 2010) (Pfiefer, J., concurring). By the single act of stabbing Williams, Osie committed trespass, murder (as the accompanying felony to aggravated burglary,) aggravated burglary, capital felony murder, and satisfies two elements of the aggravating circumstance because he was the principle offender and Williams died during the aggravated burglary. This is an extreme form of

[8] This includes trespass, assault, aggravated burglary, capital felony murder, and two different elements of the aggravated burglary specification.

bootstrapping and should be rejected as sufficient narrowing to make a defendant eligible for the death penalty.

Here, the aggravating circumstance and the aggravated murder are essentially the same thing. Thus, under this set of circumstances, the application of the death penalty becomes arbitrary and unconstitutional. Zant v. Stephens, 462 U.S. 862 (1983); Gregg v. Georgia, 428 U.S. 153 (1976).

B. The constitutionally required narrowing of R.C. § 2929.04(A)(7) can be done based on a more historically based interpretation of Ohio's aggravated burglary statute.

Ohio's aggravated burglary statute guards against the risk of personal harm that accompanies unlawful entry into an occupied structure with criminal intent. A defendant lawfully entering the home with no preconceived criminal intent, who later commits a crime, should not be convicted of aggravated burglary. Here, the evidence demonstrates that Osie entered the home lawfully and with only the purpose to talk to Williams. Therefore, these facts should not sustain the aggravated burglary conviction.

1. The Court should limit its prior holdings and find that a conviction for aggravated burglary can be sustained only if prior to the entry a defendant formed the intent to commit a crime.

R.C. § 2911.11 states that "No person, by force, stealth, or deception, shall trespass in an occupied structure . . ., when another person . . . is present, with purpose to commit in the structure . . . any criminal offense." A plain reading of the statute suggests that the purpose to commit any criminal offense must be held concurrently with the trespass. Contrary to that reading, this Court determined that a defendant can form the intent to commit a crime at any point during the trespass. State v. Fontes, 87 Ohio St. 3d 527, 721 N.E.2d 1037 (2000). This interpretation exposes persons who commit minor infractions to severe punishment. Therefore,

the Court should reverse Fontes and hold that the intent to commit the criminal offense must occur prior to entry.

The decision in Fontes is contrary to the legislative intent behind the burglary offenses. The 1974 committee comment to R.C. § 2911.12 states that "the offense is viewed as serious because of the higher risk of personal harm involved in maliciously breaking and entering an occupied . . . structure." Burglary is different than breaking and entering in two important respects; unlike breaking and entering, a burglary requires that the structure be occupied and that another person be present. R.C. § 2911.12 and R.C. § 2911.13. Breaking and entering is then distinguishable from trespassing because it requires that the person enter with the purpose to commit a theft offense—trespass requires no such intent. R.C. § 2911.13 and R.C. § 2911.21.

Yet, under the reasoning of Fontes, the carefully crafted distinction between the statutes begins to blur. Under the General Assembly's scheme, criminal intent is an important aggravator that elevates the seriousness of the burglary offenses beyond mere trespassing. In fact, it is the formation of criminal intent prior to entry that turns a trespass, a misdemeanor, into "maliciously breaking and entering," a felony. Thus, Fontes does not reflect the will of the General Assembly and should be abandoned.

Further, the majority of other states with similar statutes follow the rule that the criminal intent must be conceived prior to entry. Dolan v. State, 925 A.2d 495, fn.9 (Del. 2007). The Court of Appeals of New York explained that the purpose for requiring the intent prior to entry is because burglary is a more serious crime than simply the sum of the trespass and criminal intent to attempt a crime inside the premises. People v. Gaines, 74 N.Y.2d 358, 361-362 (N.Y. 1989). The Gaines court explained the requirement to have the criminal intent formed prior to entry appeared because of historical reasons. Id. Before the crime of burglary appeared, the defendant

could only be punished for attempting the crime he intended, regardless of how much danger that attempt caused bystanders. See id. So, the crime of burglary has always been aimed at punishing intended criminal actions—so long as they put innocent people at risk for harm. See id. Both the risk of harm and the intent to commit a crime has been historically necessary. But Fontes reads out of the statute the need to intend to commit a criminal offense, thus departing from its historical antecedents.

Beyond any historical arguments and the persuasive authorities from other states, there is certainly a prudent reason for requiring that the intent be preconceived. By following the minority rule, as Ohio does, many misdemeanors are transformed into either a felony of the first or second degree. For example, entering the house as a guest, but later slapping the host after a dispute would elevate this relatively minor offense into a first-degree felony. There are numerous instances where a minor offense jumps up to a serious felony just because it was done inside of a home.

As illustrated by the committee comment, the burglary offenses are not considered serious simply because they happen inside an occupied structure, but because entering an occupied structure with the intent to commit a crime greatly increases the risk of personal harm to the occupants. In other words, trespass guards against harm to property; burglary guards against potential harm to people.

But the lack of a preconceived intent blurs this distinction and transforms many crimes committed indoors into serious felonies. Instead of falling into what is essentially an indoor/outdoor distinction for burglary, the Court should return to the traditional focus of burglary—the risk the intended criminal action has of harming the occupants. Under the Court's current case law, nearly every indoor crime can be bootstrapped into burglary. Abandoning

Fontes and joining the majority of states serves the overall historical purpose of the burglary charge and avoids over punishing certain offenders.

Here, the mere fact this crime happened indoors, rather than on the sidewalk, elevated what was arguably manslaughter into capital murder. Osie and Williams got into an argument that escalated into violence. If the same fight had happened on the sidewalk, the determining factor between murder and manslaughter would have been whether the fact finder believed whether Williams pulled the knife first. But here not only was that distinction almost inconsequential, but merely because the dispute happened inside, it was indicted as capital murder. See Davis v. States, 737 So. 2d 480, 484-486 (Ala. 1999) (Almon, J., dissenting). See also State v. Fry, 125 Ohio St. 3d 163, 203-204 (Ohio 2010) (Pfiefer, J., concurring) ("The [Ohio] death-penalty scheme does not envision that every murder that involves a trespass will be a death-penalty case, though that is essentially what happens when aggravated burglary is chargeable.")

The Court should join the majority of the states and return to burglary's historical roots and require that intent to commit the offense occur prior to the entry.

2. In the absence of evidence showing unlawful entry into the home, the State must demonstrate that a trespass occurred prior to the infliction of physical harm.

In 1987, this Court held that even if the initial entry was lawful, if a defendant assaults the occupant, then that consent is impliedly withdrawn and the defendant becomes a trespasser. State v. Steffen, 31 Ohio St. 3d 111, 509 N.E.2d 383 (1987). Under Steffen, a guest becomes a trespasser the moment he assaults the host. State v. Steffen, 31 Ohio St. 3d 111 (1987). The Court created a legal fiction where the occupant impliedly withdraws consent, thus turning the guest into a trespasser. Id.

Because this fiction has the ability to turn a slap into a first-degree felony, the Court ought to limit this fiction to situations where the assault ends and the defendant had an opportunity to leave. If this were the case, it is plain that the defendant is a trespasser and if any further criminal act is undertaken, then a burglary has been committed. Limiting the application of the rule this way is straight-forward and avoids the nonsensical application in a situation such as this one, where a single act turns a guest into a trespasser, an assailant, and a burglar.

3. When Osie entered Dave Williams' home, he did not intend to steal from him, rather he made this decision only after the homicide; thus, Osie did not commit aggravated burglary.

A criminal conviction cannot stand unless it is based on proof beyond a reasonable doubt of all essential elements of the crime. In re Winship, 397 U.S. 358, 364 (1970). "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. In assessing sufficiency of the evidence, the Court must determine, after viewing the evidence in a light most favorable to the prosecution, whether any rational trier of fact could have reasonably found guilt beyond a reasonable doubt as to each specific element of the crime charged. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

Even examining the facts in a light most favorable to the State, they are insufficient to sustain a conviction. The panel found that the aggravated burglary was committed simultaneously with the murder. Sentencing Opinion, p. 6. The court held that "the trespass, which formed the basis of the *Aggravated Burglary* charge, commenced when Defendant began to menace and assault Mr. Williams in his own home . . .." Id. (emphasis sic). Here, the panel relied on Osie's assault and menacing to form the basis of the trespass. But the State never presented evidence that Osie trespassed "by force, stealth, or deception." Rather, the State

demonstrated that, under Steffen, Osie's privilege to be inside the house had terminated. But the statute requires that the trespass itself be undertaken with either force, stealth, or deception. Because this clause modifies the term trespass, the State was obligated to present evidence regarding either of these facts. Therefore, the evidence is insufficient to sustain the judgment.

C. Conclusion

As R.C. 2929.04(A)(7) operates in a case like this, it is unconstitutionally overboard. It does not properly narrow the class of persons eligible for the death penalty. To avoid the constitutional deficiency, the Court should return to aggravated burglary historical roots and require that the intent to commit a criminal offense occur prior to entry. A R.C. 2929.04(A)(7) applies here, Osie's conviction is unconstitutional and should be reversed.

PROPOSITION OF LAW NO. XIV

A CAPITAL DEFENDANT IS DENIED HIS SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS TO A FAIR TRIAL AND RELIABLE SENTENCING AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 9 AND 16 OF THE OHIO CONSTITUTION WHEN A PROSECUTOR COMMITS ACTS OF MISCONDUCT DURING THE TRIAL PHASE AND THE SENTENCING PHASE OF HIS CAPITAL TRIAL.

During both the trial and sentencing phase of Osie's capital trial, the State committed acts of misconduct that deprived Osie of a fair trial and a reliable sentence. As a result of these acts, Osie's rights guaranteed under the Eighth and Fourteenth Amendments to the United States Constitution as well as Article I §§ 9 and 16 of the Ohio Constitution were violated. Thus, Osie's convictions and sentence must be reversed.

A. Trial phase misconduct

1. Prosecutor withheld exculpatory evidence

Before Osie's trial, defense counsel filed pretrial motions requesting relevant exculpatory evidence in actual or constructive possession of the prosecutor. Tr. 9/11/09 p. 50-53, 70-71. In response to the Motion for Discovery, the trial court ordered the prosecutor to turn over all evidence as it was uncovered. Id. at p. 52. Nevertheless, the prosecutor withheld relevant exculpatory evidence until right before and during the trial. The prosecutor's actions limited defense counsel's ability to effectively challenge the evidence against Osie.

On April 8, 2010, less than two weeks prior to the start of trial, the prosecutor sent a letter to Osie's trial counsel, enclosing a BCI report relating that no usable prints had been found on a white box containing the possible murder weapon. This report was dated April 13, 2009, almost a full year prior to the April 8th letter. In the letter, the prosecutor asserts that he had just been made aware of the existence of the report.

At another point during the trial, the State called Donald Simpson, Osie's cellmate in the county jail, to testify about conversations he and Osie had while incarcerated. Trial Tr. Vol. II p. 95-96. The morning of Simpson's testimony, the State revealed to the defense that Simpson had a felony criminal record, which had not been previously disclosed. Id. at p. 106-107.

Simpson's testimony was essential to the State's case. The State argued that Simpson helped establish the motive for the murder and thus established the elements of one of the death penalty specifications. Simpson also provided testimony about the events leading up to the murder as well as to details of the murder to which Osie supposedly confessed.

Simpson stated that Osie told him that he and Robin had used cocaine that evening, and he went to Williams' house between 1:30 - 2:00 a.m. Id. at p. 99-100. Simpson further testified that Osie got mad, punched Dave, and grabbed a knife. Id. Then Simpson related that Osie took the television, checks, and a credit card to make it look like a break-in had happened. Id. at p. 102. He said Osie tried to use the credit card at Meijer to buy a diamond ring for Robin. Id.

The prosecutor's failure to disclose exculpatory evidence in a timely manner amounted to prosecutorial misconduct. State v. Couch, No. CA2001-06-132, 2002 Ohio App. LEXIS 3411 (Butler Ct. App. June 28, 2002) *12-14. Had the State complied with its duty to turn over exculpatory evidence, defense counsel could have been more prepared in presenting Osie's defense. Osie was prejudiced by the improper withholding of Simpson's felony record and the improper withholding of the BCI report. If Osie's trial counsel had earlier knowledge of this information, they would have been able to develop a more thorough challenge of Simpson's allegations that he was collecting a knife that Osie had discarded. The information was

exculpatory and could have resulted in a different result had defense been provided with the information earlier. See, Proposition of Law No. VIII.

2. Prosecutor relied on evidence obtained during improper search.

Osie was arrested at his home on February 14, 2009. He was transported to the Butler County Sheriff's office and detained through the end of his trial. A hearing was held on September 11, 2009 regarding motions filed by Osie's trial counsel. At that time, defense counsel alerted the trial court that Osie's cell at the jail had been searched by detectives from the Butler County Sheriff's Office. Counsel stated that the evidence that had been seized in the search was material that Osie was "preparing to assist in the defense of this matter." Tr. 9/11/09, p. 61. The detectives turned over the material to prosecutors who copied it and provided it to defense counsel in discovery. Id. at p. 64. Osie's trial counsel asserted that the material was attorney work product and therefore inadmissible. Id.

Defense counsel argued that the evidence seized was attorney work product. Counsel informed the court that due to Osie's incarceration, it was impossible to meet with him every day to discuss his defense. Id. at p. 63. So, counsel directed Osie to write down anything that he thought may aid in his defense, thereby making those notes attorney work product. Id.

The issue was revisited on November 18, 2009, at a hearing on jury excuses. The prosecutor advised the court that after researching this issue ("a quick glossary review of federal cases"), he surmised that reversible error occurs when prosecutors view the defense's attorney work product. Tr. 11/18/09 p. 13. The prosecutor further admitted a Sixth Amendment violation occurred if anyone from the state truly viewed something that was work product material. Defense counsel responded to the prosecutor's statements by noting that the violation had already occurred—that defense counsel received attorney work product documents in their

discovery packet, necessarily meaning that someone from the State had viewed them. Id. at p. 14-15.

Despite the concession by the prosecutor that it was improper to view attorney work product, the State used evidence seized during the illegal search at Osie's trial. Specifically, the prosecutor used the evidence of letters Osie wrote to Robin Patterson as evidence to support the aggravated murder charge and death specifications, despite the fact that counsel encouraged Osie to write down his thoughts to them in preparing his defense. Trial Tr. Vol. III p. 296-97, 329. The State's use of attorney work product was improper and denied Osie his right to a fair trial. See also Proposition of Law No. VII.

B. Mitigation Phase

1. Mitigation phase closing arguments

The prosecutor made several improper comments during the closing arguments of the mitigation phase of trial. The prosecutor argued that in order for Osie's background to be mitigating, it had to be something other than the evidence of the "normal" family Osie presented in mitigation. Mit. Tr. Vol. II p. 152. This was improper. Contrary to the prosecutor's argument, in order to impose a death sentence, the court must view the defendant as an individual. Focus must be on the offense charged and on Osie. Only after a through a review of his individual and unique facts can the court arrive at a fair sentence that satisfies the requirements of the Eighth and Fourteenth Amendments of the United States Constitution and §§ 9 and 16, Article I, of the Ohio Constitution.

Additionally, the prosecutor argued that mitigation evidence regarding Osie before the time of the crime was not relevant to the sentencing determination:

> The final thing I think that we heard was that before 2006, Mr. Osie may have been a bit different, but we're here in 2010 evaluating whether those

> aggravated circumstances he committed in 2009 outweigh what's able to be put forward to you again here in 2010.

Mit. Tr. Vol. II p. 150. The State argued that nothing could outweigh the aggravating circumstance of silencing a witness, "This weight cannot be counterbalanced. There was nothing that was presented as evidence going to any mitigating factor that can counterbalance that, that silencing." Mit. Tr. Vol. II p. 153.

These arguments were improper. The trial court was obligated to weigh the aggravating circumstances against the mitigating circumstances, not Osie's failure to present evidence of some mitigating factors. The "sentencing authority's discretion" must be focused on the "'circumstances of the capital offense and the individual offender…' thus reducing the arbitrary and capricious imposition of death sentences." State v. Bedford, 39 Ohio St. 3d 122, 136, 529 N.E.2d 913, 926-27 (1988) (citing State v. Davis, 38 Ohio St. 3d 361, 369, 528 N.E.2d 925, 933 (1988)) (quoting State v. Penix, 32 Ohio St. 3d 369, 371, 513 N.E.2d 744, 746-47 (1987)).

R.C. §2929.04(B) states that the three judge panel shall consider the mitigating factors raised by the defendant. This statute imposes a duty upon the court to consider and weigh all mitigating factors. The prosecutor may not attempt to circumvent this statute, as was done in the present case, by urging the court to ignore mitigation. Moreover, the court, contrary to the prosecutor's argument, cannot turn mitigation evidence into aggravating circumstances.

This type of prosecutorial misconduct is extremely prejudicial because it encourages the sentencer to ignore the statutory framework adopted by the Ohio legislature for determining the sentence in a capital case. See Stringer v. Black, 503 U.S. 222, 232 (1992) (invalid weighing process violates Eighth Amendment). A court weighs "aggravating" vs. "mitigating." Obviously this is not a precise formula, but certainly not a completely unguided and arbitrary

process. The arbitrary infliction of capital punishment, as the State asked for, and received, is unconstitutional per se. Gregg v. Georgia, 428 U.S. 153 (1976).

Death is profoundly different from any other penalty. Lockett v. Ohio, 438 U.S. 586, 605 (1978). Because death is different, "an individualized decision is essential in all capital cases". Id. For a capital sentencing scheme to be fair, it is the individual and his offense that must be considered at sentencing. Callins v. Collins, 510 U.S. 1141 (1994) (Blackmun, J., dissenting) (citing Lockett, 438 U.S. at 605).

The prosecutor's pleas to the court not to give Osie's mitigation evidence weight deprived Osie of his right to individualized sentencing as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and §§ 9 and 16, Article I of the Ohio Constitution. Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) (plurality opinion); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982); Zant v. Stephens, 462 U.S. 862, 879 (1983).

Trial counsel failed to fully object to some of the instances of prosecutorial misconduct cited in this proposition of law. However, this Court is not precluded from reviewing this issue in its entirety. A reviewing court is required to examine the improper comments as a whole even when there is no objection to each individual comment. State v. Fears, 86 Ohio St. 3d 329, 715 N.E.2d 136 (1999) (Moyer, C.J., dissenting); See also, State v. Keenan, 66 Ohio St. 3d 402, 613 N.E.2d 203 (1993); Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1983).[9]

[9] Should trial counsel's failure to object to all of the instances of prosecutorial misconduct preclude this Court's review of the issue, this Court should find that counsel was ineffective and such ineffectiveness prejudiced Osie. See, Proposition of Law No. XII.

C. Conclusion.

The prosecutor has a unique role at a criminal trial. The prosecutor must ensure guilt is punished, but also that justice is done. State v. Lott, 51 Ohio St. 3d 160, 165, 555 N.E.2d 293, 300 (1990) (citing Berger v. United States, 295 U.S. 78, 88 (1935)). Thus, "while he may strike hard blows, he is not at liberty to strike foul ones." Id.

The State committed errors during both the trial and sentencing phases of Osie's capital trial. See State v. Thompson, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 420 (1987). These errors "cannot be ignored or overlooked." Id. at 14, 514 N.E.2d at 420. In analyzing prosecutorial misconduct under the Due Process Clause, the "touchstone" is "the fairness of the trial." Lott, 51 Ohio St. 3d at 166, 555 N.E.2d at 301 (citing Smith v. Phillips, 455 U.S. 209, 219 (1982)). The State's misconduct during both phases of Osie's trial deprived him of a fair trial. Moreover, the State's misconduct during the sentencing phase of Osie's trial deprived him of a reliable sentence as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 9, 16 and 20 of the Ohio Constitution. Thus, Osie's conviction and sentence must be vacated and this case remanded.

PROPOSITION OF LAW NO. XV

INTOXICATION PRECLUDES A VOLUNTARY CONFESSION AND LIKEWISE PRECLUDES THE ABILITY TO KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVE THE PRIVILEGE AGAINST SELF-INCRIMINATION, AND THE RIGHT TO COUNSEL IN VIOLATION OF U.S. CONST. AMENDS. V, VI, AND XIV, AND OHIO CONST. ART. I, §§ 1, 2, 10, AND 16.

A. Law.

Police interrogation of a suspect in custody threatens the Fifth Amendment privilege against self-incrimination by providing officers with an opportunity to 1) actively compel confessions through overtly coercive interrogation or 2) passively compel confessions by exposing suspects to the "inherently coercive" environment created by custodial interrogation. New York v. Quarles, 467 U.S. 649, 654 (1984). Procedural safeguards against the threat of coercion during custodial interrogation were established in Miranda v. Arizona, 384 U.S. 436 (1966).

Although Miranda warnings given by law enforcement do not need to be provided verbatim, the failure to substantively convey the rights to a defendant before questioning will result in the suppression of any subsequent statement. Id. Such rights may be waived by a defendant. But before the State may introduce an incriminating statement of a defendant, it must prove that the accused voluntarily, knowingly, and intelligently waived his Miranda rights. Id. at 457. Though courts must presume that a defendant did not waive his rights, see United States v. Jackson, 918 F.2d 236, 241 (1st Cir. 1990), the government may prove a waiver by a preponderance of the evidence. See Colorado v. Connelly, 479 U.S. 157 (1986).

To determine the validity of a Miranda waiver, courts must analyze the totality of the circumstances. See Arizona v. Fulminante, 499 U.S. 279, 285 (1991). Circumstances to consider include: "the tactics used by the police, the details of the interrogation, and any

characteristics of the accused that might cause his will easily to be overborne." United States v. Rohrbach, 813 F.2d 142, 144 (8th Cir. 1987); see also Jackson, 918 F.2d at 241.

B. Facts.

The prosecution in Osie's case did not overcome the presumption against the waiver. It is not contested that the waiver was provided at some point during the interrogation. However, the combination of the alcohol, cocaine, and the coercive nature of the setting combined to render the waiver invalid.

In the days and hours leading up to Osie's arrest, he and Robin Patterson were binge drinking and using large amounts of cocaine. Tr. 9/11/09, p. 25-26. On the evening of February 14, 2009, detectives from the Butler County Sheriff's Office arrested Osie at his home. Id. at p. 6-8. He was transported to the station where he was interrogated. Id. at p. 22-23.

A motion hearing regarding Osie's statements was held on September 11, 2009. Tr. 9/11/09. Osie's trial counsel did not call him to testify at the suppression hearing. The State called Detective Robert Whitlock to testify concerning the waiver and subsequent statements obtained from Osie. Detective Whitlock testified that he was one of four officers that responded to Osie's home on February 14, 2009. Id. at p. 7. He stated that Osie was patted down, handcuffed, and transported to the Butler County Sheriff's Office where he was immediately given his Miranda warnings. Id. at p. 9-10.

C. Argument.

Detective Whitlock admitted during his testimony that "most people who are handcuffed and taken to the sheriff's department would be a little nervous." Id. at p. 22-23. He also admitted that the circumstances did make Osie nervous during his interrogation. Id. at p. 29. Prior to the evening in question, Osie had very little interaction with law enforcement. He had previously

been cited for drunk driving, but he had never been investigated or interrogated for a serious felony. Tr. 5/3/10, p. 7. He was therefore unfamiliar with his rights as guaranteed by Miranda.

His lack of understanding of the situation was further exacerbated by his intoxication causing his will to be easily overborne. Det. Whitlock was familiar with Osie's prior record. Id. at p. 20. The implication of that record is that Osie had recently developed a serious alcohol problem. And, on cross examination, Det. Whitlock admitted that Osie had informed him of his cocaine and alcohol abuse earlier in the day. Tr. 9/11/09, p. 25-26.

The Supreme Court decision in Miranda v. Arizona, 384 U.S. 436 (1966), created a presumption of a coercive atmosphere in custodial interrogation. The Court decided that where there is custodial interrogation and government involvement, there is a conclusive presumption. As a result, any statement that a suspect in that environment gives is presumed to be coerced. Any statement that is coerced cannot then be used against that suspect. That presumption of coerciveness is only overcome if two requirements are met. First, a suspect must be apprised of certain rights. Id. at 467-468. Then, the suspect must issue a valid waiver of those rights. Id. at 475-477. If both of those requirements are not met, any statement or confession from a suspect in custodial interrogation is presumed coerced in violation of the suspect's rights.

In the present case, the second requirement was not met—the totality of the circumstances, the alcohol, the cocaine, and the interrogation rendered Osie's waiver invalid. In Quarles, the Court noted the "inherently coercive" nature of custodial interrogation. 467 U.S. at 654. This coerciveness was compounded by Osie's lack of experience with police as well as his ~~recent alcohol and cocaine abuse. The statements taken by Dets. Whitlock and Gerhardt are in~~ violation of the defendant's Fifth, Sixth, and Fourteenth Amendment rights under the Ohio and

United States Constitutions. The admission into evidence of said statements violated the guarantees contained in the case of Miranda v. Arizona. Id.

D. Conclusion.

Osie's alcohol and cocaine intoxication and the inherently coercive nature of his custodial interrogation precluded a voluntary confession and likewise precluded his ability to knowingly, voluntarily, and intelligently waive his privilege against self-incrimination and his right to counsel in violation of U.S. Const. amends. V, VI, and XIV, and Ohio Const. art. I, §§ 1, 2, 10, and 16. His statements were therefore inadmissible against him at trial.

PROPOSITION OF LAW NO. XVI

A PERVASIVE PATTERN OF POLICE COERCION VIOLATES A DEFENDANT'S RIGHT TO BE FREE FROM COMPELLED SELF-INCRIMINATION AND RENDERS A WAIVER OF MIRANDA RIGHTS AND SUBSEQUENT CONFESSION INVOLUNTARY AND INADMISSIBLE AT TRIAL. U.S. CONST. AMENDS. V, XIV; OHIO CONST. ART. I, § 10.

A. Law.

In Miranda, the United States Supreme Court explained that the voluntariness doctrine in state cases encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice. Miranda v. Arizona, 384 U.S. 436 (1966). The Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution each provide that no person shall be compelled in any criminal case to be a witness against himself. The Ohio provisions are identical to the Federal provisions, which are themselves applicable to the states through the Due Process Clause of the Fourteenth Amendment. Brown v. Mississippi, 297 U.S. 278, 286 (1936).

The privilege against self-incrimination is an essential mainstay of our adversary system, and guarantees an individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own will." Miranda, 384 U.S. at 464-65 (1966).

Coercive police activity is a necessary element to finding that a confession is not voluntary within the Fifth Amendment, on which Miranda was based. Colorado v. Connelly, 479 U.S. 157, 170 (1986); McCall v. Dutton, 863 F.2d 454, 459 (6th Cir. 1988); State v. Dailey, 53 Ohio St. 3d 88, 91, 559 N.E.2d 459, 462 (1990). This requires a determination that the police "extorted [the confession] from the accused by means of coercive activity." McCall, 863 F.2d at 459 (citing Connelly, 479 U.S. at 167). Once it is established that the police activity was objectively coercive, it is necessary to examine the defendant's subjective state of mind to

determine whether the "coercion" in question was sufficient to overbear the will of the accused. Id. (citing United States v. Rohrbach, 813 F.2d 142, 144 (8th Cir. 1987)). Finally, the defendant must prove that his will was overborne because of the coercive police activity in question. If the police misconduct at issue was not the "crucial motivating factor" behind the defendant's decision to confess, the confession may not be suppressed. Id.

The United States Supreme Court and Ohio courts have both held that the Due Process Clause, separate from considerations of Miranda's application to custodial interrogations, continues to require an inquiry as to whether a defendant's will was "overborne by the circumstances surrounding the giving of a confession," thereby rendering the statement involuntary. Dickerson v. United States, 530 U.S. 428, 434 (2000) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)); State v. Chase, 55 Ohio St. 2d 237, 246, *378 N.E.2d 1064*, 1070 (1978); State v. Petitjean, 140 Ohio App. 3d 517, 525-26, 748 N.E.2d 133, 139 (2000).

A court must consider the totality of the circumstances in determining whether the confession was obtained in a manner that violated the Due Process Clause. This takes into consideration the totality of the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Id. Under this standard, a confession "may be involuntary even where Miranda warnings are given...[and] even where Miranda warnings are not required, a confession may be involuntary if on the totality of the circumstances the 'defendant's will was overcome by the circumstances....'" Petitjean, 140 Ohio App. 3d at 526, 748 N.E.2d at 140.

B. Facts.

In 2008, Osie began a tumultuous relationship with Robin Patterson. Robin was employed as an officer manager for a contracting company. Trial Tr. Vol. I p. 25, 27. The

victim, David Williams was an investor in the company. Id. at p. 23-25. Williams informed Osie that he intended to pursue criminal charges against Robin for an alleged theft from the business. Id. Osie was anxious about the possibility of criminal charges being filed against Robin. Tr. 9/11/09 p. 28-29. On February 13, 2009, after a day of binge drinking and abusing cocaine, he went to Williams' house to discuss the matter. Id. The next morning, Williams was found stabbed to death in his home. Id. at p. 6.

After officers found Williams dead in his home, they began to investigate Williams' friends and business contacts. Id. at p. 16. They quickly learned about his business relationship with Robin Patterson and her romantic involvement with Osie. Id. at p. 16-17.

Osie was arrested at his home on February 14, 2009. Id. at p. 6. Osie made his devotion to Robin clear to detectives from the moment of his arrest; he spoke with detectives about Valentine's Day and his relationship with Robin on the way to the Sheriff's Office. Id. at p. 21. Detectives were aware that he had sent Robin numerous text messages (Trial Exhibit 55, p. 18), and also that he had gone to the victim's home in an effort to dissuade Williams from pursuing the criminal theft charges against Robin. Tr. 9/11/09 p. 28-29.

Once they arrived at the sheriff's office, detectives used threats against Robin to elicit statements from Osie. Detective Gerhardt asked him repeatedly if he loved Robin. Trial Exhibit 55 p. 31-32. She then advised Osie that if he didn't cooperate, that they would involve Robin in the investigation. Id. at p. 32-33. The detectives insinuated that they could charge Robin in Williams' death, because "her fingerprints are in the house." Id. at p. 33. Detective Gerhardt then repeatedly told Osie that by not providing a full confession, it would be his fault if Robin were implicated. Id. Osie immediately admitted to taking the television out of the victim's

house and disposing of it in a dumpster in Cincinnati. Id. at p. 34. Detectives later discovered this statement was false. Trial Tr. Vol. II p. 247.

Detectives then sought to elicit the location of the knife by making false statements to Osie about the victim's blood being infected with the Hepatitis C virus. Trial Exhibit 55 p. 35-36. Detectives manipulated Osie by asserting that his granddaughter could discover it and become infected. Id. He instantly admitted to the detectives that he threw the knife into the Ohio River (Id. at p. 37), a statement also later determined to be false. Trial Tr. Vol. II p. 250-251.

On June 23, 2009, Mr. Osie's trial counsel filed a Motion to Suppress statements made by Mr. Osie to detectives of the Butler County Sheriff's Office. A hearing regarding the Motion to Suppress was held on September 11, 2009. Tr. 9/11/09.

C. Argument

A confession obtained by the police through the use of threats is violative of due process and the "true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort." Haynes v. Washington, 373 U.S. 503, 513 (1963).

Osie's statements to the Butler County Sheriff's detectives were not voluntary. On February 14, 2009, Osie was in a position to have his will easily overborne. He was intoxicated from cocaine use and binge drinking and his lack of familiarity with the criminal justice system hindered his ability to understand his rights. Detectives admitted that Osie appeared to be nervous. Tr. 9/11/09 p. 29. At one point, Osie attempts to end the interrogation and informs detectives that he wants to go home. Trial Exhibit 55 p. 23.

The detectives recognized that Osie was deeply in love with Robin Patterson and wanted to protect her. They used this vulnerability to manipulate and coerce Osie into confessing to

culpability in the death of David Williams. Their improper threats to involve Robin in the investigation constituted coercion by the police sufficient to render Osie's confession involuntary.

Detectives continued their use of coercive tactics by using Osie's desire to protect his granddaughter to strong-arm him into divulging the location of the knife used in the incident. Det. Whitlock stated to Osie: "I'm sitting here telling you he [Williams] is Hepatitis C...The knife is important to us. I don't want your granddaughter picking it up..." Id. at p. 36.

The totality of the circumstances surrounding Osie's interrogation demonstrates that not only was the police activity coercive, but also that it was sufficiently coercive to overcome his will. Osie was in custody at the Butler County Sheriff's Office. His confession was a direct result of the coercion; he immediately gave answers to their coercive statements. Thus coercion employed by the Butler County Sheriff's detectives was the crucial motivating factor behind Osie's decision to confess.

The admission of Osie's involuntary confession was prejudicial and requires reversal. A confession is evidence to which a trier of fact affords great weight. As the Court said in Arizona v. Fulminante:

> A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.... The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.'

499 U.S. 279, 296 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139-140 (1968) (White, J., dissenting).

D. Conclusion.

Detectives' coercive tactics violated Osie's constitutional rights. His statements were not voluntary, and thus should not have been admitted at trial. All of the statements Osie made to the Butler County Sheriff's detectives were the product of an unconstitutional scheme by law enforcement to circumvent Osie's due process rights afforded to every criminal suspect. Despite the detectives' reading of Miranda to Osie, his statements were involuntary. The totality of the circumstances surrounding Osie's confession demonstrate coercion. These tactics violated Osie's right against compelled self-incrimination in violation of his Fifth Amendment, Due Process, and Ohio Constitutional rights.

PROPOSITION OF LAW NO. XVII

WHEN THE DEFENDANT WAIVES HIS RIGHT TO A JURY IN A CAPITAL CASE, THE TRIAL JUDGE SHOULD DISQUALIFY HIMSELF IF HE HAS AN ONGOING FINANCIAL RELATIONSHIP WITH THE MITIGATION SPECIALIST BECAUSE THE JUDGE COULD BE CALLED UPON TO ASSESS THE CREDIBILITY OF THE MITIGATION SPECIALIST'S TESTIMONY. THE FAILURE TO DO SO VIOLATES THE DEFENDANT'S RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES. UNGAR V. SARAFITE, 376 U.S. 575, 588 (1964); AND TUMEY V. OHIO, 273 U.S. 510 (1927).

A. Introduction

Judges ought to avoid situations where their impartiality may be called into question. Judge Powers allowed the appointment of Christopher Pagan as Osie's mitigation specialist, who is the judge's former law partner, and with whom the judge has an ongoing financial relationship. This ongoing relationship was not only improper, but also it impinged on Osie's right to a fair trial.

B. Relevant Facts

Trial counsel filed numerous motions, including motions asking the court to appoint an investigator,[10] a motion to permit ex parte hearings on requesting funds for experts, a mitigation specialist, and a motion for funds to retain experts. Tr. 9/11/2009, p. 54-57, 91. The first two motions were granted, and the last two motions were held in abeyance for trial counsel to make a specific request to the trial judge. Id. at p. 91. Trial counsel requested that the court appoint Christopher Pagan as the mitigation specialist. Id. at p. 55. Judge Powers expressed a discomfort in appointing Pagan, due to his ongoing relationship with him, but no decision was made and the motion was held in abeyance. Id.

[10] The court granted this motion in a separate hearing on 4/17/2009.

A second hearing was held on November 9, 2009 to discuss appointing Pagan as the mitigation specialist. Judge Powers expressed concern about appointing Pagan because he owed the judge money. Tr. 11/9/2009 p. 4-5. Judge Powers decided that he could not personally appoint Pagan, so he referred the matter to Judge Sage to make the actual appointment. Id. at p. 5. The prosecutor objected to appointing Pagan. Id. at p. 7. The court noted that if the Ohio Public Defender's office was appointed to handle the mitigation investigation, instead of Pagan, the case would be delayed. Id.

On November 13, 2009, the parties appeared in front of Judge Sage concerning the appointment of Pagan. Trial counsel explained to Judge Sage that Pagan now handles the cases that Judge Powers had been working on when he was a private attorney. Tr. 11/13/2009 p .3-4. This creates a conflict, because once a judgment is obtained, Pagan would be obligated to share a portion of the fee with Judge Powers. See id.

The State objected to the appointment of Pagan, citing the fact that if the case went to a three-judge panel and Pagan was called to testify, it would create a situation where Judge Powers would have to recuse himself. Id. at p. 5. To circumvent this issue, Greg Howard told the court that he did not expect to waive jury, and that he would not be calling Pagan to testify. Id. at p. 5-6. This seemed to satisfy Judge Sage because he granted the motion to appoint Pagan. Id. at p. 6.

C. Argument

1. The Ohio Judicial Code of Conduct required Judge Powers' disqualification.

The Ohio Code of Judicial Conduct mandates that a sitting judge recuse himself not only if there is "actual bias and prejudice" but also if there is "the appearance of impropriety." James v. James, 101 Ohio App. 3d 668, 656 N.E.2d 399, 404 (1995); see also Ohio Code of Judicial

Conduct, 1.2 (explaining that a judge "shall avoid *impropriety* and the appearance of *impropriety*"). Former Chief Justice Moyer found that "[t]he proper test for determining whether a judge's participation in a case presents an appearance of impropriety is . . . an objective one. A judge should step aside or be removed if a reasonable and objective observer would harbor serious doubts about the judge's impartiality." In re Disqualification of Lewis, 117 Ohio St. 3d 1227, 884 N.E.2d 1082, 1083 (2004).

Ohio Code of Judicial Conduct, 2.11(A) states that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's *impartiality* might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal *knowledge* of facts that are in dispute in the proceeding." Comment one of the Code explains the scope of this disqualification: "Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of divisions (A)(1) to (6) apply." Id., comment one.

The Code also states that "A judge shall not engage in financial activities permitted under divisions (A) and (B) of this rule if they will do any of the following:...Involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves." Ohio Code of Judicial Conduct, 3.11(C)(3).

2. Judge Powers' ongoing financial relationship with Christopher Pagan created the appearance of impropriety.

Not every prior professional relationship that a judge has will create an appearance of impropriety so great that it falls under the scope of the rule's governance. See e.g., In re Disqualification of Cross, 74 Ohio St. 3d 1228, 657 N.E.2d 1338, 1339 (1991). But the

relationship between Pagan and Judge Powers rose to that level because it was financial and ongoing.

Initially, Judge Powers indicated his own reluctance to appoint Pagan as an expert. First, he denied the defendant the right to use Pagan for this reason; but then Judge Powers asked the administrative judge to determine the appropriateness of Pagan serving as the mitigation expert. In that same vein, Judge Powers also felt uncomfortable setting Pagan's pay, since "I have a pecuniary interest in the fact that Pagan and I were previously law partners, and there's still a financial string between us in terms of he still owes me money." Tr. 11/9/2009 p. 4-5. Not only was Judge Powers uneasy with this appointment, but so too was the prosecutor. Tr. 11/13/2009 p. 5. This ongoing financial relationship puts this case on a different footing than the other cases in which the Chief Justice found no appearance of impropriety.

Moreover, the Code of Judicial Conduct requires that a judge be disqualified when a family member has a financial interest in the law firm appearing in the proceeding. Ohio Code of Judicial Conduct, 2.11, comment four. If Judge Power's family member would have had the same interest in Pagan's firm as the Judge did and appeared in front of Judge Powers, the rules would have required that he be disqualified. If that is case, it makes no sense for Judge Powers himself to sit on the case with that same conflict. Here, Judge Powers has a pecuniary interest in not damaging his former law partner's reputation.

Outside of Ohio, ongoing financial relationships have been found to create the appearance of impropriety. In Florida, the financial relationship between the judge's spouse and the defense attorney's spouse disqualified the judge from ruling on a claim of ineffective assistance of counsel. Aurigemma v. State, 964 So. 2d. 224 (Fla. App. 4th Dist. 2007) ("This

ongoing "business relationship" creates the requisite well-founded fear to support the motion to disqualify.").

Besides this ongoing financial relationship with Pagan, Judge Powers should have recused himself once Pagan was appointed because he could have been called to assess the credibility of his former law partner's testimony if he took the stand. See United States v. Dandy, 998 F.2d 1344, 1349 (6th Cir. 1993) (rejecting the claim that a judge should have recused himself because he was friendly with the victim of the crime perpetrated by the defendant, partly on the grounds that the judge "was not called upon to evaluate the credibility of [the victim] because defendant Dandy was tried by a jury").

Not surprisingly, courts are more concerned with appearances of bias when the judge will have to assess the witness's credibility. See Hadler v. Union Bank & Trust Co. of Greensburg v. Nyhart Co., Inc., 765 F. Supp. 976 (S.D. Ind. 1991) (finding that a judge must recuse himself because he is friends with a witness in the case whose credibility would be at issue, and the parties waived their right to a jury trial).

Osie's right to a fair trial and effective assistance of trial counsel was abridged because of this conflict of interest between Judge Powers and Pagan. In order to get Pagan appointed as the mitigation specialist, Osie's trial attorney submitted to the court that he had no intention to ever call Pagan as an expert. Tr. 11/13/2009 p. 5. This concession was made to allay the prosecutor's concerns, that if Osie waived his right to a jury, Pagan would not be called to testify at the mitigation hearing. Id., at p. 5-6. Agreeing not to call Pagan before a mitigation investigation had been undertaken violated Osie's right to effective assistance of counsel. Porter v. McCollum, 130 S. Ct. 447, 558 U.S. ___, (2009); Wiggins v. Smith, 539 U.S. 510, 524 (2003).

3. Judge Powers' ongoing financial relationship with Christopher Pagan violated Osie's right to a fair trial.

The Sixth Circuit has recognized that the failure of a biased state judge to recuse his or her self from presiding over a case, can violate a defendant's right to a fair trial. Railey v. Webb, 540 F.3d 393, 397 (6th Cir. 2008). The Sixth Circuit held that the presence of judicial bias is a structural error and cannot be forfeited. Id., at 399. Further, Due Process requires not only the absence of bias but also the appearance of bias. Id. See also Anderson v. Sheppard, 856 F.2d 741, 746 (6th Cir. 1988). Among the limited circumstances where the court will find a Due Process violation absent actual bias is if the judge had a substantial and personal pecuniary interest in the outcome of the case. Tumey v. Ohio, 273 U.S. 510, 523, 47 S. Ct. 437 (1927).

Here, Judge Powers admittedly had a pecuniary interest in his relationship with Pagan. Although Judge Powers didn't stand to benefit directly from Pagan's performance, in this particular case, Due Process does not require such a direct benefit. Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972). Judge Powers stood to suffer financial loss if Pagan's reputation was harmed. Moreover, Judge Powers had an ongoing relationship with Pagan. This made Judge Powers invested in Pagan's long term success. Accordingly, Judge Power's appearance of bias violated Osie's right to a fair trial.

D. Conclusion

The trial judge erred by not disqualifying himself once Pagan was appointed to be Osie's mitigation specialist. Because Judge Powers had an ongoing financial relationship with Pagan, Osie's right to a fair trial was violated. Therefore, the Court should reverse the conviction and remand the case to a new judge for a new trial.

PROPOSITION OF LAW NO. XVIII

POLICE INTERVIEWS THAT ARE SELECTIVELY RECORDED DEPRIVE DEFENDANTS OF DUE PROCESS OF LAW. THE ADMISSION OF ONLY PORTIONS OF THE DEFENDANT'S STATEMENTS VIOLATES THE DEFENDANT'S RIGHT TO A FAIR TRIAL AND THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION. U.S. CONST. AMEND. XIV.

A. Law

"A defendant in a criminal case has been accorded due process of law when there is a law creating or defining the offense, a court of competent jurisdiction, accusation in due form, notice and opportunity to answer the charge, trial according to the established course of judicial proceedings, and a right to be discharged unless found guilty." Powell v. Alabama, 287 U.S. 45 (1932).

When a defendant in a criminal case is denied fundamental fairness in his proceedings, his due process rights are violated. "For the admission of evidence to violate constitutional due process, it must be shown that admitting the evidence violates 'fundamental fairness,' i.e., that it violates those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." Burton v. Renico, 391 F.3d 764, 774 (6th Cir. 2004) (quoting Dowling v. United States, 493 U.S. 342, 352-53 (1990)).

B. Facts

On the evening of February 14, 2009, detectives from the Butler County Sheriff's Office arrested Osie at his home. Tr. 9/11/09 p. 6-8. Detective Whitlock testified at the suppression hearing that he was one of four officers that responded to Osie's home to take him into custody. Id. at p. 7. He claimed that once Osie was in custody, he was transported to the Butler County

Sheriff's Office, where he was, and immediately read his Miranda warnings. Id. at p. 9. Osie's warnings and subsequent waiver were not recorded on the audio tapes. Id. at p. 10; see also Miranda v. Arizona, 384 U.S. 436 (1966).

At the suppression hearing, the prosecutor questioned Detective Whitlock as to the time of day the detectives arrived at Osie's residence; he responded that it was between 8:00-8:30 p.m. Tr. 9/11/09 p. 8. The State introduced the Miranda card that Osie signed, dated, and recorded the time. The time on the card reads either 7:30 or 7:36. Id. at p. 11. After prompts from the prosecutor, Det. Whitlock corrected his testimony and stated that the time Osie was taken into custody must have been between 6:00-6:30 p.m. Id. He then admitted to basing his testimony regarding the time of day on the amount of time he spent at Osie's residence and the travel distance to the sheriff's office and changed his answer again to 7:00 p.m. Id. at p. 11-12. There was no firm testimony at the suppression hearing or during trial as to the time that Osie arrived at the sheriff's office-only the time that he signed the back of the Miranda card.

Detectives Whitlock and Gerhardt interrogated Osie for twenty to thirty minutes between the time he was read his Miranda warnings and the time they turned on the tape recording at 7:58 p.m. Trial Ex. 55. By the time the detectives turned on the recording, Osie had already admitted to the detectives that he went to the victim's house to talk him out of filing charges against his girlfriend, Robin Patterson. Id. at p. 3. Osie had also admitted that he and the victim began to argue and fight in the kitchen where he grabbed a knife and stabbed the victim in self-defense. Id. The first recording is approximately 45 minutes long, ending at 8:43 p.m.

Detectives began a second recording at 9:07 p.m. Trial Ex. 55b, p. 2. At the beginning of the second recording, Osie is answering questions that were asked before the recording began. Id. It is not clear what the detectives told Osie during the break in the recording or what

questions he was asked. He ultimately admits that he took property from the victim's residence and disposed of it. Id. at p. 9. The second recording ends at 9:17 p.m. Id. at p. 12.

C. Argument

When detectives from the Butler County Sheriff's Office recorded only the portions of Osie's statements that were beneficial to their case, they violated Osie's right to due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution.

Under both the Ohio and Federal Rules of Evidence, if a prosecutor introduces a recording at trial, then the defendant is permitted to introduce the entirety of that recording. Fed. R. Evid. 106; Ohio R. Evid. 106. Rule 106 is the partial codification of the common-law doctrine of completeness which permits a party to introduce a complete statement when an adverse party introduces only part. United States v. Shaver, 89 Fed. Appx. 529 (6th Cir. 2004). Ohio R. Evid. 106 provides that:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which is otherwise admissible and which ought in fairness to be considered contemporaneously with it.

In United States v. Houlihan, the court recognized that Evidence Rule 106 "codifies principles of fairness and completeness." 92 F.3d 1271, 1283 (1st Cir. 1996). The court held that under the rule, "a party against whom a fragmentary statement is introduced may demand that the rest of the statement...be admitted into evidence in order to place the excerpt in context." Id.

Recording only excerpts of a suspect's statement is fundamentally unfair, because it allows for a misrepresentation of the entire statement. See United States v. Shaver, 89 Fed. Appx. 529 (6th Cir. 2004); United States v. Spearman, 186 F.3d 743 (6th Cir. 1999); State v. Davis, 4 Ohio App. 3d 199, 447 N.E.2d 139 (9th Dist. 1982). A prosecutor could easily

misrepresent the statement of a defendant if he is permitted to select which parts to play. Similarly, recording fragments of interviews allows officers to frame interrogations in a way most favorable to them, without the defendant having the protection of Evidence Rule 106 at trial.

D. Conclusion

As a defendant in a criminal case, Osie was guaranteed certain rights by the United States and Ohio Constitutions. His right to due process of law, a protection afforded him by the Fourteenth Amendment to the United States Constitution, was violated when law enforcement recorded only the excerpts of his statement that were consistent with their theory of the case. It was further violated when the court allowed the state to introduce Osie's fragmented statement when a complete recording was unavailable to challenge it.

PROPOSITION OF LAW NO. XIX

OHIO'S DEATH PENALTY LAW IS UNCONSTITUTIONAL. OHIO REV. CODE §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, AND 2929.05 DO NOT MEET THE PRESCRIBED CONSTITUTIONAL REQUIREMENTS AND ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED. 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 (1977). The underlying principle of governmental respect for human dignity is the Court's guideline to determine whether this statute is constitutional. See Furman v. Georgia, 408 U.S. 238 (1972) (Brennan, J., concurring); Rhodes v. Chapman, 452 U.S. 337, 361 (1981); Trop v. Dulles, 356 U.S. 86 (1958). The Ohio scheme offends this bedrock principle in the following ways.

1. Arbitrary and unequal punishment.

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

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

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

Ohio's system imposes death in a racially discriminatory manner. Blacks and those who kill white victims are much more likely to get the death penalty. While African-Americans comprise about 12% of Ohio's population, nearly half of Ohio's death row inmates are African-American. See Ohio Public Defender Commission Statistics, July 14, 2006; see also The Report of the Ohio Commission on Racial Fairness, 1999. While 4 Caucasians were sentenced to death for killing African-Americans (or an African-American), 45 African-Americans sit on Ohio's death row for killing a Caucasian. Ohio Public Defender Commission Statistics, July 14, 2006. Ohio's statistical disparity is tragically consistent with national findings. The General Accounting Office found victims' race influential at all stages, with stronger evidence of racial influence involving prosecutorial discretion in the charging and trying of 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). In short, Ohio law fails to assure against race discrimination playing a role in capital sentencing.

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. Commonwealth v. O'Neal, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring); 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 II, 339 N.E.2d at 678.

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

2. Unreliable sentencing procedures.

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

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

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

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor 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 (1982); mental disease or defect, Penry v. Lynaugh, 492 U.S. 302 (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 (1982); or lack of criminal history (Delo v. Lashley, 507 U.S. 272 (1993))] will not be factored into the sentencer's decision. While the federal constitution may allow states to shape consideration of mitigation, see Johnson v. Texas, 509 U.S. 350 (1993), Ohio's capital scheme fails to provide adequate guidelines to sentencers and fails to assure against arbitrary, capricious, and discriminatory results.

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

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

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

dismissed regardless of mitigating circumstances. There is no corresponding provision for a capital defendant who elects to proceed to trial before a jury.

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

4. Mandatory submission of reports and evaluations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. Proportionality and appropriateness review.

Ohio Revised Code §§ 2929.021 and 2929.03 require data be reported to the courts of appeals and to the 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 prohibits adequate appellate review.

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

similar cases and ultimately must focus on the character of the individual and the circumstances of the crime. Id.

Ohio's statutes' failure to require the jury or three-judge panel recommending life imprisonment to identify the mitigating factors undercuts adequate appellate review. Without this information, no significant comparison of cases is possible. 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. 1 (1987). However, this prevents a fair proportionality review. There is no meaningful manner to distinguish capital defendants who deserve the death penalty from those who do not.

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

The cursory appropriateness review also violates the capital defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the 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 Osie's liberty interest in O.R.C. § 2929.05 that is protected by the Due Process Clause.

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, Osie's capital convictions and sentences cannot stand.

8.1 International law binds the State of Ohio.

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

8.2 Ohio's obligations under international charters, treaties, and conventions.

The United States' membership and participation in the United Nations (U.N.) and the Organization of American States (OAS) creates obligations in all fifty states. Through the U.N. Charter, the United States committed itself to promote and encourage respect for human rights and fundamental freedoms. Art. 1(3). The United States bound itself to promote human rights in cooperation with the 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. Pursuant to the Supremacy Clause, the ICCPR, the ICERD, and the CAT are the supreme laws of the land. As such, the United States must fulfill the obligations incurred through ratification. Former 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 is now or may become a party in the future, it is hereby ordered as follows:
>
> Section 1. Implementation of Human Rights Obligations.
>
> (a) It shall be the policy and practice of the Government of the United States, being committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR, the CAT, and the CERD.

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

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

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

Ohio's statutory scheme denies equal protection and due process in several ways. It allows for arbitrary and unequal treatment in punishment. (See discussion infra § 1). Ohio's sentencing procedures are unreliable. (See discussion infra § 2). Ohio's statutory scheme fails to provide individualized sentencing. (See discussion infra § 1, 2). Ohio's statutory scheme

burdens a defendant's right to a jury. (See discussion infra § 3). Ohio's requirement of mandatory submission of reports and evaluations precludes effective assistance of counsel. (See discussion infra § 4). O.R.C. § 2929.04(B)(7) arbitrarily selects certain defendants who may be automatically eligible for death upon conviction. (See discussion infra § 5). Ohio's proportionality and appropriateness review is wholly inadequate. (See discussion infra § 7). As a result, Ohio's statutory scheme violates the ICCPR's and the ICERD's guarantees of equal protection and due process. This is a direct violation of international law and of the Supremacy Clause of the Constitution.

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

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

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

result in the arbitrary deprivation of life and thus violate the ICCPR's death penalty protections. This is a direct violation of international law and a violation of the Supremacy Clause.

8.2.3 Ohio's statutory scheme violates the ICERD's potections against race discrimination.

The ICERD, speaking to racial discrimination, requires that each state take affirmative steps to end race discrimination at all levels. Art. 2. It requires specific action and does not allow states to sit idly by when confronted with practices that are racially discriminatory. However, Ohio's statutory scheme imposes the death penalty in a racially discriminatory manner. (See discussion infra § 1). A scheme that sentences blacks and those who kill white victims more frequently and which disproportionately places African-Americans on death row is in clear violation of the ICERD. Ohio's failure to rectify this discrimination is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

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

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

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

While conditions, reservations, and understandings accompanied the United States' ratification of the ICCPR, the ICERD, and the CAT, those conditions, reservations, and understandings cannot stand for two reasons. Article 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 and will not follow. Their role is to simply advise and consent.

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

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

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

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

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

8.3 Ohio's obligations under customary international law.

International law is not merely discerned in treaties, conventions and covenants. International law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law." United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

Regardless of the source "international law is a part of our law[.]" The Paquete Habana, 75 U.S. at 700.

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

The DHR guarantees equal protection and due process (Art. 1, 2, 7, 11), recognizes the right to life (Art. 3), prohibits the use of torture or cruel, inhuman or degrading punishment (Art. 5) and is largely reminiscent of the ICCPR. Each of the guarantees found in the DHR are violated by Ohio's statutory scheme. (See discussion infra §§ 1-8). Thus, Ohio's statutory scheme violates customary international law as codified in the DHR and cannot stand.

However, the DHR is not alone in its codification of customary international law. Smith directs courts to look to "the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law" in ascertaining international law. 18 U.S. (5 Wheat.) at 160-61. Ohio should be cognizant of the fact that its statutory scheme violates numerous declarations and conventions drafted and adopted by the United Nations and the OAS, which may, because of the sheer number of countries that subscribe to them, codify customary international law. See id. Included among these are:

1. The American Convention on Human Rights, drafted by the OAS, entered into force in 1978. It provides numerous human rights guarantees, including: equal protection (Art. 1, 24), the right to life, (Art. 4(1)), prohibition against arbitrary deprivation of life (Art. 4(1)),

imposition of the death penalty only for the most serious crimes (Art. 4(2)), no re-establishment of the death penalty once abolished (Art. 4(3)), prohibits torture, cruel, inhuman or degrading punishment (Art. 5(2)), and guarantees the right to a fair trial (Art. 8).

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

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

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

5. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty adopted by the U.N. Economic and Social Council in Resolution 1984/50 in 1984. It provides numerous protections to those facing the death penalty, including: permitting capital punishment for only the most serious crimes, with the scope not going beyond intentional crimes with lethal or other extremely grave consequences (1), requiring that guilt be proved so as to

leave no room for an alternative explanation of the facts (4), due process, and the carrying out of the death penalty so as to inflict the minimum possible suffering (9).

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

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

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. Ohio Revised Code §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution and international law. Osie's death sentence must be vacated.[11]

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

CONCLUSION

For each of the foregoing reasons, this Court must reverse Gregory Osie's convictions and remand for a new trial. Alternatively, his death sentences must be vacated and his case remanded for a new penalty phase hearing.

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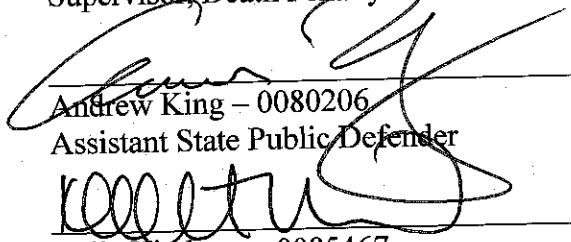

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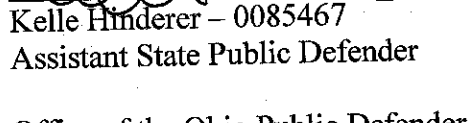

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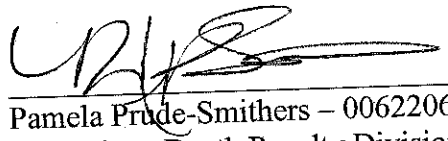
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MERIT BRIEF OF APPELLANT GREGORY OSIE AND APPENDIX TO MERIT BRIEF were forwarded by first-class, postage prepaid, U.S. Mail to Michael T. Gmoser, Prosecuting Attorney, Butler County, 315 High Street, 11th Floor, Hamilton, Ohio 45011, on this 2nd day of May, 2010.



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Supervisor, Death Penalty Division

COUNSEL FOR APPELLANT

342553

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	Case No. 2010-1105
-vs-	:	Appeal taken from Butler County Court of Common Pleas
GREGORY OSIE,	:	Case No. CR2009020302
Appellant.	:	**This is a death penalty case**

APPENDIX MERIT BRIEF OF APPELLANT GREGORY OSIE

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 10-1105
Appellee,	:	
-vs-	:	Appeal taken from Butler County Court of Common Pleas
GREGORY C. OSIE,	:	Case No. CR 2009-02-0302
Appellant.	:	**This is a death penalty case.**

NOTICE OF APPEAL OF APPELLANT GREGORY C. OSIE

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FILED
JUN 25 2010
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

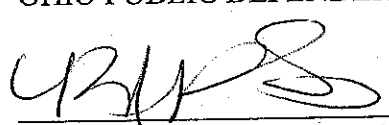
STATE OF OHIO,	:	Case No.
Appellee,	:	
-vs-	:	Appeal taken from Butler County Court of Common Pleas
GREGORY C. OSIE,	:	Case No. CR 2009-02-0302
Appellant.	:	**This is a death penalty case.**

NOTICE OF APPEAL

Appellant Gregory C. Osie hereby gives notice of appeal to the Supreme Court of Ohio from the decision and judgment entry of the Butler County Court of Common Pleas, entered on May 12, 2010. See Entry and Sentencing Opinion attached. This is a capital case and the date of the offense is February 14, 2009. See Supreme Court Rules of Practice 19.1 & 19.2(A).

Respectfully submitted,

OFFICE OF THE
OHIO PUBLIC DEFENDER



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing NOTICE OF APPEAL was forwarded by regular U.S. mail to Robin N. Piper, Butler County Prosecuting Attorney, 315 High Street, Hamilton, Ohio 45011, on the 25th day of June, 2010.

Pamela Prude-Smithers
Counsel for Appellant

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

FILED
2010 MAY 12 PM 3:06
BUTLER COUNTY
CLERK OF COURTS

STATE OF OHIO	CASE NO. CR2009-02-0302
Plaintiff	POWERS, J. ONEY, J. PATER, J.
vs.	JUDGMENT OF CONVICTION ENTRY
GREGORY C. OSIE	
Defendant	

On May 10, 2010 defendant's sentencing hearing was held pursuant to Ohio Revised Code Section 2929.19. Defense attorney's, Gregory Howard, David Washington and the defendant were present and defendant was advised of and afforded all rights pursuant to Crim. R. 32. The Court after the defendant plead not guilty and was found guilty, has considered the record, the charges, the defendant's Guilty Verdict by a Three Judge panel, and findings as set forth on the record and herein, oral statements, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors of Ohio Revised Code Section 2929.12 and whether or not community control is appropriate pursuant to Ohio Revised Code Section 2929.13, and finds that the defendant is not amenable to an available community control sanction. Further, the Court has considered the defendant's present and future ability to pay the amount of any sanction, fine or attorney's fees and the court makes no finding at this time of the defendant's ability to pay attorney fees.

The Court finds that the defendant has been found guilty of:

MURDER as to Count One, a violation of Revised Code Section 2903.02(A) a unclassified felony. With respect to this Count, the defendant conviction and sentence is hereby merged into Count Two.

AGGRAVATED MURDER as to Count Two, a violation of Revised Code Section 2903.01(B) a unclassified felony. With respect to this Count, the defendant is hereby sentenced to:

Death shall be imposed upon the Defendant, which sentence is imposed pursuant to R.C. 2929.02 (A) and 2903.03-2929.04.

AGGRAVATED BURGLARY as to Count Three, a violation of Revised Code Section 2911.11(A)(2) a first degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 10 years.
This sentence will be served **concurrent** with Count Two and Four.

AGGRAVATED ROBBERY as to Count Four, a violation of Revised Code Section 2911.01(A)(1) a first degree felony. With respect to this Count, the defendant is hereby sentenced to:

Prison for a period of 10 years.
This sentence will be served **concurrent** with Count Two and Three.

IN THE COMMON PLEAS COURT
GENERAL DIVISION
BUTLER COUNTY, OHIO

STATE OF OHIO,	*	CASE NO. CR 2009-02-0302
Plaintiff,	*	THREE-JUDGE PANEL: NOAH E. POWERS II (PRESIDING)
v.	*	PATRICIA ONEY CHARLES PATER
GREGORY C. OSIE	*	
		SENTENCING OPINION
Defendant	*	

****

This Opinion is issued pursuant to RC § 2929.03(F).

INTRODUCTION

Defendant Gregory C. Osie, hereinafter Defendant, was indicted in this matter in a five-count indictment, charging him with two counts of *Aggravated Murder* (Counts One and Two), one count of *Aggravated Burglary* (Count Three), one count of *Aggravated Robbery* (Count Four) and one count of *Tampering with Evidence* (Count Five). Both aggravated murder counts, which involved the death of David Williams, also contained three (3) *Death Penalty Specifications*, two pursuant to RC §2929.04(A)(7), one allegedly being in the course of an *Aggravated Burglary* and the other allegedly being in the course of an *Aggravated Robbery* with the other specification being that "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," pursuant to RC §2929.04(A)(8).

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Common Pleas Court
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Defendant pled ***Not Guilty*** to each of the charges and specifications. Defendant, after consultation with counsel, in writing and in open court, waived his right to a Jury Trial and requested that this matter be tried to a three-judge panel. That Panel, hereinafter "the Panel", consisting of the three above-referenced judges, was randomly selected by court personnel in

pretrial proceedings which took place in the presence of Defendant and both defense counsel prior to Defendant's decision to waive a jury trial.

On April 19, 2010, the *Trial Phase* of this matter commenced before the Panel. Following the *Trial Phase* proceedings, viz: April 22, 2010, the Panel found Defendant guilty beyond a reasonable doubt of the following offenses: one count of *Murder* (Count One), one count of *Aggravated Murder* (Count Two), together with each of the three *Death Penalty Specifications* attached thereto, one count of *Aggravated Burglary* (Count Three), one count of *Aggravated Robbery* (Count Four) and one count of *Tampering with Evidence* (Count Five).

Thereafter, the matter was set for the *Sentencing Phase* of the trial. Defendant, after consultation with counsel and being fully advised of all of his rights, in writing and in open court, waived his right to a presentence investigation and to a court-ordered forensic (psychological) report for mitigation purposes.

Pursuant to RC § 2929.04, the *Sentencing Phase* of the trial commenced before the Panel on April 28, 2010, for the purpose of receiving evidence with respect to the issue of whether the three statutory, *Aggravating Circumstances*, proven by the Prosecution beyond a reasonable doubt during the *Trial Phase* of the proceedings, outweighed the *Mitigating Factors* beyond a reasonable doubt. The Panel permitted the State to use only selected *Trial-Phase* exhibits during the *Sentencing Phase* of the proceedings. The Prosecution presented with minimal evidence and introduced only the selected *Trial-Phase* exhibits. It presented no additional witnesses. However, the Court permitted all testimony from the *Trial Phase* to be admitted without objection by the Defense team. The Panel indicated that only evidence relevant to the proof of statutory aggravating circumstances would be considered.

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In accordance with RC § 2929.04(C), Defendant was given great latitude in the presentation of evidence of the factors listed in RC § 2929.04 (B) and of any other factors in mitigation of the imposition of the sentence of death. He presented mitigation evidence which included testimony from his mother, one of his brothers, a son, a community organizer, and a minister. Defendant exercised his right to remain silent, and specifically waived his right to any allocution.

An attempt by the Prosecution to present victim impact evidence in rebuttal to the evidence offered by the Defense Team was rejected by the Panel.

Counsel presented final arguments.

The Panel entered into deliberations for the purpose of determining whether the three statutory, *Aggravating Circumstances*, proven by the Prosecution beyond a reasonable doubt during the trial phase of the proceedings, outweigh the *Mitigating Factors* beyond a reasonable doubt. See RC § 2929.04

FACTUAL BACKGROUND

During the early morning hours of February 14, 2009, Defendant purposely caused the death of David Williams while committing, or attempting to commit, the offense of aggravated burglary. More specifically, Defendant, while knowingly entering or remaining on the premises of David Williams, without privilege to do so, did, by force, commit the following offenses: assault, theft, menacing, and did, at the time of the offense, have a deadly weapon on his person, to wit: a knife, on or about his person. More specifically, Defendant entered Williams' home to prevent Williams from testifying in a criminal proceeding against Defendant's alleged girlfriend, Robin Patterson, and Defendant himself. When coercion did not work, Defendant became enraged and assaulted and, eventually, killed Williams. As a

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result of his activities during the early morning hours of that day, Defendant was not only convicted of aggravated murder but three specifications charging that that offense was committed while he was committing or attempting to commit the offense of aggravated burglary, committing or attempting to commit the offense of aggravated robbery, and for the purpose of preventing David Williams from giving testimony in criminal charges against the aforementioned Patterson, all of which was proven to the satisfaction of the three judge panel beyond a reasonable doubt.

In this case, the statutory, Aggravating Circumstances (proven by the State beyond a reasonable doubt) that are being weighed against the mitigating factors are as follows:

- That Defendant purposely caused the death of David Williams while he was committing or attempting to commit the offense of aggravated burglary and was the principal offender in the aggravated murder. [RC §2929.04 (A)(7)]
- That Defendant purposely caused the death of David Williams while he was committing or attempting to commit the offense of aggravated robbery and was the principal offender in the aggravated murder. [RC §2929.04 (A)(7)]
- That Defendant purposely caused the death of David Williams, the victim of the aggravated murder, who was a witness to an offense, to prevent David Williams' 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 David Williams was a witness. [RC §2929.04 (A)(8)]

DISCUSSION: WEIGHING THE SPECIFIC AGGRAVATING CIRCUMSTANCES AND ALL MITIGATING FACTORS

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In order to sentence Defendant to death, the law requires that the Panel find beyond a reasonable doubt that the Aggravating Circumstances in this case outweigh the Mitigating Factors. The Panel must consider the evidence presented as to the aggravating circumstance that transformed the offense of aggravated murder from a case in which the death penalty

was not a potential penalty to one where it is a potential penalty. These aggravating circumstances must then be weighed against the mitigating factors that would weigh in favor of a decision that a sentence of life in prison is the appropriate sentence.

The weighing process is just that. The Panel must put the aggravating circumstances on one side of the balance sheet and place all of the mitigating factors on the other, and then make a determination beyond a reasonable doubt whether the aggravating circumstances outweigh the mitigating factors. Proof beyond a reasonable doubt mandates that this Panel have a firm belief or conviction as to what has been established. Proof beyond a reasonable doubt requires that an ordinary person would be willing to act, and rely, upon that proof in the most important of his or her own affairs.

Pursuant to RC §2929.03(F), the Panel must make certain findings. The Panel must specifically find reasons why the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors. See ***State vs. Fox*** (1994), 69 Ohio St 3d 183; ***State vs. Green*** (2000), 90 Ohio St 3d 352. To satisfy the statutory and case law requirements, the Panel performed the within weighing process, weighting each circumstance and/or factor from least important to most important in significance, as follows: no weight, some weight, moderate weight, considerable weight, substantial weight, and great weight. The Panel did not consider the aggravated murder of David Williams an aggravating circumstance.

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AGGRAVATING CIRCUMSTANCES

The weight that the Panel allocates to the statutory, Aggravating Circumstances proven by the State beyond a reasonable doubt is as follows

THAT DEFENDANT PURPOSELY CAUSED THE DEATH OF DAVID WILLIAMS WHILE HE WAS COMMITTING OR ATTEMPTING TO COMMIT

THE OFFENSE OF AGGRAVATED BURGLARY AND WAS THE PRINCIPAL OFFENDER IN THE AGGRAVATED MURDER.
[Ohio Revised Code §2929.04 (A)(7)]

In many respects, the Court believes that the first two specifications were, largely part of the commission of the aggravated murder, itself, or the "cover up" which followed immediately thereafter, and accord each of those aggravating circumstances some weight. The Court finds the aggravated burglary specification somewhat more compelling because it was the first step in Defendant's criminal conduct that led to the *Aggravated Murder* of David Williams. Regardless of how Defendant entered the victim's residence, the trespass, which formed the basis of the *Aggravated Burglary* charge, commenced when Defendant began to menace and assault Mr. Williams in his own home and to commit the predicate offense, *Aggravated Burglary*, which invoked the felony murder rule in this case. This circumstance the Panel accorded considerable weight.

THAT DEFENDANT PURPOSELY CAUSED THE DEATH OF DAVID WILLIAMS WHILE HE WAS COMMITTING OR ATTEMPTING TO COMMIT THE OFFENSE OF AGGRAVATED ROBBERY AND WAS THE PRINCIPAL OFFENDER IN THE AGGRAVATED MURDER.
[OHIO REVISED CODE §2929.04 (A)(7)]

Of the two predicate felony murder specifications, the Panel found the Aggravated Robbery to be less compelling. That offense (specification) was more related to the cover-up, in terms of trying to make the murder look like a burglary gone awry. Nevertheless, the Panel was mindful of the fact that the Defendant took various items of property belonging to Mr. Williams, which he used to commit a theft against the victim, even after his death. For example, within minutes after leaving the residence, Defendant was at a local UDF store filling his gas tank on the victim's credit card and, later, proceeded to Meijer's Department Store, where he used that same card in an attempt to buy a ring, jewelry and a red negligee,

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ostensibly, to present to his paramour, Robin Patterson, as a Valentine's gift. This circumstance the Panel has also accorded moderate weight.

THAT DEFENDANT PURPOSELY CAUSED THE DEATH OF DAVID WILLIAMS, THE VICTIM OF THE AGGRAVATED MURDER, WHO WAS A WITNESS TO AN OFFENSE, TO PREVENT DAVID WILLIAMS' 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 DAVID WILLIAMS WAS A WITNESS [RC §2929.04 (A)(8)]

The Panel finds most compelling this specification, that Defendant killed Mr. Williams to prevent his testimony in a criminal proceeding. This was clearly Defendant's overwhelming motivation in this matter, as evidenced by the fact that he sent a text message to his paramour to assure her that her troubles were over and that the voice of the witness against her had been silenced, and goes to the heart of the circumstances of the aggravated murder. It represents a threat, an attack, not only upon the victim, but upon the criminal justice system itself. Defendant silenced Mr. Williams to subvert justice, to prevent Mr. Williams from lawfully seeking justice and redress in the Courts of this State. This specification the panel gives its most weight, great weight.

MITIGATING FACTORS

RC § 2929.04(B) provides as follows:

> 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:

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(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.

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

In accordance with RC § 2929.04(B), the Court has considered all of the evidence, information, reports and arguments relevant to the nature and circumstances of the aggravated circumstance or mitigating factors including, but not limited to, the history, character and background of the Defendant, and all of the following:

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1. NATURE AND CIRCUMSTANCES OF THE OFFENSE

This Court has weighed the nature and circumstances of the offense for any mitigating factors. The Court has done so with an eye toward relating them to any mitigating

factors or mitigating evidence that exists. After weighing all of the facts, the Court finds no mitigating factors exist concerning the nature and circumstances of the offense as they relate to the aggravated murder of David Williams. Indeed, there is nothing mitigating about the offense itself. Motivated by his desire to silence a witness against his paramour and himself, Defendant menaced, stalked, assaulted, and, finally, killed Mr. Williams after battering, stabbing him some ten times, and slashing his throat on at least two occasions before he succumbed.

2. THE HISTORY, CHARACTER, AND BACKGROUND OF DEFENDANT

Defendant was raised in an area of Cincinnati known as Camp Washington. He had a normal upbringing. His parents remained married for some forty-seven years until the death of his father in 2006.

Defendant's upbringing was typical and ordinary, in spite of the fact that he and his four siblings-- three brothers and one sister-- were raised in what has been characterized as a tough area of town. During his youth, he was actively involved in Cub Scouts and Weblows, and played several sports, football, baseball, and basketball.

His parents raised him with good, strong, German Catholic values and appropriate discipline. Those values included community service which Mr. Osie continued to perform during the formative years of his life up through high school. He performed paid and volunteer community service, cleaning up parks, playgrounds, and streets in his neighborhood.

Near the end, or just after completing, his high school career, Defendant married a lady by the name of Kate, to whom he stayed married until around 2006. That marriage resulted in two children, Gregory Jr. and Brian.

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During most of Defendant's adult life, he was a lawful and productive member of society. Indeed, the uncontroverted testimony is that from the time he was an older teen up until the time his marriage ended and his father passed, Defendant was gainfully employed and provided well for his family. He was actively attended the sporting activities of his son, Brian, even coaching his team at one point.

He remained close to his family and committed to family values until around 2006. He visited his family and participated in family activities and get-togethers with his children, siblings, and parents. His family loves him and remains committed to him.

The Panel accords the history, character, and background of Defendant, which includes some 46 years as a productive member of society, substantial weight.

3. ANY OTHER FACTORS THAT ARE RELEVANT TO THE ISSUE OF WHETHER DEFENDANT SHOULD BE SENTENCED TO DEATH

During the course of the mitigation Phase of the instant proceedings, several other matters came to the attention of the Panel by the Defense Team. These include the following: Defendant's lack of a prior criminal record, his cocaine usage, and his alleged cooperation with police during the homicide investigation which gave rise to this matter. The Panel has addressed and weighted each of that alleged mitigating evidence.

The Panel believes that Defendant's lack of a prior criminal record has been clearly established. The evidence seems to indicate that Defendant may have had a single OVI (M1) offense and nothing more. This mitigating evidence the Panel gives significant weight.

The Panel believes that there is some mitigating evidence that drug usage became a factor in Defendant's criminality. Indeed, subsequent to Defendant's marriage to Kate ending, and the death of his father in 2006, Defendant's family began to notice changes in

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him. Among the changes noticed was the fact that he began using cocaine, and, perhaps, other drugs and either borrowing and/or taking money from his mother. His brother, son and nephew attempted an intervention approximately one week before the incident that gave rise to this action, but without effect.

Hence, the Panel believes that Defendant probably had used cocaine on the day preceding the homicide, and that he may have been under its effects at the time the offense occurred. However, given the fact that Defendant's consumption of the drug was voluntary on his part, the Panel gives its mitigating value minimal weight.

Finally, Defendant claims that his cooperation with the police is a mitigating factor in this matter. While, superficially, that sounds plausible, it is not supported by the facts, as revealed by his statement to the police. He did sign a Miranda card and indicated his willingness to talk to police. However, a review of his statement indicates that he was not forthcoming with respect to his conduct and culpability, and only admitted that which was dragged out of him after being caught in multiple lies and falsehoods he told the police. In the end, he was denying even the smallest facts and never did really indicate the location of the knife which he used to kill Mr. Williams. This is borne out when he later admitted to his cellmate, Donald Simpson, Jr., that the knife was located at or near the intersection of Grinn and Barret in West Chester Township, which knife he requested that Simpson plant on another individual. Accordingly, the Panel gives Defendant's alleged cooperation with the police minimal value.

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4. ALL OTHER FACTORS ENUMERATED IN ORC § 2929.04(B)

The Panel has also weighed the other factors that are relevant to the issue of whether Defendant should be sentenced to death. The Panel previously commented on Defendant's

background and will not recount those facts again. Further, the Panel finds that Defendant has two sons, a loving mother, three brothers and a sister. This has minimal mitigation value.

The Defendant raised the mitigating factors previously set forth in this opinion. Out of an abundance of caution and fairness, the Panel has also reviewed all other factors enumerated in ORC § 2929.04(B). The Panel finds that none of these factors applicable except as previously mentioned in this opinion.

5. STATEMENTS OF COUNSEL, ALLOCUTION OF DEFENDANT, AND VICTIM IMPACT EVIDENCE

The Panel has also considered statements of defense counsel at the sentencing. The Panel did not admit into evidence, and has not considered, any victim impact evidence in arriving at this decision. The Panel has not considered the aggravated murder itself as an aggravating circumstance.

CONCLUSION

The Panel has considered all of the evidence presented during both the *Trial* and *Sentencing Phases* as it relates to the three specific aggravated circumstances involved in the death of David Williams. The Panel has also considered all of the mitigating evidence and mitigating factors presented at both phases of the proceedings. The Panel has weighed the three specific aggravating circumstances against all of the mitigating factors and mitigating evidence. The Panel has weighed the mitigating factors individually and collectively. After weighing the specific aggravating circumstances against the mitigating factors, the members of the Panel ***unanimously find*** that the State of Ohio has proved beyond a reasonable doubt that the **specific aggravating circumstances** that the Defendant was found guilty of committing **outweigh the mitigating factors.**

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Therefore, it is **ORDERED, ADJUDGED, AND DECREED** that Defendant be, and is hereby, sentenced to **DEATH** on Count Two of the Indictment, and the specifications thereto, and it is further

ORDERED, ADJUDGED, AND DECREED that, on Count Three of the Indictment, Defendant is sentenced to **TEN (10) YEARS** in prison, which sentence shall be served ***concurrent*** to Count Two, and it is further

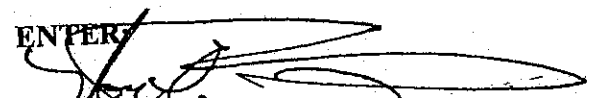
ORDERED, ADJUDGED, AND DECREED that, on Count Four of the Indictment, Defendant is sentenced to **TEN (10) YEARS** in prison, which sentence shall be served ***concurrent*** to Count Two, and it is further

ORDERED, ADJUDGED, AND DECREED that, on Count Five of the Indictment, the Defendant is sentenced to **FIVE (5) YEARS** in prison. The sentence in Count Five shall be served ***consecutive*** to Count One, and it is further

ORDERED, ADJUDGED, AND DECREED that Count One, upon no objection from the State, shall be merged with Count Two as an ***allied offense of similar import***, and it is further

ORDERED, ADJUDGED, AND DECREED that a separate judgment of conviction and sentencing entry shall be filed in this matter.

ENTERED



JUDGE NOAH E. POWERS II, PRESIDING

JUDGE PATRICIA ONEY

JUDGE CHARLES PATER

JUDGE NOAH E. POWERS II
Common Pleas Court
Butler County, Ohio

Copies to:
Judge Patricia S. Oney
Judge Charles Pater
Jason Phillabaum, Prosecutor
Michael Oster, Prosecutor
J. Gregory Howard, Esq., Lead Defense Counsel
David Washington, Jr., Esq., Co-Defense Counsel

JUDGE NOAH E. POWERS II
Common Pleas Court
Butler County, Ohio

ARTICLE I, SECTION 1, OHIO CONSTITUTION

§ 1 RIGHT TO FREEDOM AND PROTECTION OF PROPERTY.

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.

SECTION 2, ARTICLE I, OHIO CONSTITUTION

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

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.

SECTION 5, ARTICLE I, OHIO CONSTITUTION

§ 5 TRIAL BY JURY; REFORM IN CIVIL JURY SYSTEM.

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.

SECTION 9, ARTICLE I, OHIO CONSTITUTION

§ 9 BAILABLE OFFENSES; OF BAIL, FINE, AND PUNISHMENT.

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 a person who is charged with a felony where the proof is evident or the presumption great and who poses a potential serious physical danger to a victim of the offense, to a witness to the offense, or to any other person or to the community. Excessive bail shall not be required; excessive fines shall not be imposed; and cruel and unusual punishments shall not be inflicted.

SECTION 10, ARTICLE I, OHIO CONSTITUTION

§ 10 TRIAL OF ACCUSED PERSONS AND THEIR RIGHTS; DEPOSITIONS BY STATE AND COMMENT ON FAILURE TO TESTIFY IN CRIMINAL CASES.

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 the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a 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 made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

SECTION 16, ARTICLE I, OHIO CONSTITUTION

§ 16 REDRESS IN COURTS.

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

SECTION 20, ARTICLE I, OHIO CONSTITUTION

§ 20 POWERS RESERVED TO THE PEOPLE.

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.

AMENDMENT V, UNITED STATES CONSTITUTION

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

AMENDMENT VI, UNITED STATES CONSTITUTION

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 defense.

AMENDMENT VIII, UNITED STATES CONSTITUTION

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

AMENDMENT XIV, UNITED STATES CONSTITUTION

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

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

ARTICLE II, UNITED STATES CONSTITUTION

Section 1.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

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.

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 Offences 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.

He shall from time to time give to the Congress Information on 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.

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.

ARTICLE VI, UNITED STATES CONSTITUTION

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

LEXSTAT ORC ANN. 2901.04

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2011 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
IN GENERAL

Go to the Ohio Code Archive Directory

ORC Ann. 2901.04 (2011)

§ 2901.04. Rules of construction; references to previous conviction; interpretation of statutory references that define or specify a criminal offense

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

LEXSTAT ORC 2903.01

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2903. HOMICIDE AND ASSAULT
HOMICIDE

Go to the Ohio Code Archive Directory

ORC Ann. 2903.01 (2011)

§ 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.*

LEXSTAT ORC ANN. 2911.01

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
ROBBERY

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ORC Ann. 2911.01 (2011)

§ 2911.01. Aggravated robbery

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

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

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

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

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

(1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;

(2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) As used in this section:

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

(2) "Law enforcement officer" has the same meaning as in *section 2901.01 of the Revised Code* and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

LEXSTAT ORC 2911.11

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
BURGLARY

Go to the Ohio Code Archive Directory

ORC Ann. 2911.11 (2011)

§ 2911.11. Aggravated burglary

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

(B) Whoever violates this section is guilty of aggravated burglary, a felony of the first degree.

(C) As used in this section:

(1) "Occupied structure" has the same meaning as in *section 2909.01 of the Revised Code*.

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

LEXSTAT ORC 2911.12

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
BURGLARY

Go to the Ohio Code Archive Directory

ORC Ann. 2911.12 (2011)

§ 2911.12. Burglary

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

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

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

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

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

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

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

LEXSTAT ORC 2911.13

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
BURGLARY

Go to the Ohio Code Archive Directory

ORC Ann. 2911.13 (2011)

§ 2911.13. Breaking and entering

(A) No person by force, stealth, or deception, shall trespass in an unoccupied structure, with purpose to commit therein any theft offense, as defined in *section 2913.01 of the Revised Code*, or any felony.

(B) No person shall trespass on the land or premises of another, with purpose to commit a felony.

(C) Whoever violates this section is guilty of breaking and entering, a felony of the fifth degree.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING
TRESPASS

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ORC Ann. 2911.21 (2011)

§ 2911.21. Criminal trespass

(A) No person, without privilege to do so, shall do any of the following:

(1) Knowingly enter or remain on the land or premises of another;

(2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows the offender is in violation of any such restriction or is reckless in that regard;

(3) Recklessly enter or remain on the land or premises of another, as to which notice against unauthorized access or presence is given by actual communication to the offender, or in a manner prescribed by law, or by posting in a manner reasonably calculated to come to the attention of potential intruders, or by fencing or other enclosure manifestly designed to restrict access;

(4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified by signage posted in a conspicuous place or otherwise being notified to do so by the owner or occupant, or the agent or servant of either.

(B) It is no defense to a charge under this section that the land or premises involved was owned, controlled, or in custody of a public agency.

(C) It is no defense to a charge under this section that the offender was authorized to enter or remain on the land or premises involved, when such authorization was secured by deception.

(D) (1) Whoever violates this section is guilty of criminal trespass, a misdemeanor of the fourth degree.

(2) Notwithstanding *section 2929.28 of the Revised Code*, if the person, in committing the violation of this section, used a snowmobile, off-highway motorcycle, or all-purpose vehicle, the court shall impose a fine of two times the usual amount imposed for the violation.

(3) If an offender previously has been convicted of or pleaded guilty to two or more violations of this section or a substantially equivalent municipal ordinance, and the offender, in committing each violation, used a snowmobile, off-highway motorcycle, or all-purpose vehicle, the court, in addition to or independent of all other penalties imposed for the violation, may impound the certificate of registration of that snowmobile or off-highway motorcycle or the certificate of registration and license plate of that all-purpose vehicle for not less than sixty days. In such a case, *section 4519.47 of the Revised Code* applies.

(E) Notwithstanding any provision of the Revised Code, if the offender, in committing the violation of this section, used an all-purpose vehicle, the clerk of the court shall pay the fine imposed pursuant to this section to the state recreational vehicle fund created by *section 4519.11 of the Revised Code*.

(F) As used in this section:

(1) "All-purpose vehicle," "off-highway motorcycle," and "snowmobile" have the same meanings as in *section 4519.01 of the Revised Code*.

(2) "Land or premises" includes any land, building, structure, or place belonging to, controlled by, or in custody of another, and any separate enclosure or room, or portion thereof.

LEXSTAT ORC ANN. 2921.04

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2921. OFFENSES AGAINST JUSTICE AND PUBLIC ADMINISTRATION
BRIBERY AND INTIMIDATION

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ORC Ann. 2921.04 (2011)

§ 2921.04. Intimidation of attorney, victim or witness in criminal case

(A) No person shall knowingly attempt to intimidate or hinder the victim of a crime in the filing or prosecution of criminal charges or a witness involved in a criminal action or proceeding in the discharge of the duties of the witness.

(B) No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness.

(C) Division (A) of this section does not apply to any person who is attempting to resolve a dispute pertaining to the alleged commission of a criminal offense, either prior to or subsequent to the filing of a complaint, indictment, or information, by participating in the arbitration, mediation, compromise, settlement, or conciliation of that dispute pursuant to an authorization for arbitration, mediation, compromise, settlement, or conciliation of a dispute of that nature that is conferred by any of the following:

(1) A section of the Revised Code;

(2) The Rules of Criminal Procedure, the Rules of Superintendence for Municipal Courts and County Courts, the Rules of Superintendence for Courts of Common Pleas, or another rule adopted by the supreme court in accordance with Section 5 of Article IV, Ohio Constitution;

(3) A local rule of court, including, but not limited to, a local rule of court that relates to alternative dispute resolution or other case management programs and that authorizes the referral of

disputes pertaining to the alleged commission of certain types of criminal offenses to appropriate and available arbitration, mediation, compromise, settlement, or other conciliation programs;

(4) The order of a judge of a municipal court, county court, or court of common pleas.

(D) Whoever violates this section is guilty of intimidation of an attorney, victim, or witness in a criminal case. A violation of division (A) of this section is a misdemeanor of the first degree. A violation of division (B) of this section is a felony of the third degree.

LEXSTAT ORC 2929.021

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TITLE 29. CRIMES -- PROCEDURE
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PENALTIES FOR MURDER

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ORC Ann. 2929.021 (2011)

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

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

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

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

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

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

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

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

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

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

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ORC Ann. 2929.022 (2011)

§ 2929.022. Determination of aggravating circumstances of prior conviction

(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 [2929.02.3] 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.

LEXSTAT ORC ANN. 2929.023

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ORC Ann. 2929.023 (2011)

§ 2929.023. Defendant may raise matter of age

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.

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ORC Ann. 2929.03 (2011)

§ 2929.03. Imposing sentence for aggravated murder

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

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

(a) Life imprisonment without parole;

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

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

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

(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 [2929.02.3] of the Revised Code*, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(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 [2929.02.3] 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 [2929.02.3] 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 [2929.02.3] 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.

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§ 2929.04. Criteria for imposing death or imprisonment for a capital offense

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

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

(2) The offense was committed for hire.

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

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

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

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

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

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

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

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

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

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

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to *section 2929.023 [2929.02.3] 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.

LEXSTAT ORC ANN. 2929.05

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2929. PENALTIES AND SENTENCING
PENALTIES FOR MURDER

Go to the Ohio Code Archive Directory

ORC Ann. 2929.05 (2011)

§ 2929.05. Appellate review of death sentence

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

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 [2929.02.2]* or *2929.03 of the Revised Code*, the court of common pleas that sentenced the offender shall vacate the sentence if the offender did not present evidence at trial that the offender was not eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced and if the offender shows by a preponderance of the evidence that the offender was less than eighteen years of age at the time of the commission of the aggravated murder for which the offender was sentenced. The court is not required to hold a hearing on a motion filed pursuant to this division unless the court finds, based on the motion and any supporting information submitted by the defendant, any information submitted by the prosecuting attorney, and the record in the case, including any previous hearings and orders, probable cause to believe that the defendant was not eighteen years of age or older at the time of the commission of the aggravated murder for which the defendant was sentenced to death.

LEXSTAT ORC ANN. 2945.05

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2945. TRIAL
TRIAL BY COURT

Go to the Ohio Code Archive Directory

ORC Ann. 2945.05 (2011)

§ 2945.05. Defendant may waive jury trial

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

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

LEXSTAT ORC ANN. 2945.06

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2945. TRIAL
TRIAL BY COURT

Go to the Ohio Code Archive Directory

ORC Ann. 2945.06 (2011)

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

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

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FEDERAL RULES OF EVIDENCE
ARTICLE I. GENERAL PROVISIONS

Go to the United States Code Service Archive Directory

USCS Fed Rules Evid R 106

Review Court Orders which may amend this Rule.
Review expert commentary from The National Institute for Trial Advocacy

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

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FEDERAL RULES OF EVIDENCE
ARTICLE VIII. HEARSAY

Go to the United States Code Service Archive Directory

USCS Fed Rules Evid R 804

Review Court Orders which may amend this Rule.
Review expert commentary from The National Institute for Trial Advocacy

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceed-

ing, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement against interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) [Transferred to Rule 807]

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

LEXSTAT OHIO CRIM R 11

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Ohio Rules Of Criminal Procedure

Ohio Crim. R. 11 (2011)

Review Court Orders which may amend this Rule.

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 plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

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

(F) Negotiated plea in felony cases.

When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea.

If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity.

The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

LEXSTAT OHIO CRIM. R. 16

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Ohio Rules Of Criminal Procedure

Ohio Crim. R. 16 (2011)

Review Court Orders which may amend this Rule.

Rule 16. Discovery and Inspection

(A) Purpose, Scope and Reciprocity.

This rule is to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts, to protect the integrity of the justice system and the rights of defendants, and to protect the well-being of witnesses, victims, and society at large. All duties and remedies are subject to a standard of due diligence, apply to the defense and the prosecution equally, and are intended to be reciprocal. Once discovery is initiated by demand of the defendant, all parties have a continuing duty to supplement their disclosures.

(B) Discovery: Right to Copy or Photograph.

Upon receipt of a written demand for discovery by the defendant, and except as provided in division (C), (D), (E), (F), or (J) of this rule, the prosecuting attorney shall provide copies or photographs, or permit counsel for the defendant to copy or photograph, the following items related to the particular case indictment, information, or complaint, and which are material to the preparation of a defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant, within the possession of, or reasonably available to the state, subject to the provisions of this rule:

(1) Any written or recorded statement by the defendant or a co-defendant, including police summaries of such statements, and including grand jury testimony by either the defendant or co-defendant;

(2) Criminal records of the defendant, a co-defendant, and the record of prior convictions that could be admissible under *Rule 609 of the Ohio Rules of Evidence* of a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal;

(3) Subject to divisions (D)(4) and (E) of this rule, all laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings, or places;

(4) Subject to division (D)(4) and (E) of this rule, results of physical or mental examinations, experiments or scientific tests;

(5) Any evidence favorable to the defendant and material to guilt or punishment;

(6) All reports from peace officers, the Ohio State Highway Patrol, and federal law enforcement agents, provided however, that a document prepared by a person other than the witness testifying will not be considered to be the witness's prior statement for purposes of the cross examination of that particular witness under the Rules of Evidence unless explicitly adopted by the witness;

(7) Any written or recorded statement by a witness in the state's case-in-chief, or that it reasonably anticipates calling as a witness in rebuttal.

(C) Prosecuting Attorney's Designation of "Counsel Only" Materials.

The prosecuting attorney may designate any material subject to disclosure under this rule as "counsel only" by stamping a prominent notice on each page or thing so designated. "Counsel only" material also includes materials ordered disclosed under division (F) of this rule. Except as otherwise provided, "counsel only" material may not be shown to the defendant or any other person, but may be disclosed only to defense counsel, or the agents or employees of defense counsel, and may not otherwise be reproduced, copied or disseminated in any way. Defense counsel may orally communicate the content of the "counsel only" material to the defendant.

(D) Prosecuting Attorney's Certification of Nondisclosure.

If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

(1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion;

(2) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will subject a witness, victim, or third party to a substantial risk of serious economic harm;

(3) Disclosure will compromise an ongoing criminal investigation or a confidential law enforcement technique or investigation regardless of whether that investigation involves the pending case or the defendant;

(4) The statement is of a child victim of sexually oriented offense under the age of thirteen;

(5) The interests of justice require non-disclosure.

Reasonable, articulable grounds may include, but are not limited to, the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation, whether or not those instances resulted in criminal charges, whether the defendant is pro se, and any other relevant information.

The prosecuting attorney's certification shall identify the nondisclosed material.

(E) Right of Inspection in Cases of Sexual Assault.

(1) In cases of sexual assault, defense counsel, or the agents or employees of defense counsel, shall have the right to inspect photographs, results of physical or mental examinations, or hospital reports, related to the indictment, information, or complaint as described in section (B)(3) or (B)(4) of this rule. Hospital records not related to the information, indictment, or complaint are not subject to inspection or disclosure. Upon motion by defendant, copies of the photographs, results of physical or mental examinations, or hospital reports, shall be provided to defendant's expert under seal and under protection from unauthorized dissemination pursuant to protective order.

(2) In cases involving a victim of a sexually oriented offense less than thirteen years of age, the court, for good cause shown, may order the child's statement be provided, under seal and pursuant to protective order from unauthorized dissemination, to defense counsel and the defendant's expert. Notwithstanding any provision to the contrary, counsel for the defendant shall be permitted to discuss the content of the statement with the expert.

(F) Review of Prosecuting Attorney's Certification of Non-Disclosure.

Upon motion of the defendant, the trial court shall review the prosecuting attorney's decision of nondisclosure or designation of "counsel only" material for abuse of discretion during an *in camera* hearing conducted seven days prior to trial, with counsel participating.

(1) Upon a finding of an abuse of discretion by the prosecuting attorney, the trial court may order disclosure, grant a continuance, or other appropriate relief.

(2) Upon a finding by the trial court of an abuse of discretion by the prosecuting attorney, the prosecuting attorney may file an interlocutory appeal pursuant to division (K) of *Rule 12 of the Rules of Criminal Procedure.*

(3) Unless, for good cause shown, the court orders otherwise, any material disclosed by court order under this section shall be deemed to be "counsel only" material, whether or not it is marked as such.

(4) Notwithstanding the provisions of (E)(2), in the case of a statement by a victim of a sexually oriented offense less than thirteen years of age, where the trial court finds no abuse of discretion, and the prosecuting attorney has not certified for nondisclosure under (D)(1) or (D)(2) of this rule, or has filed for nondisclosure under (D)(1) or (D)(2) of this rule and the court has found an abuse of discretion in doing so, the prosecuting attorney shall permit defense counsel, or the agents or employees of defense counsel to inspect the statement at that time.

(5) If the court finds no abuse of discretion by the prosecuting attorney, a copy of any discoverable material that was not disclosed before trial shall be provided to the defendant no later than commencement of trial. If the court continues the trial after the disclosure, the testimony of any witness shall be perpetuated on motion of the state subject to further cross-examination for good cause shown.

(G) Perpetuation of Testimony.

Where a court has ordered disclosure of material certified by the prosecuting attorney under division (F) of this rule, the prosecuting attorney may move the court to perpetuate the testimony of relevant witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness's testimony shall be made and shall be admissible at trial as part of the state's case in chief, in the event the witness has become unavailable through no fault of the state.

(H) Discovery: Right to Copy or Photograph.

If the defendant serves a written demand for discovery or any other pleading seeking disclosure of evidence on the prosecuting attorney, a reciprocal duty of disclosure by the defendant arises without further demand by the state. The defendant shall provide copies or photographs, or permit the prosecuting attorney to copy or photograph, the following items related to the particular case indictment, information or complaint, and which are material to the innocence or alibi of the defendant, or are intended for use by the defense as evidence at the trial, or were obtained from or belong to the victim, within the possession of, or reasonably available to the defendant, except as provided in division (J) of this rule:

(1) All laboratory or hospital reports, books, papers, documents, photographs, tangible objects, buildings or places;

(2) Results of physical or mental examinations, experiments or scientific tests;

(3) Any evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi. However, nothing in this rule shall be construed to require the defendant to disclose information that would tend to incriminate that defendant;

(4) All investigative reports, except as provided in division (J) of this rule;

(5) Any written or recorded statement by a witness in the defendant's case-in-chief, or any witness that it reasonably anticipates calling as a witness in surrebuttal.

(I) Witness List.

Each party shall provide to opposing counsel a written witness list, including names and addresses of any witness it intends to call in its case-in-chief, or reasonably anticipates calling in rebuttal or surrebuttal. The content of the witness list may not be commented upon or disclosed to the jury by opposing counsel, but during argument, the presence or absence of the witness may be commented upon.

(J) Information Not Subject to Disclosure.

The following items are not subject to disclosure under this rule:

(1) Materials subject to the work product protection. Work product includes, but is not limited to, reports, memoranda, or other internal documents made by the prosecuting attorney or defense counsel, or their agents in connection with the investigation or prosecution or defense of the case;

(2) Transcripts of grand jury testimony, other than transcripts of the testimony of a defendant or co-defendant. Such transcripts are governed by *Crim. R. 6*;

(3) Materials that by law are subject to privilege, or confidentiality, or are otherwise prohibited from disclosure.

(K) Expert Witnesses; Reports.

An expert witness for either side shall prepare a written report summarizing the expert witness's testimony, findings, analysis, conclusions, or opinion, and shall include a summary of the expert's qualifications. The written report and summary of qualifications shall be subject to disclosure under this rule no later than twenty-one days prior to trial, which period may be modified by the court for

good cause shown, which does not prejudice any other party. Failure to disclose the written report to opposing counsel shall preclude the expert's testimony at trial.

(L) Regulation of discovery.

(1) The trial court may make orders regulating discovery not inconsistent with this rule. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.

(2) The trial court specifically may regulate the time, place, and manner of a *pro se* defendant's access to any discoverable material not to exceed the scope of this rule.

(3) In cases in which the attorney-client relationship is terminated prior to trial for any reason, any material that is designated "counsel only", or limited in dissemination by protective order, must be returned to the state. Any work product derived from said material shall not be provided to the defendant.

(M) Time of motions.

A defendant shall make his demand for discovery within twenty-one days after arraignment or seven days before the date of trial, whichever is earlier, or at such reasonable time later as the court may permit. A party's motion to compel compliance with this rule shall be made no later than seven days prior to trial, or three days after the opposing party provides discovery, whichever is later. The motion shall include all relief sought under this rule. A subsequent motion may be made only upon showing of cause why such motion would be in the interest of justice.

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Ohio Rules Of Criminal Procedure

Ohio Crim. R. 23 (2011)

Review Court Orders which may amend this Rule.

Rule 23. Trial by Jury or by the Court

(A) Trial by jury.

In serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney. In petty offense cases, where there is a right of jury trial, the defendant shall be tried by the court unless he demands a jury trial. Such demand must be in writing and filed with the clerk of court not less than ten days prior to the date set for trial, or on or before the third day following receipt of notice of the date set for trial, whichever is later. Failure to demand a jury trial as provided in this subdivision is a complete waiver of the right thereto.

(B) Number of jurors.

In felony cases juries shall consist of twelve.

In misdemeanor cases juries shall consist of eight.

If a defendant is charged with a felony and with a misdemeanor or, if a felony and a misdemeanor involving different defendants are joined for trial, the jury shall consist of twelve.

(C) Trial without a jury.

In a case tried without a jury the court shall make a general finding.

LEXSTAT OHIO CRIM. R. 32

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Ohio Rules Of Criminal Procedure

Ohio Crim. R. 32 (2011)

Review Court Orders which may amend this Rule.

Rule 32. Sentence

(A) Imposition of sentence.

Sentence shall be imposed without unnecessary delay. Pending sentence, the court may commit the defendant or continue or alter the bail. At the time of imposing sentence, the court shall do all of the following:

(1) Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment.

(2) Afford the prosecuting attorney an opportunity to speak;

(3) Afford the victim the rights provided by law;

(4) In serious offenses, state its statutory findings and give reasons supporting those findings, if appropriate.

(B) Notification of right to appeal.

(1) After imposing sentence in a serious offense that has gone to trial, the court shall advise the defendant that the defendant has a right to appeal the conviction.

(2) After imposing sentence in a serious offense, the court shall advise the defendant of the defendant's right, where applicable, to appeal or to seek leave to appeal the sentence imposed.

(3) If a right to appeal or a right to seek leave to appeal applies under division (B)(1) or (B)(2) of this rule, the court shall also advise the defendant of all of the following:

(a) That if the defendant is unable to pay the cost of an appeal, the defendant has the right to appeal without payment;

(b) That if the defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost;

(c) That if the defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost;

(d) That the defendant has a right to have a notice of appeal timely filed on his or her behalf.

Upon defendant's request, the court shall forthwith appoint counsel for appeal.

(C) Judgment.

A judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence. Multiple judgments of conviction may be addressed in one judgment entry. If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall render judgment accordingly. The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk.

LEXSTAT OHIO EVID R 106

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Ohio Rules Of Evidence
Article I General Provisions

Ohio Evid. R. 106 (2011)

Review Court Orders which may amend this Rule.

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which is otherwise admissible and which ought in fairness to be considered contemporaneously with it.

LEXSTAT OHIO EVID. R. 804

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Ohio Rules Of Evidence
Article VIII Hearsay

Ohio Evid. R. 804 (2011)

Review Court Orders which may amend this Rule.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(A) Definition of unavailability.

"Unavailability as a witness" includes any of the following situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) persists in refusing to testify concerning the subject-matter of the declarant's statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of the declarant's statement;

(4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity;

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

(B) Hearsay exceptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony.

Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in

interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability.

(2) Statement under belief of impending death.

In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

(3) Statement against interest.

A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement.

(4) Statement of personal or family history.

A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or (b) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Statement by a deceased or incompetent person.

The statement was made by a decedent or a mentally incompetent person, where all of the following apply:

(a) the estate or personal representative of the decedent's estate or the guardian or trustee of the incompetent person is a party;

(b) the statement was made before the death or the development of the incompetency;

(c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.

(6) Forfeiture by wrongdoing.

A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

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Code Of Judicial Conduct
Canon 1

Ohio Jud. Rule 1.2 (2011)

Review Court Orders which may amend this Rule.

Rule 1.2 Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the *independence, integrity, and impartiality* of the judiciary, and shall avoid *impropriety* and the appearance of *impropriety*.

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Code Of Judicial Conduct
Canon 2

Ohio Jud. Rule 2.11 (2011)

Review Court Orders which may amend this Rule.

Rule 2.11 Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's *impartiality* might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal *knowledge* of facts that are in dispute in the proceeding.

(2) The judge *knows* that the judge, the judge's spouse or *domestic partner*, or a person within the *third degree of relationship* to either of them, or the spouse or *domestic partner* of such a person is any of the following:

(a) A party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) Acting as a lawyer in the proceeding;

(c) Has more than a *de minimis* interest that could be substantially affected by the proceeding;

(d) Likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a *fiduciary*, or the judge's spouse, *domestic partner*, parent, or child, or any other member of the *judge's family residing in the judge's household*, has an *economic interest* in the subject matter in controversy or in a party to the proceeding.

(4) [RESERVED]

(5) The judge, while a judge or a *judicial candidate*, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge *knows* that the judge's spouse or *domestic partner*, or a person within the *third degree of relationship* to either of them, or the spouse or *domestic partner* of such a person has acted as a judge in the proceeding.

(7) The judge meets any of the following criteria:

(a) The judge served as a lawyer in the matter in controversy or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) The judge served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the particular matter, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) The judge was a material witness concerning the matter;

(d) The judge previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and *fiduciary economic interests*, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or *domestic partner* and minor children residing in the judge's household.

(C) A judge subject to disqualification under this rule, other than for personal bias or prejudice under division (A)(1) of this rule, may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

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Code Of Judicial Conduct
Canon 3

Ohio Jud. Rule 3.11 (2011)

Review Court Orders which may amend this Rule.

Rule 3.11 Financial, Business, or Remunerative Activities

(A) A judge may hold and manage investments of the judge and *members of the judge's family.*

(B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of or independent contractor for any business entity except that a judge may do any of the following:

(1) Manage or participate in a business closely held by the judge or *members of the judge's family;*

(2) Manage or participate in a business entity primarily engaged in investment of the financial resources of the judge or *members of the judge's family;*

(3) Write or teach.

(C) A judge shall not engage in financial activities permitted under divisions (A) and (B) of this rule if they will do any of the following:

(1) Interfere with the proper performance of judicial duties;

(2) Lead to frequent disqualification of the judge;

(3) Involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves;

(4) Result in violation of other provisions of this code.

(D) As soon as practicable without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this rule.