

ORIGINAL

In The Supreme Court Of Ohio

STATE OF OHIO,

:

Appellee,

:

-vs-

:

Case No. 2010-2198

CALVIN MCKELTON,

:

Appellant.

:

This Is A Capital Case.

On Appeal From The Court Of
Common Pleas Of Butler County
Case No. CR-10-020189

MERIT BRIEF OF APPELLANT CALVIN MCKELTON

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Statement of the Case and Facts¹

Overview and Procedural History

The defendant-appellant Calvin McKelton was charged with aggravated murder in connection to the death of Germaine Evans and murder in connection with the death of Margaret Allen. The State alleged that McKelton killed Allen, with whom he had had a prolonged relationship, by strangling her in July of 2008. The State alleged that McKelton killed Evans, or had him killed, in February of 2009, to prevent him from serving as a witness in connection with the death of Margaret Allen.

The State maintained that McKelton was guilty of capital murder with respect to Evans based on two specifications for death eligibility: R.C. § 2929.04(A)(3) (the alleged aggravated murder was committed for the purpose of escaping detection or apprehension for the killing of Allen), and R.C. § 2929.04(A)(8) (the crime was alleged to have been committed for the purpose of preventing the victim from testifying in a criminal proceeding). McKelton was also charged with a specification for using a firearm under R.C. § 2941.145 in connection with the death of Germaine Evans.

The indictment also charged McKelton with two counts of felonious assault in violation of R.C. § 2903.11(A)(1), two counts of Domestic Violence in violation of R.C. § 2919.25(A), one count of aggravated robbery under R.C. § 2911.01(A)(3), aggravated arson under R. C. § 2909.02(A)(2), tampering with evidence under R.C. § 2921.12(A)(1), gross abuse of a corpse under R.C. § 2927.01, and intimidation of a witness under R.C. § 2921.04(B). McKelton's trial

¹ McKelton Raises 21 Propositions of Law. Because many of those propositions are fact-intensive, a more detailed statement of the relevant facts is deferred to those propositions. This statement provides an overview.

began on October 4, 2010. McKelton was found guilty of all of the charges except for aggravated robbery, which was dismissed before trial, and intimidation, of which he was found not guilty.

McKelton's mitigation hearing began on October 21, 2010. The aggravating factors were merged, leaving the aggravating factor that the crime was committed for the purpose of preventing the victim from testifying in a criminal proceeding under R.C. § 2929.04(A)(8). The jury returned a verdict of death on October 22, 2010, and the trial court entered its opinion sentencing him to death on November 8, 2010. The appellant filed a timely Notice of Appeal on December 23, 2010.

Pretrial

The weeks leading up McKelton's trial were marred by problems concerning McKelton's counsel and the issue of the non-disclosure of witnesses. First attorney Richard Goldberg was forced to withdraw from his representation of McKelton just a month before trial because of a conflict. 9/17/2010 Hrg. Tr. 4-5. McKelton had retained Goldberg. However, because Goldberg did not specialize in capital cases, the trial court also appointed Greg Howard and Melynda Cook. 2/16/10 Hrg. Tr. 7-8.

Due to McKelton's past conviction for intimidation and allegations of intimidation in the case at hand, the State did not disclose 23 of its witnesses. Hrg. 8/6/10 Tr. 8. The State filed its Certification for Non-Disclosure of Witnesses on May 1, 2010. Dkt. 71. Counsel for McKelton opposed the State's non-disclosure noting the tremendous disadvantage non-disclosure would have to the defense of McKelton's case. Dkt. 72. The final hearing regarding non-disclosure of witnesses was held a week before trial. *See* 9/27/10 Hrg. Tr. The State disclosed eight witnesses the evening before trial began, and one of the witness's statements was not provided until the morning of trial. Tr. 281, 285, 299.

In September, just weeks before the trial began, the State informed Goldberg that he had a conflict because at least one of his clients was on its witness list (9/17/10 hrg. tr. 3-4), and the trial court allowed him to withdraw. *Id.* at 4. However, Goldberg expressed concerns about withdrawing, telling the court that he had done a “considerable amount of work” himself, that he was not sure that co-counsel could “pick up the slack” if he were to withdraw, and that he believed his withdrawal might deprive McKelton of effective assistance of counsel. *Id.* at 17. McKelton also expressed his concern, stating that he had only met with Howard and Cook privately twice. *Id.* at 13. McKelton also said that when Howard and Cook were first appointed, Goldberg told him that they were only needed to handle the motions pertaining to the death penalty part of his case. *Id.* at 14.

Less than three weeks before trial, Howard and Cook filed a motion for a continuance and moved to withdraw from representation (dkt. 156), and McKelton informed the court that he too wanted the attorneys to withdraw (9/17/10 hrg. tr. 20, 22). McKelton told the Court that his attorneys had only visited him twice, that they had tried to force him to take a plea bargain, and that they had not made sufficient use of experts. *Id.* at 12-4. Greg Howard and Melynda Cook, McKelton’s attorneys, told the Court that their relationship with McKelton had broken down and that they could not effectively represent him. *Id.* at 6, 22. The trial court had set the trial date for October 4, 2010 in February of that year. 2/16/10 Hrg. Tr. 18. While the case had not had any prior continuances, the trial court refused to grant a continuance or to allow Howard and Cook to withdraw. 9/17/2010 Hrg. Tr. 33-4.

Voir Dire

The trial court rejected McKelton’s motion for individual voir dire and said he was contemplating voir dire of 10 to 12 jurors at a time. 7/8/10 Hrg. Tr. p. 35-6. Voir dire was

ultimately conducted with the entire venire present. In front of the entire venire, jurors commented on news articles and television reports that they had seen in relation to McKelton's case. Tr. 52-54, 158-70. One juror admitted that he did not think that he could put all of the news reports out of his head. *Id.* at 160. Another juror read about the case in the *Hamilton Journal* after Margaret Allen's body was found. She admitted that after reading the articles, she believed McKelton was probably guilty. *Id.* at 167-70.

In front of the entire venire, the State asked the jurors if they, or someone close to them, had been victims of domestic violence. Tr. 71. The State then had 15 of the jurors testify about their experiences with a loved one who had been in abusive relationships, if they were in denial about the abuse, minimized the abuse, or refused to report it. Tr. 71-87. The State then asked those jurors if they could be fair to McKelton, and two of them told the state (and the venire) that they could not be fair because of the experience of dealing with domestic violence in the past. Tr. 87.

Trial

After voir dire, eight witnesses had still not been disclosed to defense counsel. The State did not provide the statement of Allen's friend, Charia Mam, until after trial began. Defense counsel again moved for a continuance, and the court denied the motion. Tr. 300, 302.

Before the events that were the basis for this trial, McKelton and Allen had been romantically involved and living together. Tr. 338. Allen had been pregnant with McKelton's child, but lost her baby shortly before her death. Tr. 519. McKelton and Evans were friends. Tr. 1039.

The State presented 36 witnesses in its case-in-chief. The State's first witness was Ziala Danner, Allen's niece who lived with Allen and McKelton. Tr. 302. Danner testified that she

called 911 when she was frightened because she heard screaming coming from the garage. Tr. 341-42. The State played the 911 call. Tr. 349. On the night of that phone call, Allen was treated for a broken ankle. This was the basis for one of McKelton's domestic violence and felonious assault charges. Dkt 1.

Officer Kelly Smith and Sherrie Bluester, a screener for Butler County Children's Services, both testified to statements made by Allen regarding her broken ankle. Tr. 392, 405. Allen denied that McKelton had broken her ankle, but the State used inconsistencies in Allen's denials as evidence she was hiding abuse. Tr. 1953-4. Defense counsel objected to Allen's hearsay statements, and the State argued that they were admissible under the forfeiture by wrongdoing exception to hearsay rules. Tr. 401. Defense counsel argued "I think they have to show that she's not here today and that she's not here and due to his wrongdoing for the purposes of preventing her from testifying in regard to this issue." Tr. 403. The trial court replied "Clearly the allegation in this case is that this defendant murdered the victim, Ms. Allen, and I think this is exactly what the forfeiture by wrongdoing exception is. So therefore, I'm going to permit it under the exception to the hearsay rule." Tr. 404.

Allen's other niece Terri White also lived with Allen and testified about prior incidents between McKelton and Allen in the two years he lived with Allen. Tr. 425. White testified that she had seen McKelton choking Allen in the past. Tr. 431. White also testified that Allen had told her not to say anything about what went on in the house. Tr. 441. White said this was why she never called the police. Tr. 441. After White's testimony, Margene Robinson was called by the State to testify as an expert "in the dynamic of domestic violence." Tr. 649.

Shaunda Luther and Charia Mam, who had been friends of Allen's, testified at trial regarding conversations they had with Allen regarding McKelton. Tr. 485, 537. Allen once told

her friend Luther to be careful what she said around McKelton and his friends because they were “killers” and that she was “serious meaning killers.” Tr. 498-9. Charia Mam testified that Allen told her she thought McKelton would kill her if she had an abortion without telling him or if she cheated on him. Tr. 547, 555. Allen also told Mam that she was mad at Ziala for calling the police because “now the police would be all in their business.” Tr. 578.

Allen’s body was discovered at Schmidt field on July 27, 2008. Tr. 682. The forensic pathologist estimated that the body had been in the park for two to three days before it was discovered. Tr. 1443. The jury was shown pictures of Allen’s autopsy. Tr. 1428. Allen’s autopsy revealed that the cause, mechanism, and manner of death were strangulation, asphyxia, and homicide, respectively. Tr. 1436, 1441, 1443. A DNA test was performed on extracts from Allen’s fingernails. Tr. 742. The profile discovered was from an unknown male. *Id.* McKelton and Evans were excluded from the DNA sample taken from Allen’s fingernails. *Id.*

When the police went to Allen’s house it appeared ransacked. *See* Tr. 804. Detective Rebecca Ervin testified that there was a strong odor of gasoline in the house. Tr. 795. Portions of mattresses and carpet appeared to have been burned. Tr. 804, 810. This was the basis for the arson charge. Dkt 1. Allen’s car was not at the house. Tr. 861. The car was later discovered abandoned in Golf Manor—an area of Cincinnati. *Id.*

Andre Ridley testified that Evans told him about witnessing Allen’s death. According to Ridley, Evans said that McKelton choked Allen during a fight. Tr. 909. At some point McKelton started smacking Allen, saying “wake up Missy, wake up. Wake up. Wake up. Missy.” *Id.* McKelton then began to cry and continued begging “please, Missy, wake up. Wake up. Please wake up”, and poured water on her. *Id.* According to Ridley, McKelton then “turned into CSI,” and had Evans help him “stage the scene as a robbery. Tr. 910.

Evans' body was found in Inwood park on February 27, 2009. Tr. 1358. Evans had been killed by a gunshot wound to the back of the head. Tr. 1577. The State never identified who the shooter was or might have been. Detective Jenny Luke testified that she called Germaine Evans' sister, Crystal Evans, on February 24, 2009, to discuss her brother's murder. Tr. 1251. McKelton was romantically involved with Crystal Evans and living with her at that time. Tr. 1040. Crystal Evans met McKelton through Germaine. Tr. 1039.

The State relied on informants to connect McKelton to Evans' death. The State argued that McKelton had Evans killed to eliminate the only witness to a crime, yet according to their witnesses, he created several more witnesses by repeatedly and casually confessing to his crimes to acquaintances. The informants Lemuel Johnson and Marcus Sneed both testified that McKelton admitted to them that he had Evans killed. Lemuel Johnson testified that that McKelton told him that McKelton knew Detective Luke had called Crystal looking for Germaine and "had to kill Mick [Germaine Evans] . . . Mick be the only person that can connect him to Missy Murder." Tr. 1748. Similarly, Marcus Sneed testified that McKelton admitted to killing both Allen and Evans. Tr. 1599, 1602. Sneed testified that McKelton told him he had to kill Evans because "[t]hat was the only guy that could link him to the murder." Tr. 1602.

McKelton did not call any witnesses after the close of the State's case. Tr 1861. McKelton was found guilty by the jury of all counts and specifications, except the intimidation charges. Tr. 2155-8.

Penalty Phase

The penalty phase began October 21, 2010. Mit. Tr. 1. At the outset of the penalty phase, the capital specifications for the murder of Germaine Evans were merged in Specification 2 of Count 10 of the indictment, that Evans was killed to prevent his testimony in any criminal

proceeding. Mit. Tr. 4-5. No capital specifications were included in the State's charges of the murder of Margaret Allen. Dkt. 1. Over objection, the State sought to introduce the photographs from the autopsy of Margaret Allen because they were relevant to "the autopsy report and the testimony of Dr. Gorniak that had to with the death of Margaret Allen that Germaine Evans was witness to...and the abuse of a corpse which he was a witness to." Mit. Tr. 26. The Court allowed them in because "they have limited probative value, but they do have probative value that outweighs any...prejudice." Tr. Mit. 27.

McKelton's counsel gave a brief opening statement, which took up about two pages of transcript. Mit. Tr. 21-23. Defense counsel had only three witnesses testify at mitigation: Calvin's mother Audrey, his daughter Kayla, and Germaine Evans's sister Crystal. Mit. tr. 32-66. In closing argument, defense counsel told the jury that McKelton was "a bad person" and that they should consider only death or life without parole, but not the other two available life sentences. Mit. Tr. 111-2.

The jury recommended that McKelton receive a death sentence. Mit. Tr. 177. The court followed that recommendation on November 2, 2010. 11/2/10/ Hrg. Tr. 11.

Argument

Proposition of Law No. I

The accused's right to a fair trial is violated when the trial court denies counsel's request to withdraw and reasonable requests for continuances in a capital case. U.S. Const. amends. V, VI, VIII, XIV; Ohio Const. art. I, §§ 9, 10, 16.

Calvin McKelton was denied his right to a fair trial when the trial court unreasonably denied counsel's request to withdraw and requests by McKelton for continuances. Denial of counsel's request to withdraw ultimately denied McKelton effective assistance of counsel. The balance of relevant factors for whether a continuance should be granted weighs in favor of McKelton's requests for additional time. And McKelton's defense was prejudiced by the trial court's refusal to grant him those continuances.

A. Background information.

1. Counsel discusses continuances.

The subject of a continuance was first breached in the Crim.R. 16(f) hearing held before Judge Nastoff on August 10, 2010, nearly two months before the commencement of trial and six weeks before the withdrawal of Richard Goldberg. Regarding the new disclosure rules that took effect on July 1, 2010, defense counsel stated that if they received the witness names at the commencement of trial, they will "have to ask for a continuance every single time one of these witnesses take the witness stand, which potentially could continue this trial for weeks if not months." *See* 8/6/10 Hrg. Tr. p. 13. Later in that same hearing, Attorney Howard expressed concerns about whether co-counsel Attorney Goldberg might have a conflict of interest with one of the State's undisclosed witnesses and have to "get off the case." *Id.* at 22. Howard stated that if that were to happen, "[t]hen we're left with asking for a continuance from Judge Sage in

regard to this issue because now *we've lost somebody on our case who was a critical cog in this, and then what happens?"* *Id.* at 23 (emphasis added).

In response to defense counsel's prescient concern about Attorney Goldberg, the State suggested that counsel could "produce a list of people he's consulted and talked to his client about" and "show us." 8/6/10 Hrg. Tr. 24. Such action would violate the defense counsel's duty of zealous advocacy and effective assistance by providing the State with a list of possible witnesses. The State then assured defense counsel that, "if any of the witnesses we had were represented and as counsel of record, I would know it, I would have already told him and that is not the case." *Id.* As it turned out, Attorney Goldberg *was* the counsel of record for witness Lemuel Johnson, (who had been incarcerated since October 2009) and the "critical cog" had to withdraw. *See* Tr. p. 1732 (testimony of Lemuel Johnson).

The next discussion of continuing the case came at the September 1, 2010 conflict of interest hearing, just over a month before voir dire began on October 4th. When notified of a possible conflict of interest, Attorney Goldberg stated that McKelton's "right to counsel is extremely important at this stage, and this is something that could have been avoided much earlier on." *See* 9/1/10 Hrg. Tr. 7. To protect McKelton's right to counsel, Goldberg suggested the State should not call the witness or witnesses that created the conflict. The State replied that, "frankly, it doesn't matter about Mr. McKelton's right to counsel." *Id.* at 8. Later, the State remarked, "I just wanted to make sure there wouldn't be a continuance, and this is kind of our way of notifying other counsel that you *may* be trying this case without Mr. Goldberg." *Id.* at 15 (emphasis added).

While Goldberg was concerned with McKelton's constitutional rights, the court was only concerned with keeping the trial schedule. After Goldberg raised his concerns about leaving

McKelton in an “untenable situation,” the court stated that “every time that the attorneys want to delay [capital litigation], the first thing they drag out is that they are going to deny their client this effective assistance of counsel.” *Id.* at 19. But defense counsel’s goal was never to delay the trial. They merely had concerns about how McKelton would be affected *if* Goldberg had to withdraw, which was still uncertain at that point. The State could have confirmed Goldberg’s conflict of interest at this point, but they chose to wait. The court stated, “the bottom line is the case is going to go to trial October 4th.” *Id.* This shows the court had unreasonably predetermined to deny any requests for continuances, and nothing McKelton or his counsel could say would persuade the court otherwise, even after the impending withdrawal of Attorney Goldberg and the complete breakdown of the attorney-client relationship.

2. Counsel of choice withdraws and subsequent breakdown.

At the next hearing, on September 17, 2010, McKelton’s counsel of choice, Richard Goldberg, had to withdraw from representation because he concurrently represented a State’s witness. Once McKelton learned that fact, he was uneasy and had difficulty accepting that Goldberg’s client could have been cooperating with the State without Goldberg’s knowledge. *See* 9/17/10 Hrg. Tr. 13. Then, in front of a correction’s officer, defense counsel tried to persuade McKelton to plead guilty. *Id.* at 10, 18. McKelton became suspicious of the representation he was receiving, and the relationship broke down.

McKelton was not the only one unhappy with the attorney-client relationship. Defense counsel told the court that the breakdown in the relationship had made it so that they were not able to effectively do their job. *See* 9/17/10 Hrg. Tr. 6, 22. (*See also* Propositions of Law Nos. XV and XVI). Attorney Howard said, “*I never had to do this before*, but we’d ask the court permission to withdraw from this case.” *Id.* at 8 (emphasis added). Attorney Cook (Howard’s

wife) candidly told the court, "I cannot continue to represent him under my ethical duties to represent him and I would continue to do so, but I believe that based upon his own feelings that he said here in addition to what he said to us." *Id.* at 22.

Counsel also indicated to the court that they feared their client made threats about them, particularly in light of the State's motion to use a stun belt on McKelton. *See* 9/17/10 Hrg. Tr. 23-24. Howard told the court that, because of what the prosecutors told him, "I'm only going to assume that [McKelton's] made threats to me and threats to Ms. Cook and possibly Mr. Goldberg over the phone to various people. So I don't know that I can – that either one of us can sit here and continue to represent him on this case." *Id.* Although this was not true, the damage was done.

The State then assured counsel that McKelton was only "expressing his displeasure with his attorneys in line with what he said today, not any threats to their safety, but more that he was intending to reach out to the Ohio Public Defender's Office." *Id.* at 25. The State then accused McKelton of only complaining about his counsel so that he could get the case continued. *Id.*

McKelton asked the State to provide evidence to support their accusation that he wanted to disrupt or derail the case to get a continuance, and told the court repeatedly, "I don't want to prolong this. I never had wished to prolong this case. I never wished for [Goldberg] to step down." *Id.* at 27. Instead of derailing the case, McKelton had provided the court with a solution. As Attorney Howard stated, McKelton believed, "attorneys from the Ohio Public Defender System would have an unbiased interest in his case and would be able to more adequately represent him because – because they're from Columbus." *Id.* at 24. Howard then told the court that McKelton deserved to get counsel that he trusts. He asked for permission to withdraw. *Id.* at

28. The court denied the motion, and it noted that it, “gratuitously appointed additional counsel,” even though Superintendence Rule 20 does not permit it. *Id.* at 29.

McKelton wanted to hire his own counsel. Had the court not violated Rule 20, McKelton would not have had two attorneys he did not want thrust upon him. When the attorney he *did* hire and he *did* trust got off his case, McKelton would have been at square one with a new attorney. Even if the appointed attorneys would have ultimately been Greg Howard and Melynda Cook, the circumstances would have been different. Instead, the court ordered Cook and Howard to remain as McKelton’s attorneys. Worse, the court denied their repeated requests for a continuance.

3. Requests for continuance denied.

At the final Crim.R. 16(F) hearing on September 27, 2010, exactly seven days before trial, defense counsel asked if the still non-disclosed witness names could at least be marked “counsel only” because, as they said, “what we know we’re never going to get in this case is a continuance because Judge Sage made it clear he is not giving us a continuance.” *See* 9/17/10 Hrg. Tr. 32. Unfortunately, they were right about the court’s inflexible decision to deny reasonable requests for a continuance despite the changed circumstances of Richard Goldberg’s withdrawal and the ensuing complete breakdown in the attorney-client relationship.

During the final pretrial motions hearing, defense counsel repeated their request for a continuance based on the nondisclosure ruling the week before. *See* 10/4/10 Hrg. Tr. 23. In addressing the motion for a continuance, the State asked for it to be denied. “*We’re* ready to go to trial,” Prosecutor Salyers said. *Id.* at 23-24 (emphasis added). At that point, the State had been working on the case since July of 2008 and had arrested McKelton in February of 2010. Meanwhile, the defense counsel had just lost a “critical cog” seventeen days earlier and their

relationship with their client had broken down beyond repair because the State did not appraise Attorney Goldberg of his conflict earlier. Plus they were still waiting for the names of eight witnesses on the eve of trial. Nevertheless, the court denied the motion for continuance. *Id.* at 24.

On the morning of the first day of trial, before opening statements, defense counsel renewed their motion for a continuance and submitted a motion to have the police turn over all materials acquired during their investigation. Tr. 299. The defense specifically cited their concern that a statement from State witness Charia Mam from August 4, 2008 was just turned over to the prosecutor's office at the start of trial on October 5, 2010. *Id.* at 300. The State called the police's action "inexcusable" but noted that the delay was "only 12 hours too late." *Id.* at 300-01. But Charia Mam was called to testify first on the morning of October 6, 2010, so while the delay might have "only" been 12 hours, the police's action left the defense with less than 24 hours to investigate a non-disclosed witness statement during a capital case when every minute and hour was precious. *See id.* at 536. Also, as the defense reiterated, they remained concerned about what the State "did not turn over." *Id.* at 301. The continuance would have allowed the State to confirm all the required statements were disclosed. Instead, the motion was denied and the trial began. *Id.* at 302.

B. Substitution of counsel.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). "The presentation of a criminal defense can be a mystifying process even for well-informed laypersons. This is one of the reasons for the right to counsel." *Gonzalez v. United States*, 553 U.S. 242, 249 (2008) (internal citations omitted). "[T]he right to the aid of counsel is of this fundamental character." *Powell v. Alabama*, 287 U.S. 45, 68 (1932).

McKelton's counsel of choice, Richard Goldberg, had to withdraw from representation because he concurrently represented a State's witness. Once McKelton learned that fact, he was uneasy and had difficulty accepting that Goldberg's client could have been cooperating with the State without Goldberg's knowledge. *See* 9/17/10 Hrg. Tr. 13. Then, in front of a police officer, defense counsel tried to persuade McKelton to plead guilty. *See id.* at 18. McKelton became suspicious of the representation he was receiving, and the relationship broke down. Both McKelton and his appointed attorneys, Melynda Cook and Greg Howard, asked for substitution of counsel. *See id.* at 6, 22. While he did not want to continue on with Cook and Howard, McKelton repeatedly stated that he did not want a continuance of his trial. He simply wanted counsel he could trust, and he referenced the Ohio Public Defender. But the court denied his motion to remove counsel as well as counsel's motion to withdraw.

"An indigent defendant * * * must demonstrate 'good cause' to warrant substitution of counsel." *State v. Williams*, 99 Ohio St. 3d 493, 512-13, 794 N.E.2d 27, 49 (2003) (citing *United States v. Iles*, 906 F.2d 1122, 1130 (6th Cir. 1990)). A "breakdown in the attorney-client relationship will warrant substitution if the breakdown is so severe as to jeopardize the defendant's right to effective assistance of counsel." *Id.* at 513, 794 N.E.2d at 49-50 (citing *State v. Coleman*, 37 Ohio St. 3d 286, 292, 525 N.E.2d 792 (1988)). *See also*, *State v. Cowans*, 87 Ohio St. 3d 68, 73, 717 N.E.2d 298 (1999). The trial court's decision is reviewed under an abuse-of-discretion standard. *Williams, supra*, citing *Iles*, 906 F.2d at 1130-31, fn. 8.

In *Williams*, this Court upheld the appellant's conviction of rape and aggravated murder with a capital specification but remanded for a new sentencing hearing based on ineffective assistance of counsel at the penalty phase caused when the trial court abused its discretion in failing to substitute counsel. *See Williams*, 99 Ohio St. 3d at 513, 518. As in the *Williams* case,

defense counsel in McKelton's case were afraid of their client based on the State's depiction of McKelton's phone calls and motion to use a stun belt. *See* 9/17/10 Hrg. Tr. 23-24. Also, Attorneys Cook and Howard are married, so they would have heightened fear for their co-counsel's well-being. Like in *Williams*, the breakdown was so severe that counsel "could not continue to fulfill their professional obligation to their client." *See Williams*, 99 Ohio St. 3d at 513, 794 N.E.2d at 50. This fear and accompanying breakdown was the "good cause" needed to warrant substitution of counsel. *Id.* at 512-13, 794 N.E.2d at 49-50.

The breakdown did more than just "jeopardize" McKelton's right to effective assistance of counsel. It predictably led to ineffective assistance. *See* Propositions of Law Nos. XV and XVI. While a new mitigation hearing might have been warranted in *Williams*, where DNA evidence linked the appellant to the crime, no such evidence was presented in McKelton's case. In fact, the only DNA evidence directly excluded McKelton, and the case against him was built on circumstantial evidence and the testimony of incarcerated informants. *See* Tr. 2012 (defense's closing argument). Thus, unlike in *Williams*, McKelton deserves a new guilt-phase trial, instead of only a new sentencing-phase trial. Also, as in *Williams*, McKelton was facing the death penalty, where more process, not less, is required. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

Additionally, McKelton *became* indigent only after extinguishing his savings to hire private counsel, Attorney Goldberg. If Goldberg thought it was likely he represented one of the State's witnesses, he should have withdrawn earlier and returned all unearned funds to McKelton so he could hire another counsel of his choice. Additionally, the State should not have waited until the mid-September 2010, less than three weeks before trial, to finally inform Goldberg of his conflict. *See* 9/17/10 Hrg. In fact, the State said they had already checked for conflicts. *See*

8/6/10 Hrg. Tr. 24. The State assured defense counsel that, "if any of the witnesses we had were represented and as counsel of record, I would know it, I would have already told him and that is not the case." *Id.* As it turned out, Attorney Goldberg *was* the counsel of record for witness Lemuel Johnson (who was incarcerated since October 2009) and when Goldberg withdrew from the case, he took McKelton's last dollars with him, leaving him indigent. *See* Tr. p. 1732 (testimony of Lemuel Johnson).

C. Balancing test for denial of continuances.

A trial court has discretion whether to grant a continuance. *See Ungar v. Sarafite*, 376 U.S. 575, 589-90 (1964). Reversible error results from the denial of a continuance, requested by the defense, when the denial deprives the defendant of a fair trial. *See Powell v. Collins*, 332 F.3d 376, 396 (6th Cir. 2003) (citing *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988)). Reversible error also results if the denial of a continuance requested by the defense infringes on a specific constitutional right of the defendant. *Id.* The defendant "must also show that the denial of his request resulted in actual prejudice to his defense." *Id.* (citation omitted). "Actual prejudice may be demonstrated by showing that additional time would have made relevant witnesses available or otherwise benefited the defense." *Id.* (citation omitted).

A balancing test is used where the defendant claims constitutional error resulting from the denial of a continuance. *Id.* The reviewing court balances the length of any delay that would follow from a continuance; whether the court, parties, or witnesses would be inconvenienced by the continuance; whether other continuances were granted; the reasons for the request, including whether there was any purpose to delay the trial, whether the defendant was at fault for causing the delay; whether the defense would be prejudiced; and the complexity of the case. *Id. See also State v. Landrum*, 53 Ohio St. 3d 107, 115, 559 N.E.2d 710 (1990): "Several factors can be

considered: the length of delay requested, prior continuances, inconvenience, the reasons for the delay, whether the defendant contributed to the delay, and other relevant factors.” (Citing *State v. Unger*, 67 Ohio St. 2d 65, 67-68, 423 N.E.2d 1078 (1981) and *Unger v. Sarafite*, 376 U.S. 575, 589-591 (1964)).

D. Error to deny McKelton’s requests for continuances.

The *Powell/Landrum* factors balance in McKelton’s favor because in each instance when the trial court denied a continuance, one of McKelton’s specific constitutional rights was implicated. See *Powell*, 332 F.3d at 396. The error resulting from the trial court’s denial of a continuance, combined with the nondisclosure of witnesses, implicates McKelton’s Sixth Amendment right to confrontation and effective counsel. And the error resulting from the denial of a continuance in the penalty phase implicates McKelton’s Eighth Amendment right to present relevant mitigating evidence of his history and background. See *Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982); *Lockett*, 438 U.S. at 604-05.

The *Powell/Landrum* factors also balance in McKelton’s favor because no other continuances were granted. Once the court set the October 4th trial date, it was clear that nothing would alter it. The court’s inflexible stance was erroneous in light of the withdrawal of McKelton’s counsel of choice and the subsequent breakdown in the attorney-client relationship. Also, McKelton asked for a substitution of counsel and a continuance weeks before the trial began, which would have limited the inconvenience to parties and witnesses by allowing weeks or months for them to plan ahead.

Additionally, the *Powell/Landrum* factors balance in McKelton’s favor because the State was ultimately at fault for the requests for continuances. Although the State tried to argue that McKelton was intentionally delaying his case, McKelton repeatedly stated that he did not want

to “prolong” his case because he was worried that “being [incarcerated] longer gives the prosecutor opportunity to create more lies to use against [him].” *See* 9/17/10 Hrg. Tr. 19.

The State bears the ultimate responsibility for the request for continuance because they waited until there were less than three weeks before trial to disclose Richard Goldberg’s conflict, even though the witness that necessitated the conflict, Lemuel Johnson, had been incarcerated for nearly a year before trial. *See* Tr. 1732. The State even claimed they had checked and there was no conflict as late as August 6, 2010. *See* 8/6/10 Hrg. Tr. 24. But, this was false because Goldberg *was* the counsel of record for Johnson. Had the State informed Goldberg of the conflict months earlier, McKelton could have hired his own counsel or would have had more time to request the services of the Ohio Public Defender’s Office. Additionally, the State’s nondisclosure motion prevented McKelton from discovering even the names of the witnesses against him until the eve of trial, further burdening his appointed attorneys. A continuance also could have benefitted McKelton by allowing more time for his counsel and their investigator to prepare their mitigation case should there be a guilty verdict.

The factors set out in *Powell* and *Landrum* also balance in McKelton’s favor because this was a complex death penalty case involving two homicides and 36 State witnesses. Tr. 1881. Eight of the State’s witnesses were not disclosed until the start of the trial. McKelton’s counsel of choice, Richard Goldberg, had to withdraw less than three weeks before trial because of a previously undisclosed conflict of interest, leaving McKelton with Melynda Cook and Greg Howard, whom he had met only twice briefly. And those two remaining attorneys, Cook and Howard, just happened to be married.

While he did not want to continue with Cook and Howard, McKelton repeatedly stated that he did not want a continuance of his trial. He simply wanted counsel he could trust, and he

referenced the Ohio Public Defender. But the court denied his motion to remove counsel and counsel's motion to withdraw. The court also denied counsel's repeated request for a continuance to investigate the nondisclosed witnesses, despite counsel's concerns about missing statements, such as the delay in getting Charia Mam's statement. Tr. 299.

Any delay in the trial date because of a continuance would not have inconvenienced the jury since the requests were initially made before they were impaneled. Also, as in *Powell*, "any inconvenience to the jury in this regard pales when compared to the gravity and magnitude of the issue involved — i.e., whether the death penalty should be imposed." 332 F.3d at 397 (citation omitted). Additionally, as Justice Thurgood Marshall famously stated, "death is different." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

More process, not less, is required in a death penalty case. See *Lockett*, 438 U.S. at 605; *Woodson*, 428 U.S. at 305 (plurality opinion). Here, the trial court's errors created a situation in which McKelton was denied effective assistance of counsel under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984). (See also Propositions of Law No. XV and XVI). Because of the trial court's error in denying defense counsel's motion to withdraw and reasonable requests for a continuance, particularly with McKelton's life at stake, McKelton was denied his rights under U.S. Constitution amendments V, VI, VIII, XIV and the Ohio Constitution, article I, §§ 9, 10, 16.

E. Conclusion.

The trial court erred in denying defense counsel's request to withdraw. That error was compounded by the trial court's failure to grant repeated requests for a continuance. Combined, these errors violated McKelton's due process and denied him effective assistance of counsel.

This court should reverse and remand this case for a new trial where McKelton is represented by conflict-free counsel with sufficient time to fully conduct an effective defense.

Proposition of Law No. II

It is violation of a capital defendant's right to due process, fair trial and effective assistance of counsel for a trial court to grant the State's motion for certification of a witness under Ohio R. Crim. P. 16(D) when the State has not provided reasonable articulable grounds for nondisclosure and to allow the State to withhold evidence until the evening before the commencement of a capital trial. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 10, 16.

A. Criminal Rule 16 requirements

Criminal Rule 16 requires the State to provide the Defendant a list of the names and addresses of the witnesses the State intends to call at trial as well as the written or recorded statements of those witnesses. Crim. R. 16(B)(7) and (I). However, Crim. R. 16(D) allows the State to refrain from disclosure under certain circumstances: "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."

Crim. R. 16(D). While the rule provides a method for non-disclosure, the State does not have unfettered discretion to withhold discovery of otherwise discoverable materials. Upon motion of the defendant, the trial court "shall review the prosecuting attorney's decision of nondisclosure

for abuse of discretion during an in camera hearing conducted seven days prior to trial, with counsel participating.” Crim. R. 16(F).

B. State files Certification for Non-Disclosure of Witnesses

On May 1, 2010, the State filed a Certification for Non-Disclosure of Witnesses pursuant to Crim. R. 16(D). In the motion, the State certified that the disclosure of the identity of certain witnesses as required by Crim. R. 16(B)(1)(e) may subject them or others to physical harm, substantial economic harm, and/or coercion. Dkt. 71. Counsel for McKelton opposed the State’s non-disclosure noting the tremendous disadvantage non-disclosure would have to the defense of McKelton’s case. Dkt. 72.

On July 16, 2010, the State filed a second motion for non-disclosure of witnesses. In this motion, the prosecutor identified eighteen witnesses (##54-76) whom the State argued were not subject to disclosure. The State further identified the “reasonable grounds” for non-disclosure as the protection of witnesses or other third parties from harm, coercion, or intimidation. Dkt. 133 at p. 2. McKelton again objected to the non-disclosure and requested a hearing on the matter as soon as possible. Dkt. 135. Counsel for McKelton again made several arguments opposing the State’s certification. Particularly, counsel noted that McKelton was being held in custody without bond and was unable to cause physical harm to any disclosed witnesses. More importantly, counsel noted the potential ethical problems that would develop if the Court allowed for non-disclosure of witness names and statements since McKelton’s counsel regularly represented criminal defendants and could have a conflict of interest with the witnesses. *Id.* at 4. The trial court, pursuant to *State v. Gillard*, 40 Ohio St. 3d 226, 533 N.E.2d 272 (1988), referred the matter to Judge Andrew Nastoff for a hearing on the matter. Dkt. 140, 141.

Only after counsel raised the issue of a potential conflict and the trial court recommended that the State look into the matter, did the State file a Notice Confirming Defense Counsel's Conflict of Interest and Request for Hearing. 8/6/10 Hrg. Tr. 2; Dkt. 151. "[T]he State...gives notice that it has confirmed, at Defense Counsel's request, that Defense Counsel Goldberg's continued participation as counsel for the Defendant in this matter will result in a conflict of interest between his duties to the Defendant and his duties to one or more current or former clients." Dkt. 151 at 1. In a hearing before the trial court, counsel raised concerns about McKelton receiving effective assistance of counsel if he were to withdraw at this point because of an ethical problem. 9/1/10 Tr. 17.

Initially, Goldberg made the decision to "stay on until such time as a conflict become more imminent." *Id.* at 20. Ultimately, Goldberg made the decision on September 17, 2010, twenty days before McKelton's capital trial, to withdraw as counsel for McKelton. "I've confirmed again with Mr. Salyers that my situation is I have an ethical conflict. And Mr. Salyers has confirmed again that there are one or more current or past clients of mine that he intends to call as a witness in the trial. As a result of that, I'm in an ethical dilemma and cannot come between two clients... at this point I believe that it would be unfair to both sides if I were -- and unethical if I were to continue to represent Mr. McKelton. So on my personal behalf, I would move to withdraw." 9/17/10 at 3-4.

C. Hearing on Certificate of Non-Disclosure of Witness

1. State's Argument

Ten days before the beginning of trial, Judge Nastoff held a hearing on the certification of nondisclosure of witnesses. At the hearing, the State indicated that the State had not disclosed eight of the trial witnesses. Specifically, the State did not disclose the names of witnesses 59, 61,

62, 66, 68, 69, 70 and 71. The State again articulated that its decision was guided by Crim. R. 16(D)(1), the intimidation, coercion or harm provision. 9/27/10 at 18. "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." *Id.* The court indicated to the State that it was looking for information as to why the eight witnesses were chosen for non-disclosure over the witnesses who were disclosed. "What is it about their circumstance, you know, or the information that they are going to provide or, vis-à-vis this defendant that guided that decision." *Id.* at 20. In response to the court's request for specific information, the State argued that the State's reasoning for not disclosing certain witnesses was more about McKelton and not about the individual witness. *Id.* The court correctly noted, "But if it was all about the defendant then you would have gone—you could have not disclosed any witnesses." *Id.* The State continued to argue that the need for non-disclosure was more about McKelton than the individual witnesses, and in support of that argument, introduced exhibits regarding a previous conviction for intimidation and a letter from McKelton that discussed posting witnesses' names in Butler County.² *Id.* at 22-24. The State further argued that an associate of McKelton told McKelton that they were going to "John Brown" this case. *Id.* at 26. The State interpreted this statement to mean tampering with witnesses. *Id.* at 26.

The court again asked the State whether there was something in particular about these eight witnesses that separates them out from the witnesses that have been disclosed. *Id.* at 27. In response the State argued that witnesses 59 and 61 were extremely afraid to have their names disclosed and probably would not agree to testify if their names were disclosed. *Id.* The State

² Although the correspondence from McKelton states "Buttler Co.", the State argues that McKelton was referring to J.C. Battle & Company, a funeral home in Cincinnati. Aside from a law enforcement official's interpretation of the handwriting to be Battles Co., no other evidence was submitted to support the State's contention. See Proposition of Law No. VIII.

asserted that witnesses 62, 68 and 69, all of whom were incarcerated, also indicated a fear for themselves and their family. *Id.* at 28. The State did not provide further information about the remaining two witnesses.

2. Defense's argument

Defense requested that the State provide an individualized concern of each particular witness, not a generalized concern. *Id.* at 28. In addition, defense pointed out that the associate of McKelton who said he was going to John Brown the case was one of the State's witnesses not a defense witness. *Id.* at 31. Finally the defense noted that the State was not disclosing eight out of the 30 lay witnesses the State intended to call. Defense argued that such a large amount of undisclosed witnesses made it nearly impossible for defense counsel to prepare for trial. *Id.* at 30. Defense also correctly pointed out that the rule provides that the material be disclosed seven days before trial and that failure to comply with that would result in McKelton having to prepare the defense on the day of trial. *Id.* at 32.

3. Court ruling

The court determined that the State did not abuse its discretion in failing to disclose the eight witnesses. *Id.* at 39. In making this determination, the trial court relied on the fact that the case involved the specification of killing a witness and that there was a specific course of conduct of threats or prior instances of witness tampering or intimidation. The court further relied on the State's assertion that it had utilized its discretion to pare down the witness list to the eight witnesses and that the witnesses were fearful of participating absent the State seeking those protections. *Id.* at 38-39. On October 4, 2010, at some time after 5:12 p.m., the State disclosed the names and statements of Charles Bryant, Jerome Henderson³, Lemuel Johnson, Charia Mam,

³ Henderson did not testify at trial.

Shaunda Luther, Andre Ridley, Gerald Wilson and Marcus Sneed. Tr. 281, 285. The trial was scheduled to begin the next morning at 9:00 a.m. Tr. 281. One of the witness's statement was not provided until the morning of trial. Tr. 299. This witness statement was obtained over two years before the day of trial and related to incidents regarding Margaret Allen. Tr. 300. Defense counsel again renewed their request for a continuance. *Id.*

D. Argument

1. The trial court erred in finding that the State did not abuse its discretion in failing to disclose the witnesses.

According to Crim. R. 16(F), the trial court is required to review the prosecuting attorney's decision of nondisclosure for abuse of discretion. As the Staff Notes to the rule note, the judicial review is to determine whether the prosecutor's decision was unreasonable, arbitrary or capricious. Crim. R. 16 Staff Notes 7/1/10 amendment Division (F). A review of the State's motion and the certification hearing demonstrates that the State's decision to not disclose the eight witnesses was arbitrary. The State argued that it had to withhold the names of witnesses because disclosure would compromise the safety of a witness or subject them to intimidation. However, during the hearing the State admitted that the decision was really based on McKelton, not the witnesses. If McKelton were a threat to anyone who testified against him, then he would be a threat to all of the witnesses and all of the lay witnesses would have been subject to non-disclosure.

The State admitted that part of the reason for not disclosing certain witnesses names was because those witnesses were afraid to have their names disclosed and might not agree to testify absent non-disclosure. However, this is not one of the reasonable articulable grounds which would permit nondisclosure. "The new rule explicitly recognizes that it the prosecution's duty to assess the danger to witnesses and victims." Staff Notes 7/1/10 amendment Division (D). It is

not whether the witnesses is fearful of the defendant, but whether the prosecutor has reason to believe that the witness's safety may be in jeopardy.

The arbitrariness of the prosecutor's decision not to disclose is further demonstrated by reviewing the testimony of the witnesses who were not subject to disclosure. Charia Mam and Shaunda Luther were friends of victim Margaret Allen. Both Mam and Luther testified about their interactions with Allen and the dynamics of Allen's relationship with McKelton. Witnesses Terri and Traci White provided similar information about the relationship between Allen and McKelton that was even more damaging. However, those witnesses' names were disclosed to defense ahead of time. The State provided absolutely no reason why Mam and Luther's safety was in any jeopardy as compared to other witnesses. When providing judicial review of the State's decision, the trial court had an obligation to conduct the review under the "objective criteria" set out in division (D) of the staff note. Such a review should have resulted in trial court to require the disclosure of those witness names.

- 2. Assuming arguendo that the State did not abuse its discretion by failing to disclose witnesses, it was error for the trial court to allow the prosecutor to wait until the day before trial to disclose eight witnesses names.**

Criminal Rule 16(F)(5) provides that nondisclosed material shall be provided to the defendant no later than commencement of trial. The Staff Notes states that "Seven days provides adequate opportunity for the defense to prepare for trial and respond to the content of any nondisclosed material." Clearly this provision contemplates providing defense counsel more than one evening to prepare for eight witnesses to a capital case.

Regardless of whether the rule requires the evidence to be disclosed seven days before trial, fundamental fairness requires that the evidence be disclosed in a manner that will allow defense counsel time for preparation. This did not occur in the present case. Instead, the State

waited until the evening before trial to disclose the names and statements of eight witnesses. Had defense counsel not slept the entire night before the trial commenced, they still would only have had approximately fifteen to prepare for the eight witnesses. Tr. 281, 285.

E. The failure to disclose witnesses' names and statements violated McKelton's right to counsel as provided by the Sixth Amendment to the United States Constitution.

Moreover, the State's failure to disclose the names of eight witnesses until the day before trial interfered with counsel's right to effective assistance of counsel. Because of the State's failure to disclose witness names one of McKelton's trial attorneys had to withdraw less than three weeks before the beginning of trial. Due to the nondisclosure, his attorneys were unaware until one month prior to trial that Richard Goldberg, McKelton's retained attorney, had a conflict of interest requiring him to withdraw from the case. 9/1/10 Hrg. Tr. See Proposition of Law No.

I. At a hearing on August 6, Goldberg expressed concern that due to the nondisclosure, he would have no way of knowing if he represented any of the State's witnesses. 8/6/10 Hrg. Tr. 23. The Court suggested that the prosecutors contact their witnesses to determine if any of them were represented by Mr. Goldberg. *Id.* p. 30. On Sept. 1, 2010, the State informed Goldberg that he did indeed have a conflict due to an ongoing representation of a State's undisclosed witness. 9/1/10 Hrg. Tr. 4. The State did not disclose the identity of the witness. *Id.* at 5-7.

Goldberg's removal from McKelton's case at the eleventh hour severely hindered his defense. Goldberg informed the Court that his last minute withdrawal would result in McKelton's right to effective assistance of counsel being violated. Goldberg and the other attorneys had already divided the responsibilities, and in Goldberg's opinion, Howard and Cook could not effectively represent McKelton without him. 9/1/10 Hrg. Tr. 17-18.

A review of the transcript demonstrates that McKelton was denied effective assistance of counsel as a result of the nondisclosure. See Proposition of Law Nos. XV and XVI. Because of

the failure to disclose, counsel were not given the opportunity to voir dire on the non-disclosed information. Moreover, counsel was not able to have adequate time to prepare for trial.

The Sixth Amendment, applied to the State through the Fourteenth Amendment, guarantees that “[i]n all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defense.” The United States Supreme Court has concluded that the core of this right is “the opportunity for a defendant to consult with an attorney **and to have him investigate the case and prepare a defense for trial.**” *Michigan v. Harvey*, 494 U.S. 344, 348 (1990)(emphasis added).

Counsel cannot effectively represent clients if they are not provided with any information to investigate. It is unrealistic to think that defense counsel can simultaneously try a capital case and fully investigate witnesses at the same time. As defense stated, “The difference of a week makes is to the defendant and the preparation for trial...We’re not going to have time to prepare for eight or seven witnesses when we’re sitting in trial eight, ten hours a day.” 9/27/10 Hrg. Tr. 36. The trial court’s response to this argument, “It’s an unenviable position. I think the State’s position is that your client put you in that position.” was improper. 9/27/10 Hrg. Tr. 37. The trial court cannot sit idly by while a capital defendant is denied his right to present an adequate defense.

Providing defense with the names and statement of eight witnesses the night before trial effectively precludes defense from the opportunity to investigate the case and prepare for trial. The trial court erred by allowing the State to wait until the eve of trial to disclose the witnesses names.

F. The failure to disclose witnesses denied McKelton his right to a fair trial and amounted to a due process violation.

The overall purpose of Ohio's discovery rules is to produce a fair trial. *Lakewood v. Papadelis*, 32 Ohio St. 3d 1, 3, 511 N.E.2d 1138 (1987). The failure to disclose witness and evidence can amount to the denial of due process. The failure to disclose witness names also amounted to a denial of McKelton's right to a fair trial. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56-57 (1987) ("The United State Supreme Court has traditionally evaluated claims regarding the improper withholding of evidence under the broader protections of the Due Process Clause of the Fourteenth Amendment."); *See also, United States v. Bagley*, 473 U.S. 667 (1985); *Brady v. Maryland*, 373 U.S. 83 (1963).

Providing defense with the names and statements of eight witnesses on the eve of trial effectively precluded the defense from the opportunity to investigate the case and prepare for trial. Moreover, when viewed in combination with all of the improperly admitted evidence (*See* Propositions of Law Nos. IV, V, VI, VII, VIII, X, XI, and XIV) and when viewed in light of the fact that the trial court denied defense counsel the right to cross examine several of the nondisclosed witnesses (*See* Proposition of Law No. IX), it is clear that McKelton trial violated fundamental elements of fairness.

Proposition of Law No. III

The capital defendant's right against cruel and unusual punishment and his right to due process are violated when the legal issue of relevance is left to the jury regarding and sentencing considerations. U.S. Const. amends. VIII, XIV. Ohio Const. art. I, §§ 1, 9, and 10.

A. Introduction

McKelton filed a motion requesting individual, sequestered voir dire. Dkt. 47. The Court denied this motion, because it would be "unnecessary and time consuming and really quite worthless." 7/8/10 Hrg. Tr. 35-36. As a result, The entire venire was made aware that there was press surrounding McKelton's case that made him appear guilty. McKelton would ultimately not be given the opportunity for sufficient voir dire, in violation of his right to an impartial jury.

B. Legal Standards

The trial judge has the discretion to determine the proper scope of voir dire. *State v. Mapes*, 19 Ohio St. 3d 108, 115, 484 N.E.2d 140, 146 (1985). See also *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981). However, the exercise of this discretion is limited by the constitutional dictates of due process and the right to be tried by an unbiased jury. *Morgan v. Illinois*, 504 U.S. 719, 726-31 (1992).

"Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *Rosales-Lopez*, 451 U.S. at 188. The ability to make informed challenges during jury selection ensures the right to an impartial jury. The right to challenge is "one of the most important of the rights secured to the accused" and "[a]ny system for the empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." *Pointer v. United States*, 151 U.S. 396 (1894).

A capital defendant must be given sufficient latitude to voir dire prospective jurors. *State v. Jenkins*, 15 Ohio St. 3d 164, 186, 473 N.E.2d 264, 268 (1984). All caution must be taken in voir dire during a capital case because a court cannot simply rely upon a juror's assurances of impartiality. *Irving v. Dowd*, 366 U.S. 717, 728 (1961). Individual questioning prevents the "inhibiting effect of a large audience" as well as the tendency for jurors to parrot the responses of their peers or give what the jurors believe is the "correct" answer to a question. *See Berryhill v. Zant*, 858 F.2d 633, 640-42 (11th Cir. 1988) (J. Clark, concurring).

C. Argument

1. The entire venire was made aware of pretrial publicity.

McKelton filed a motion requesting individual, sequestered voir dire, (Dkt. 47) but the trial court denied this motion, 7/8/10 Hrg. Tr. 35-36. During the State's voir dire, in which all members of the venire were present, jurors commented on news articles and television reports that they had seen in relation to McKelton's case. Tr. 52-54, 158-70. One juror admitted that he did not think that he could put all of the news reports out of his head. *Id.* p. 160. Juror 59, who ultimately served on the jury, admitted that he had also been exposed to pretrial publicity. *Id.* p. 52. When asked if he could still be fair, he replied, "I believe I'm open minded enough to put that aside, but it would be hard." *Id.* Another juror read about the case in the *Hamilton Journal* after Margaret Allen's body was found. She said in front of the entire venire that that after reading the articles, she believed McKelton was probably guilty. *Id.* p. 167-70.

The press surrounding McKelton's case made it appear that he was guilty, and the entire venire was exposed to that effect. This would have been prevented by the trial court granting McKelton's motion requesting individual sequestered voir dire. Because the court did not take the proper precautions in this highly publicized case, the venire was tainted against McKelton.

2. The State questioned jurors about domestic violence.

In front of the entire venire, the State asked the jurors if they, or someone close to them, had been victims of domestic violence. Tr. 71. The State then had 15 of the jurors talk about their experiences with loved ones who had been in abusive relationships. Tr. 71-87. The State asked if those people were in denial about the abuse, minimized the abuse, or refused to report it. Tr. 71-87. Many of the jurors talked about how their loved ones had been repeatedly abused and the victims had minimized or denied the abuse. *Id.* The State then asked those jurors if they could “set aside the feelings about those experiences . . . to treat Mr. McKelton’s case fairly,” even though it might “understandably” be “a struggle.” Tr. 87.

The State was not concerned with McKelton being treated fairly. The prosecutor who asked these questions would later ask Allen’s physical therapist, with no basis, “if [Allen] had told you her boyfriend broke her ankle by slamming a car door on it repeatedly, would that have changed your treatment plan or your suggestions for avoiding future injury?” Tr. 481-82. The State had the prospective jurors tell the venire about their experiences with domestic violence to make the jury aware of the evil of domestic violence in society and unfairly prejudice McKelton with the jurors’ tales of abuse. The prejudicial impact would not have spread to the entire venire if the trial court had granted McKelton’s motion for individual, sequestered voir dire.

3. Voir dire was insufficient.

McKelton was not given sufficient opportunity to ensure the impartiality of his jury. The entire voir dire process for McKelton’s capital trial took less than one day. Tr. 89. Defense counsel had only one afternoon to conduct its voir dire, and the trial court would not even permit them to administer a thorough questionnaire, as defense counsel had requested. Dkt. 131. Defense counsel had also filed a motion for comprehensive voir dire. Dkt. 48. The trial court did

not administer defense counsel's proposed questionnaire and rejected his motion for comprehensive voir dire, because he did not want "subjective, attitudinal type of questioning."

7/8/2010 Hrg. Tr. 35.

The questionnaires that were used contained only cursory information and did not ask jurors about their views on the death penalty. Dkt. 177. McKelton's attorneys went in to voir dire with little information about the potential jurors and had little time to question them. The prejudice from this was compounded by the fact that eight witnesses and their statements were not disclosed to defense counsel until after voir dire. Tr. 281, 285. Accordingly, defense counsel did not have all of the information it would need to conduct an effect voir dire.

In a capital cases more process is due, not less. See *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976). McKelton's rights to sufficient voir dire and an impartial jury should have been upheld, even if it meant that voir dire took a little longer and the jurors had to fill out longer questionnaires.

D. Conclusion

The trial court refused to allow McKelton a sufficient opportunity and necessary protections to ensure an impartial jury. As a consequence, McKelton was deprived of his rights to an impartial jury, due process, and against cruel and unusual punishment. U.S. Const. amends. VIII, XIV. McKelton is entitled to a new trial or alternatively a new penalty phase under O.R.C. § 2929.06(B).

Proposition of Law No. IV

The accused's rights of confrontation and due process are violated where hearsay is admitted against him under the forfeiture by wrongdoing doctrine and no showing is made that the defendant procured the unavailability of the witness with the purpose of preventing them from testifying as a witness. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 5, 9, 10, 16.

The forfeiture by wrongdoing exception to hearsay and confrontation requires a showing that the wrongdoer made the witness unavailable *for the purpose of preventing them from testifying as a witness*. *Giles v. California*, 554 U.S. 353, 368 (2008); Evid.R. 804(B)(6). When the trial court ruled that statements of Margaret Allen were admissible, it said "the allegation in this case is that this defendant murdered the victim, Ms. Allen, and I think this is exactly what the forfeiture by wrongdoing exception is." Tr. 404. But forfeiture by wrongdoing requires more than an allegation that the defendant murdered the victim. The exception does not apply to most murder victims. *Giles*, 554 U.S. at 361.

The court did not make, and could not have made, a finding that McKelton made Allen unavailable with the purpose of preventing her from testifying. The State did not charge McKelton with killing Allen to prevent her testimony as a witness under R.C. § 2929.04(A)(8). The State did not even charge McKelton with purposefully killing Allen. The indictment and bill of particulars allege that McKelton killed Allen as a proximate result of felonious assault. Dkt. 1, 4.

Furthermore, all of the State's witnesses testified that McKelton's killing of Allen was accidental. None of them testified that it was done purposefully, let alone with the specific purpose of preventing Allen's testimony as a witness. Tr. 909, 1290-91, 1600. And the State conceded in closing argument that there is no way to know why McKelton killed Allen and that McKelton did not plan it. Tr. 1957-78, 1993.

Accepting as true everything the State's witnesses said, McKelton killed Allen accidentally, even if culpably. An accident, by definition, lacks intent.

A. The intent requirement cannot be satisfied in an accidental killing.

The forfeiture doctrine "makes plain that uncontroverted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying." *State v. Fry*, 125 Ohio St. 3d 163, 179, 926 N.E.2d 1239, 1261-62 (2010) (quoting *Giles*, 554 U.S. at 361). The *Giles* Court noted that the purpose requirement means that the exception applies "only when the defendant engaged in conduct *designed* to prevent the witness from testifying" by "means of procurement." *Giles*, 554 U.S. at 359-60. The *Giles* Court described this requirement in its analysis with terms like "means and contrivance," "planning," "scheming," and "devising" conduct to prevent the witness from testifying. *Giles*, 554 U.S. at 360-61. The forfeiture doctrine requires the state to show by a preponderance of the evidence that the defendant's wrongdoing was for the purpose of preventing testimony. *State v. Hand*, 107 Ohio St. 3d 378, 392, 840 N.E.2d 151 (2006). But, in this case, the prosecutor's statements and the evidence produced at trial prove the opposite. The prosecutor told the jury that McKelton "didn't plan to kill Missy. That was spontaneous. It wasn't planned." Tr. 1993. The State's witnesses described an accidental or, at worst, heat-of-passion killing, after which McKelton even tried to revive Allen.

Andre Ridley was the only witness who testified about Evans' account of Allen's killing. According to Ridley, Evans told him that McKelton choked Allen during a fight. Tr. 909. At some point McKelton started smacking Allen, saying "wake up Missy, wake up. Wake up. Wake up. Missy." *Id.* McKelton then began to cry and continued begging "please, Missy, wake up. Wake up. Please wake up", and poured water on her. Tr. 910.

Officer Jennifer Luke testified that she believed McKelton killed Allen in the context of an argument that got out of control, rather than anything that McKelton planned. Tr. 1290-91. The State's informant Marcus Sneed testified that McKelton told him Allen's killing was an accident. Tr. 1600. Referring to the argument between Allen and McKelton in closing, the Prosecutor said: "This is one of those missing pieces. We don't know what the argument was about. We'll never know. There is no way to know." Tr. 1957-78.

The prosecutor's statements and the evidence produced at trial preclude the State from taking the position that McKelton killed Allen to prevent her from testifying as a witness. It did not meet its burden as required by the forfeiture doctrine.

B. The trial court applied the wrong standard for the forfeiture doctrine.

The trial court repeatedly demonstrated a misunderstanding of the law governing the forfeiture by wrongdoing exception. In response to defense counsel's objection to the introduction of Allen's statements, the court stated, "Clearly the allegation in this case is that this defendant murdered the victim, Ms. Allen, and I think this is exactly what the forfeiture by wrongdoing exception is." Tr. 404. The court found the statements admissible, and defense counsel made a continuing objection to Allen's statements. *Id.*

Later in the trial, after allowing the jury to hear dozens of prejudicial hearsay statements, the court further explained his ruling on the record:

...my logic is very simple. It is that obviously it is the position of the prosecutor under 804(B)(6) that the defendant in this particular case forfeited his --not only his right of confrontation, but his ability to object to the statements that the victim, Margaret Allen, made in this particular case due to his own actions. And that's essentially the basis of the forfeiture by wrongdoing doctrine in Ohio...There are a number of cases... *State v. Fry* ... *State v. Hand* ...these cases again reiterate Ohio's longstanding belief that a defendant forfeits any objection to -- to the testimony of a victim by their own misconduct.

Tr. 610. But in the four full pages of the court's explanation, there is no mention of the purpose requirement, no speculation as to McKelton's purpose in killing Allen, and no requisite finding regarding McKelton's purpose by a preponderance of the evidence. Tr. 609-12.

Defense counsel was then given an opportunity to respond to the court's ruling, and they informed the court that the State had not satisfied the burden of the forfeiture exception because they could not show McKelton acted with the requisite purpose. Tr. 615. The State responded that it believed it had established that "this relationship was in a dynamic of domestic violence, of a pattern of abuse designed to isolate her and keep her from resorting to outside help." Tr. 619.

After the court repeatedly applied the wrong standard and allowed dozens of statements, the State provided a pinpoint citation, which the court quoted, finally alluding to the correct standard: "the Supreme Court in *State vs. Hand* states that the 'State need not establish that Hand's sole motivation was to eliminate Welsh as a potential witness. It needed only to show that Hand was motivated in part by a desire to silence the witness.'" Tr. 404, 610, 619-20, citing *Hand*, 107 Ohio St. 3d at 392 840 N.E.2d. at 172.

But while the court seemed to eventually identify the correct standard, it did so only after repeatedly applying the wrong standard. The court had already allowed dozens of prejudicial hearsay statements (discussed below). And at no point did the court make the specific finding that McKelton killed Allen with intent to prevent her from testifying against him, but rather "if you look at the totality of the evidence...the Court believes that the State has met its criteria, and I made my ruling" Tr. 620. Unfortunately, the court initially believed "meeting its criteria" meant showing that the defendant was accused of killing the victim. Tr. 404, 610.

C. **The State misinterpreted *Giles*.**

In its motion and at trial, the State relies on *Giles* by turning it on its head. The majority in *Giles* was explicit that forfeiture will not apply in every case involving domestic violence:

Domestic violence is an intolerable offense that legislatures may choose to combat through many means--from increasing criminal penalties to adding resources for investigation and prosecution to funding awareness and prevention campaigns. But for that serious crime, as for others, abridging the constitutional rights of criminal defendants is not in the State's arsenal.

Giles, 554 U.S. at 376. The Supreme Court in *Giles* remanded a murder conviction because the trial court allowed the victim's statements under the forfeiture exception without finding that the defendant acted with the purpose to make the victim unavailable as a witness. *Giles*, 554 U.S. at 377. *Giles* held that forfeiture, as an exception to the Confrontation Clause, requires a showing of purpose to prevent testimony. *See also* Ohio R. Evid. 804(B)(6). Unconfronted testimonial statements are not admitted under the forfeiture doctrine "[i]n cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying--as in the typical murder case involving accusatorial statements by the victim." *Giles*, 554 U.S. at 361.

Although the victim in *Giles* had reported the defendant for domestic violence three weeks before she was killed, the Supreme Court would not infer a purpose to procure the unavailability of the witness. *Giles*, 554 U.S. at 356, 377. After rejecting the notion that the forfeiture doctrine applies in all domestic violence cases, the Court explained the significance of domestic violence to the forfeiture doctrine:

The domestic-violence context is, however, relevant for a separate reason. Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence *may* support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to

the authorities or cooperating with a criminal prosecution--rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly *relevant* to this inquiry, *as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.*

Giles, 554 U.S. at 377 (emphasis added).

Since evidence of prior acts of domestic violence are “highly relevant” to the ultimate inquiry of the intent behind the crime, evidence of McKelton’s prior abuse of Allen was highly relevant evidence of his intent. According to *Giles*, the fact that there were no ongoing criminal proceedings at which the victim was expected to testify was similarly relevant. While not explicit from *Giles*, it is also highly relevant that neither the police nor Allen’s friends and family provided any testimony about Allen expressing to them any plans to report McKelton or testify against him in any capacity. It is also relevant that the State did not charge McKelton with killing Allen to procure her unavailability, and that the State and its witnesses repeatedly stated that McKelton killed Allen spontaneously and accidentally and tried to revive her.

The State’s proposed evidence to show McKelton’s purpose is sparse and attenuated. Terri White testified that McKelton assaulted Allen and preventing White from calling the police when Allen asked her to in the fall of 2007. Tr. 429. (Allen was killed in July of 2008. Tr. 582). White further testified that Allen told her, “what went on in the house stayed in the house.” Tr. 618. The only further evidence of Allen’s intent to report McKelton was an affidavit about abuse on her computer with no affiant identified and which had not been updated since September of 2007. Tr. 591, 599-600. Evid.R. 804(B)(6) “applies to actions taken after the event to prevent a witness from testifying...Thus, the rule does not apply to statements of the victim in a homicide prosecution concerning the homicide.” Evid.R. 804(B)(6) Staff Note (July 1, 2001 Amendment).

Contrary to this requirement, the evidence the State relies to show McKelton's purpose consists of acts from a year before the crimes McKelton was charged with.

The evidence that the State did not present is more revealing. The State presented no evidence that Allen had told anybody about future plans to report McKelton, even though she spoke with friends like Charia Mam about the most intimate aspects of her relationship with McKelton, including Allen contemplating an abortion after she became pregnant by McKelton. Tr. 551. Mam also testified Allen was upset with Ziala for calling the police because "now the police would be all in their business," which suggests Allen did not want the police involved. Tr. 578. No law enforcement officials testified in any capacity that Allen contacted them. No charges were pending against McKelton. The State presented no evidence from any of its witnesses about McKelton's actual intent in killing Allen while discussing forfeiture, presumably because it knew that an act cannot be an accident and also done with a particular intent.

Hand and *Fry* are the two major cases this Court decided regarding the forfeiture issue. Both the trial court and the State rely on *Hand* and *Fry* on as legal authority in finding the forfeiture doctrine applicable. However, *Hand* and *Fry* have fundamental differences from this case. The State charged, and convicted, the defendants in *Hand* and *Fry* with aggravated murder with the specification of purpose to prevent testimony of witnesses under R.C. § 2929.04(A)(8) for the specific victims whose testimony was admitted under the forfeiture doctrine. *Fry*, 125 Ohio St. 3d at 180, 926 N.E.2d at 1262; *Hand*, 107 Ohio St. 3d at 389, 840 N.E.2d at 169-70. In this case the State charged McKelton with purpose under R.C. § 2929.04(A)(8) for killing Evans but not for killing Allen. The State did not even charge McKelton with killing Allen purposefully. Dkt. 1, 4.

The State placed special significance on *Fry* and argued before the trial court that this Court had adopted the reasoning that domestic violence cases are different. Tr. 619. But the standard in domestic violence cases to invoke forfeiture is the same as for any other case. *Giles* 554 U.S. at 376. Domestic violence is relevant as evidence to show a party's intent; it is not a substitute for a finding of intent. *Id.* at 377.

The facts in *Fry* are different to those in McKelton's case. In *Fry*, the victim had been the victim of domestic violence by the defendant and had reported him to the authorities. *Fry*, 125 Ohio St. at 164, 926 N.E.2d at 1248-89. The victim indicated that she wanted to press charges against the defendant and sought a criminal stalking protection order. *Id.* The defendant repeatedly called the victim and others from prison and attempted to get her to drop the charges against him, told her to say that the police coerced her into reporting him, and threatened to kill her if she did not drop the charges. *Id.* at 164-45. Shortly thereafter he was released on bond and killed the victim. *Id.* at 165-66.

Fry did not employ any different standard because of domestic violence, but rather used the history of domestic violence as evidence to support its finding regarding the defendant's intent. *Id.* at 179-80. The facts in *Fry* that address with the typical features of domestic violence that support the conclusion that Fry killed his victim for the purpose of preventing her from testifying against him. *Id.* Unlike *Fry*, Allen had not reported McKelton, nor did it appear that she had any plans to do so. Nothing was pending against McKelton at which Allen would testify, the State conceded it did not know why McKelton killed Allen, and the State never even suggested McKelton's motives were to kill Allen to prevent her from testifying at any hypothetical proceeding.

D. McKelton was prejudiced by the inadmissible hearsay which labeled him a killer.

McKelton's jury heard and considered several improper and prejudicial hearsay statements. An overwhelming number of testimonial and non-testimonial statements alike were admitted. These statements included:

- Allen's friend Shaunda Luther testified that Allen referred to McKelton and his associates as "killers" and that Allen later clarified that she was "serious meaning killers." Tr. 497.
- Luther testified that Allen referred to McKelton as a "robbery boy," which is "a person who robs other drug dealers." Tr. 498.
- Officer Kelly Smith, Sherrie Bluester (screener for Butler County Children's Services) and Mindie Nagel (physical therapist) all testified about Allen telling them how she broke her ankle; they were all given conflicting explanations. Tr. 392, 405, 464.
- Allen's friend Charia Mam testified that Allen told her if McKelton thought Allen slept with his friend Angelo "he would fucking kill me." Tr. 547.
- Mam also testified that Allen once called her when a firefighter sent her flowers and said, "he doesn't know what he could cause me. I could get fucking killed over that shit." Tr. 548
- Mam also testified that when her friends took pictures of her with a stripper at a bachelorette party, Allen "cussed everybody out for taking pictures of her and made us erase them out of the camera, because she said Calvin will fucking kill her if he saw those pictures." Tr. 550.
- Mam also testified Allen said, "if Calvin think she had an abortion and she did it without him knowing, he would kill her." Tr. 555.
- Dozens of other hearsay statements. Tr. 355-57, 377-78, 382-83, 406-08, 433, 435, 440, 443, 464-67, 490-92, 496-502, 538-45, 551, 552,556, 577-78.

McKelton was entitled to confront the witnesses against him, and the unconfrosted statements admitted against him were not harmless beyond a reasonable doubt. The Confrontation Clause of the Sixth Amendment prohibits unconfrosted testimonial statements. A statement is testimonial if made "under circumstances which would lead an objective witness

reasonably to believe that the statement would be available for use at a later trial.” *Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S. Ct. 2527, 2529 (2009).

On direct appeal, constitutional error is harmless only if the prosecution proves it to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 26 (1967). Hearsay statements that are not confrontational are still prohibited by Evid.R. 802 if they do not fit an exception under the Ohio Rules of Evidence.

To admit statements under the forfeiture doctrine, the Constitution first requires a showing that the wrongdoer made the witness unavailable *for the purpose of preventing them from testifying as a witness*. *Giles*, 554 U.S. at 368. The State not only failed to produce evidence to show that McKelton acted with intent to prevent Allen from testifying against him in any capacity, but it conceded to the jury that McKelton “didn’t plan to kill Missy. That was spontaneous. It wasn’t planned.” Tr. 1993. McKelton was prejudiced by the statements of Allen, erroneously admitted under the forfeiture by wrongdoing exception.

E. Conclusion

Dozens of prejudicial hearsay statements were admitted against McKelton and undermined his rights of confrontation and due process. McKelton is therefore entitled to a new trial, or alternatively, a new penalty phase under R.C. § 2929.06(B).

Proposition of Law No. V

The defendant's rights to a fair trial, due process and freedom from cruel and unusual punishment are violated when the trial court allows the pervasive introduction of evidence which is irrelevant, unfairly prejudicial, and impermissible character evidence. U.S. Const. amends. VI, VIII and XIV, Ohio Const. art. I, §§ 9, 10. Ohio R. Evid. 403, 404.

Calvin McKelton went by the nickname C-Murder. He had tattoos with images of pistols and phrases like "straight killer." He sold large quantities of drugs and had been doing so since the late 1990s. In that time he committed robberies, assaults, and murders.

The State presented all of this information even though it had little to no relevance to the charges against McKelton. Throughout McKelton's trial, the jury was subjected to an avalanche of testimony which was mostly or entirely irrelevant, and served only to engender prejudice against McKelton, as prohibited by Evid.R. 402 and 403(A). The jury was also overwhelmed with evidence of other acts of McKelton's which either primarily or entirely served to show his bad character and propensity to commit bad acts, rather than any proper purpose under Evid.R. 404. The testimony mentioned above represents only a small fraction of the unfairly prejudicial and irrelevant information presented to the jury at McKelton's trial, which this claim will catalogue. The entirely circumstantial case against McKelton was systematically dominated by a campaign to paint McKelton as a bad man using unfairly prejudicial and irrelevant evidence, from early in the State's case-in-chief through closing arguments and mitigation.

A. Legal standards

When evidence is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Moreover, when an individual's life is at stake, the Supreme Court has repeatedly insisted upon higher standards of reliability and fairness. *See e.g.*,

Beck v. Alabama, 447 U.S. 625 (1980) (need for heightened reliability); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (the penalty of death is qualitatively different from any other sentence and requires a heightened degree of reliability).

Evidence Rule 401 provides: “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The admissibility of relevant evidence rests within the sound discretion of the trial court. *State v. Drummond*, 111 Ohio St. 3d 14, 28, 854 N.E.2d 1038, 1059 (2006).

Evidence Rule 403(A) provides that evidence is not admissible ‘if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.’ The determination of whether a piece of evidence is inadmissible under this standard is left to the sound discretion of the trial court. *State v. Crotts*, 104 Ohio St. 3d 432, 437, 820 N.E.2d 302, 308 (2004). All evidence that tends to prove the State's version of the facts necessarily is prejudicial to the defendant. *Id.* Thus, the Rules of Evidence do not bar all prejudicial evidence, only unfairly prejudicial evidence is excludable. *Id.* Evidence is unfairly prejudicial when it may result in an improper basis for the jury's decision. *Id.* If the evidence “arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial.” *Id.* In other words if the evidence appeals to the jury's emotions rather than its intellect, it is usually prejudicial. *Id.* Further, a Rule 403 objection requires heightened scrutiny in capital cases. *State v. Morales*, 32 Ohio St. 3d 252, 257-58, 513 N.E.2d 267, 273 (1987). Whereas exclusion under 403 generally requires that the probative value of the evidence be minimal and the prejudice great, in capital cases, the probative value of each piece of evidence must outweigh any potential danger of prejudice to the

defendant. *Id.* at 258, 513 N.E.2d at 274. If the probative worth of the evidence does not outweigh the danger of prejudice to the defendant, it must be excluded. *Id.*

On direct appeal, constitutional error is harmless only if the prosecution proves it to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 26 (1967). When the record on direct appeal establishes constitutional error, the burden is on the State to prove that the error is harmless beyond a reasonable doubt. *Id.* “The harmless error standard is even more stringent when applied to errors committed at the penalty phase of a capital trial. ‘The question ... is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *State v. Fears*, 86 Ohio St. 3d 329, 354, 715 N.E.2d 136, 158 (1999) (Moyer, C.J., dissenting) (quoting *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988)).

Under Evid.R. 404, evidence of a person’s character or other acts are generally inadmissible to show action in conformity therewith. However, under 404(B), other acts may be introduced to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

B. Argument

1. McKelton’s tattoos

The jury saw shirtless photos of McKelton showing his tattoos. The tattoos included a picture of a skull with the words “straight killer” written below it, pictures of mountains with the words “King of Da Hill” under them, and picture of an individual masked with a bandana holding pistols in each hand under the words “scandalous life.” Tr. 877-9, Ex. 45D, 45F, 45G. These photos were irrelevant. Evid.R. 401.

The State indicated that the photographs of the tattoos were relevant because they were taken "for identification purposes" when McKelton was at the police station. Tr. 877. During closing argument when the State mentioned the tattoos, the proposed relevance was "just to verify that the guy that walked in and reacted that way to Toby Williamson is the same guy that was with Margaret on the cruise and living with her. That's why those pictures are in there. There's a picture from the cruise of him without a shirt, and you'll see these same tattoos." Tr. 1975. That was nonsense. The State had clear pictures of McKelton at the police station that did not show his tattoos. *See* Ex. 45A, 45B. McKelton had already been identified by multiple witnesses at the police station, signed a waiver of rights form there, and defense counsel never suggested McKelton was not at the station. Tr. 505, 885, 888.

Assuming *arguendo* that the tattoos had some relevance under Evid.R. 401, their probative value is substantially outweighed by the danger of unfair prejudice under Evid.R. 403(A). Tattoos with phrases like "straight killer" and pictures of guns indicate to the jury that McKelton is dangerous and murderous, and that he is a "thug" involved in urban gang culture. They strongly suggest violent propensities but have virtually no probative value towards McKelton's guilt for the crimes with which he was charged. Under the analogous federal rule, the Seventh Circuit found an abuse of discretion and remanded where the trial court allowed pictures of defendant's tattoos of guns, with the words redacted. *United States v. Thomas*, 321 F.3d 627, 631-633 (7th Cir. 2003).

McKelton was prejudiced by the introduction of photographs of his tattoos. In closing argument, the State used McKelton's tattoos to suggest his guilt:

There's a picture from the cruise of him without a shirt, and you'll see these same tattoos, straight killer, the grim reaper with a pistol. It's almost beyond parity [sic] to sit here and imagine how it happened, the defendant having a tattoo that says, straight killer, but that's his tattoo. On his back, scandalous life with a masked

robbery boy with pistols in each hand. And that's a strange word, scandalous. Do you remember hearing scandalous come up again?...I Think it was Charles Bryant that says...when Calvin tells Charles that he choked the bitch out...What did the defendant call Missy? He called her a scandalous bitch.

Tr. 1975-6. This is a far cry from only introducing the tattoos for identification. The State implied that the tattoos indicate that McKelton is guilty of the specific crimes he is charged with. The State also uses the word "scandalous" on McKelton's tattoo to bolster Charles Bryant's testimony. Furthermore Bryant was misquoted; he never said McKelton called Allen a "scandalous bitch." The State also links McKelton's tattoos to Allen's testimony, which was inadmissible on other grounds. *See* Proposition of Law No. IV. Allen had called McKelton a "robbery boy," which means "a person who robs other drug dealers." Tr. 498-99. This is why the State refers to the picture above McKelton's "scandalous life" tattoo as a "robbery boy." Tr. 1975. All this creates not only unfair prejudice but also confusion as prohibited by Evid.R. 403(A).

2. Testimony of Lemuel Johnson

The State inundated the jury at McKelton's trial with evidence that McKelton was a bad man who was deeply entrenched in crime and urban drug-dealing culture. The jury heard about how McKelton had been selling drugs since the 1990s, how he made deals with other drug dealers where they supply McKelton with drugs so he will refrain from violence against them, how he operated on his "turf," how he casually dealt with tens of thousands of dollars worth of cocaine to be sold as crack, and how he offered to kill people for other drug dealers in exchange for money. In a case that had nothing to do with drugs or even drug-related crime, this evidence served virtually no purpose except to unfairly prejudice the jury against McKelton.

The State concluded its redirect examination of Johnson by using leading questions to have Johnson insinuate that McKelton had murdered three people known only by their

nicknames. The State's witness, Lemuel Johnson, an incarcerated drug dealer, recounted McKelton's long history of drug dealing and crime. Before he was questioned about relevant and proper evidence, Johnson testified to a string of what the trial court called "conversations about other acts that are not relevant to this charge." Tr. 1743. The State elicited from Johnson that McKelton had been selling drugs since "the late '90s." Tr. 1734. The slight probative value of how Johnson knew McKelton could have been established without exposing to the jury to the fact that McKelton had been committing unrelated felonies for the last decade. The State then elicited from Johnson that he spoke with McKelton for the purpose of making a deal in which McKelton could buy drugs from Johnson in exchange for McKelton not retaliating against another drug dealer who had tried to kill McKelton. Tr. 1736-37. This prejudicial testimony was irrelevant.

Johnson testified that weeks after that conversation, McKelton spoke to Johnson again and offered to kill witnesses in Johnson's brother's case. Tr. 1746. The purpose of that unfairly prejudicial testimony was that when Johnson hesitated to respond, McKelton explained he had killed witnesses before, including Germaine Evans to make him unavailable in Allen's case. 1747-49. An objection and sidebar preceded the testimony about McKelton offering to kill witnesses in Johnson's brother's case:

Mr. Piper: ...The defendant suggested that this witness pay him some money...He wanted some money and he would take care of witnesses...This witness really didn't want to do that and kind of held off on that. Calvin then thought that this witness didn't trust him, so he started trying to tell him about how I can do this...Our charge involves intimidation of a witness. He talks about Margaret and he talks about getting rid of witnesses that link him to that death.

The Court: I don't mind that. I'm concerned about conversations about other acts that are not relevant to this charge.

Mr. Piper: The only difficulty with that, your Honor, is that if this were a 404(B), it would go to method of operation, plan, motive and they are relevant because what he's

trying to convince that witness of is I can do murders...I can take of [sic] a witness in your brother's case and I'll take care of these witnesses. So the whole idea of getting rid of witnesses basically goes to the very heart of our case...I'm not saying they are not prejudicial, but clearly they are relevant—

Mr. Howard: ...under 403 it's prejudicial to have come in other acts that he allegedly admitted to things like that. It's highly prejudicial and improper.

Mr. Piper: It's highly prejudicial and goes to motive in this case. Why did Mick get killed and the witness is bragging about doing this type of thing.

The Court: The Court will permit it, but I'll give a cautionary instruction before we go further.

Tr. 1742-4. The Court then instructed the jury they could consider the evidence of other acts and other wrongs “not because – to show that he acted in conformity with this, but only that it shows a plan, identity, modis [sic] operandi.” Tr. 1744-45.

Johnson's testimony of McKelton's other acts should not have come in under Evid.R. 404(b). Other acts are admissible to show that a defendant *committed* a particular crime, but not that he is *the type of person who would commit* a particular crime. *State v. Lowe*, 69 Ohio St. 3d 527, 530, 634 N.E.2d 616, 619-20 (1994). McKelton selling drugs for ten years, negotiating drug deals in exchange for refraining from violence, and offering to kill a witness for money in an unrelated case do not show that McKelton committed the particular crimes for which he was charged, but only that he was the type of person who would commit such crimes.

Unsubstantiated allegations of McKelton propositioning to kill a potential witness in an unrelated case could not be introduced to show identity through modus operandi. To show modus operandi, the other acts must form a “unique, identifiable plan of criminal activity,” which establishes “a distinctive behavioral fingerprint.” *Lowe*, 69 Ohio St. at 531-32, 634 N.E.2d at 619-20. McKelton offering to kill a witness for money in an unrelated case against an unrelated defendant cannot suffice to show modus operandi because the victim and the would-be

victim sharing one common characteristic (as witnesses) is not sufficiently specific to show a unique identifiable behavioral fingerprint.

Assuming *arguendo* that it had a proper purpose under Evid.R. 404(b), testimony about McKelton offering to kill a witness in an unrelated case was still inadmissible under Evid.R. 403(A). It was highly prejudicial; the State admitted as much. Tr. 1744. Its relevance was diminished because Evid.R. 404(b) dictates that other acts cannot be introduced to show action in conformity therewith. Furthermore, the given Evid.R. 404(b) instruction creates a risk of confusion, since the lay jurors must decipher the distinction between considering evidence for "action in conformity therewith" and "plan, identity and modus operandi." The probative value of McKelton allegedly offering to kill the witnesses against Johnson's brother was further diminished by the fact that the case was on appeal, and witnesses do not testify at appeals. Tr. 1739. (The State probably had this defect in mind when it improperly led its witness to say he was hoping his brother's case might be reversed. Tr. 1745). The lay jurors were likely unaware that witnesses do not testify in appeals. Furthermore, the jury's evaluation of Johnson was badly distorted because the trial court did not let defense counsel properly cross-examine the inmates testifying against McKelton, as discussed in greater detail in Proposition of Law No. IX.

On redirect examination, the State elicited through improper leading questions suggestions that McKelton had killed three unnamed people. On cross examination defense counsel did ask Johnson, "So you had no idea whether or not [McKelton] was being serious about these witnesses that he was telling you about, do you?" Tr. 1744. Johnson replied, "Well, I knew his background. I knew what he did. And I knew a long time before he told me about the witnesses, like I mean Mick wasn't the only person that he told me about. It was about several different witnesses in different cases. And I knew all of them. I already knew from the streets

that he was telling the truth." *Id.* This was already improper under Evid.R. 404(B) and Evid.R. 403(A). The State, however, was still not satisfied. On redirect examination, the prosecutor asked Johnson if McKelton had said other things to let him know how serious he was about Allen and Evans. Tr. 1780-81. The following exchange then took place:

Mr. Piper: Did [McKelton] tell you other things to let you know how serious he was?

Johnson: Yes.

Mr. Piper: Okay. Did he tell you about a guy named Boo?

Mr. Howard: Objection.

The Court: Overruled.

Mr. Piper: Did he tell you about a guy named Boo?

Johnson: Yes. He was another --

Mr. Piper: Let me just ask my questions. Did he tell you about a guy named Butter?

Mr. Howard: Objection, leading.

The Court: Overruled.

Johnson: Yes.

Mr. Piper: Did he tell about a guy named Wilkes?

Johnson: Yes.

Mr. Piper: Are those guys dead or alive?

Johnson: Dead.

Mr. Howard: Objection.

The Court: Overruled.

Tr. 1781. This ran afoul of Evid.R. 404(B) and Evid.R. 403(A). The probative value (that Johnson did not believe McKelton) is substantially outweighed by the insinuation that McKelton

had somehow killed three people would could only be identified as "Boo," "Butter," and "Wilkes."

Johnson's testimony that McKelton told him about killing Evans and Allen was admissible. The rest of the testimony about McKelton behaving like a violent gangster for the last ten years and committing countless other vaguely referenced crimes was unnecessary and any relevance was substantially outweighed by unfair prejudice. When defense counsel objected under Evid.R. 403, the trial court should have sustained the objection and told the jury to disregard any of those acts he had referred to as "other acts that are not relevant to this charge." Tr. 1743.

3. The testimony of Margaret Allen

The hearsay of Margaret Allen also contained several inflammatory statements of virtually no relevance.⁴ Many of her statements should have been excluded because they were inadmissible as other acts and were unfairly prejudicial. Allen's friend Shaunda Luther testified that Allen told her that McKelton and his friends were "killers," and later clarified Allen was "serious meaning killers." Tr. 497-98. The State also elicited in a leading question that Allen had referred to McKelton as a "robber boy," which means "a person who robs other drug dealers." Tr. 498-99.

This evidence was inadmissible under Evid.R. 404. It was both improper as character evidence and as evidence of other acts. It had nothing to do with the crimes McKelton was charged with but depicted him as exactly the type of person who would commit such crimes.

Similarly, this testimony was excludable under Evid.R. 403(A). This testimony supported the conclusion that McKelton was a robber, a drug dealer, and a murderer, and had virtually no

⁴ Allen's testimony should have been excluded as hearsay. See Proposition of Law No. IV.

relevance towards any element of any of the charges in the case he was on trial for. In closing argument, the state connected this to McKelton's tattoos, describing one as "scandalous life with a masked robbery boy with pistols in each hand." Tr. 1975.

4. McKelton as a Drug Dealer

The State introduced more virtually irrelevant evidence to depict McKelton as a drug dealing criminal. For no apparent relevant purpose, the State elicited from Crystal Evans, McKelton's then girlfriend, that McKelton was a drug dealer. Tr. 1065-66. The State also needlessly elicited from Bryant in leading questions that he had, as the state put it, "dope dealing" business with McKelton. Tr. 992. The State also asked Andre Ridley about details of the cocaine that McKelton gave Germaine Evans after Allen's death. Tr. 913. After Ridley testified that McKelton gave Evans twenty ounces of cocaine, the State had Ridley elaborate that it was worth \$40,000 and that he saw Evans cooking up crack with it. Tr. 913-14.

In addition to testimony about McKelton dealing drugs, the jury was exposed to irrelevant testimony about McKelton enjoying a lavish lifestyle as a drug dealer. Over objection, Shaunda Luther testified that one year McKelton gave Allen \$7,000 for Christmas presents and \$15,000 on another occasion. Tr. 491. He also gave Allen "a couple stacks of cash" for parties. Tr. 490. The State also introduced pictures of McKelton on cruises and in limousines that he had paid for. Tr. 500, 558. This evidence served no purpose except to prejudice the jury against McKelton.

5. Unnecessary References to Rap Songs

The State also made repeated mention of McKelton getting an idea from a rap song to stir the prejudices of the jury. Andre Ridley testified that Evans told him McKelton threw some "dope" beside Allen's body in the park to mislead the authorities about her death. This was

relevant testimony. The State then elicited that McKelton had gotten the idea from a song of Biggie Smalls', referring to the rapper also known as Notorious B.I.G., who was famously killed in gang related violence. Tr. 915. The State used the irrelevant detail about McKelton getting the idea from a gangster rap song to inflame the prejudices of the jury. In its Notice of Intent to Use Evidence Pursuant to Evid.R. 804(B)(6) the State gave notice it intended to use the detail about the rap song. Tr. 147. The State in closing argument again reminded the jury that McKelton had got the idea to leave the dope by the body from a Biggie Smalls song. Tr. 1979. In mitigation, the State again used this prejudicial and irrelevant detail in its argument; "McKelton through some dope down on her body to make it look like something else. He was inspired to do that by a rap song." Mit. Tr. 19.

6. Battles Co.

Over objection, detective Witherell was permitted to read and interpret a letter from McKelton to Crystal Evans and interpret words that defense maintained were "Butler Co." and the State argued were "Battles Co." Tr. 1540, Ex. 49. The State's witness then "assumes" that "Battles Co." meant "JC Battles Funeral Parlor." Tr. 1544-59. The real name of the funeral home is actually "JC Battle & Sons Funeral Home." (Ex. IV). The state bolstered its argument by adding an "s" to the name. The State was aware that there was no "s" in JC Battle. 9/27/10 Hrg. Tr. at 30. The proposed relevance of this was that McKelton had told Crystal Evans that he was going to try to intimidate witnesses. Tr. 1548.

The trial court allowed Witherell to testify about what the letter says because it is "sufficiently clear" that the letter says "B-A-D-D-L-E-S," which it absolutely does not say. Tr. 1541. On cross-examination, Witherell testified "Quite frankly, I think there is a hidden meaning

or hidden message there.” Tr. 1564. What he thought was based on speculation and suggestions of inadmissible evidence:

I’ve been a policeman in Cincinnati for well over 15 years. I’m also familiar with JC Battles Funeral Parlor. I’m also familiar with the way information is disseminated in certain neighborhoods like Avondale, like Mt. Auburn. So when I see that, that concerns me because of what I know about Mr. McKelton’s history in terms of witnesses.

Tr. 1565. On redirect examination the State elicited further speculation and improper opinion testimony to interpret McKelton’s letter:

The State: Would it make any sense for (McKelton) to say that the solution he’s found is to post, names, records, statements, whatever around Butler County?

Witherell: It does not to me, no.

The State: Would it make sense to you that the reference to posting that information at Battles Funeral Home in Avondale?

Witherell: It would make sense to me, yes. . . . (JC Battles and sons is in) a very centralized area within the City of Cincinnati area in which someone could disseminate information very easily to potential witnesses in the case.

The State: In your past experience, have you ever been involved in cases where that particular funeral home was used as a source to disseminate information into the neighborhoods about things?

Mr. Howard: Objection.

The Court: Overruled.

Witherell: Yes, I have. As a matter of fact, I worked a homicide just last year that was right in front of – right down the street from JC Battles on Rockdale Avenue.

The State: And so given that then, from your perspective, why would it make sense to say we’re going to post the names or reports or whatever it was at the funeral home in Avondale? Why does that make sense?

Witherell: It makes sense to me because I believe it’s a scare tactic. I believe that in posting potential witnesses’ names in public like that, number one, you identify who they are. Secondly, I think the underlying message is – although it’s subtle, but I think the message exists that we’re going to put this witness list up at the funeral home, and that’s

meant for people to draw their own conclusions in terms of their safety. And that is what concerned – quite frankly, that is the crux of what concerned me when I read this.

The State: Did you find it significant that this reference was made in a letter to Crystal Evans?

Witherell: I did. I believe it was a reminder to her --

Mr. Howard: Objection.

The Court: Yes, sustained.

Tr. 1567-69.

This testimony had only slight probative value, as it was evidence of other acts, but it was highly speculative—based on Witherell's hunches, opinions, and what he assumed. The danger of unfair prejudice, confusion of the issues, and misleading the jury is overwhelming. From the beginning, the line of questioning was misleading because the name of the funeral home was misstated to match McKelton's letter. The Butler County jury likely gave undue weight to Witherell assurances that he knew how things worked in Cincinnati and what the letter meant. Witherell also assured the jury he is familiar with the funeral home but did not know its real name. The testimony became increasingly misleading and prejudicial when the State asked Witherell if he had been involved in cases where that funeral home was used to disseminate information and he replied that a murder happened down the street from the funeral home in the last year.

7. Generalized Testimony

The jury was subject to a barrage of damning testimony by unknown declarants and police officers condemning McKelton based on their unidentified "knowledge" about him. Generalized testimony is particularly prejudicial because it precludes any meaningful refutation

except similarly generalized denial. *United States v. Schwartz*, 790 F.2d 1059, 1062 (3d Cir. 1986). These inadmissible and prejudicial statements include:

- Marcus Sneed testified that he “heard stuff going around in the streets” and asked McKelton “was it true what everybody was saying in the street about him killing his girlfriend.” Tr. 1598-9. Similarly, Sneed asked McKelton if the body found in Inwood park was “the guy that help you get rid of the body that everybody saying on the street.” Tr. 1602. In addition to being inadmissible hearsay, this unfairly prejudiced McKelton who had no way to refute what “everybody” was saying about him. Sneed also testified that McKelton had committed other unrelated murders and robberies. Tr. 1600. Sneed later testified that the things McKelton told him were true, even though he had no firsthand knowledge. Tr. 1642.
- Eric Karaguleff testified that the night Evans’ body was found, a group of people assembled at Inwood park. This group was “pretty much the Evans family and closes [sic] friends.” Tr. 1315. The State elicited improper hearsay from Karaguleff. See Proposition of Law No. XI. Karaguleff said the group “communicated” to him that they believed Evans had been “killed by his friend, Calvin McKelton . . . And they said it was because he helped move that lawyer’s body.” Tr. 1316. Karaguleff never identified who “communicated” this to him or what the basis for the knowledge was.
- In leading questions, the state elicited from Crystal Evans that there were “rumors” that McKelton “had something to do with [Germaine Evans’] death.” Tr. 1108.
- Detective Luke testified that an anonymous source told her that Evans was present for Allen’s homicide; he was either in the house or helped move the body after she was killed. Tr. 1249. Luke had already testified that the anonymous source gave her Evans’ name as a lead. Tr. 1248. The State was not satisfied and asked “what was the information you got about [Evans],” and Luke went on to give details about the anonymous source telling her that Evans witnessed Allen’s death, was scared, and helped to move the body. Tr. 1249. The Court instructed that be considered for the officer’s state of mind. *Id.* This failed the balance of 403(A). The probative value is only the detective’s state of mind. That value is further diminished because Luke had already testified that she was given Evans’ name as a new lead. Tr. 1248. The prejudicial value was great; Luke testified that the anonymous source told her about facts that were central to the State’s case.
- Detective Luke jumped to conclusions several times. When asked about her reaction to learning of Evans’ death, she said “we were just like, where do we go from here . . . I can’t believe this happened . . . [McKelton] did it again. It was that sort of feeling . . . I didn’t put it all together until I talked to Sheridan.” Tr. 1254. Luke later testified that she did not believe Crystal Evans’ statement based on her “past knowledge of Calvin.” Tr. 1271.
- Sheridan Evans testified that the police knew McKelton was a “serial killer.” Tr. 1836.

Some of the examples above were testified to over objection, others were not. In any event, all of them should have been stopped by the trial court. McKelton's trial was fundamentally unfair: there was repeated unsubstantiated testimony presented as a foregone conclusion and common knowledge that McKelton was a murderer.

8. McKelton as a misogynist

The State repeatedly introduced virtually irrelevant evidence that McKelton was a misogynist and womanizer. A defendant's general hatred of women cannot be used properly under Evid.R. 404(A) to prove guilt in a specific homicide. *State v. Johnson*, 71 Ohio St. 3d 332, 340, 643 N.E.2d 1098, 1105-06 (1994). Similarly, Evid.R. 403(A) prohibits such evidence.

The State elicited from Audrey Dumas (while improperly asking leading questions, as discussed in Proposition of Law No. VII) that her nickname was "50" and that she got that nickname because when McKelton was in prison she would send him fifty dollars every two weeks. Tr. 1368. The State also attempted to elicit from Dumas that McKelton cheated on her and that ended their relationship, even after Dumas said the cheating was mutual. *Id.* The State later, apropos of nothing, asked Dumas if McKelton demanded she start bringing him money in jail earlier that year. Tr. 1453-54. The State then played a recorded jail call for the jury where McKelton demanded Dumas start bringing him money. Tr. 1455, Ex. 77. At the beginning of this phone call, McKelton greeted Dumas, "fuck you doing?" Ex. 77. When Dumas told McKelton she's been "looking for love," McKelton responded "get the fuck out of here, your love right here, motherfucker." *Id.* McKelton later threatened to have Dumas' tires slashed if she did not bring him money. *Id.* Earlier on the recording, Dumas told McKelton she does not want to be involved with him because he had a son with Crystal Evans. *Id.* This call primarily served to

depict McKelton as a controlling womanizer who swore at and threatened the women in his life and demanded money from them like a pimp.

Charles Bryant testified that McKelton said to him “basically females can’t be trusted, and, you know, you got to watch them and things of that sort.” Tr. 988. When asked about Allen on direct examination, Bryant testified McKelton told him “—they [women] good with lying. They got a way with words. You got to watch them sometimes.” *Id.* Bryant later testified that McKelton said of Allen, “That she was scandalous and running her mouth, and it was a whole lot of foul words.” Tr. 989 In closing, the State misquoted Bryant, adding the epithet “bitch,” and connected his statement to McKelton’s irrelevant and inflammatory tattoos:

On his back, scandalous life with a masked robbery boy with pistols in each hand. And that’s a strange word, scandalous. Do you remember hearing scandalous come up again? . . . I think it was Charles Bryant that says . . . when Calvin tells Charles that he choked the bitch out . . . what did the defendant call Missy? He called her a scandalous bitch.

Tr. 1975-56 But this is not what Bryant said in his testimony. *See* Tr. 989. McKelton never called Allen a bitch, the epithet was added by the State. This Court found in *Johnson* that the epithet “son of a bitch” was “undoubtedly inflammatory,” and not harmless error. *Johnson* 71 Ohio St. at 340, 643 N.E.2d at 1105-06.

9. Audrey Dumas

The State asked misleading and prejudicial questions from Audrey Dumas while improperly cross-examining her under Evid.R. 611(C), as discussed in greater detail in Proposition of Law No. VII. Tr. 1363, 1373. The State then elicited from Dumas that McKelton called her “50,” this was because when he was incarcerated, she would send him 50 dollars every two weeks. Tr. 1368. The State then continued this prejudicial and virtually irrelevant line of questioning by asking Dumas if McKelton called her from jail and told her to start bringing him

money again. Tr. 1453-54. The State asked Dumas if she told McKelton that bringing him money "wasn't her role anymore," and if McKelton told her she could not resign from her role unless he fired her, and he had not fired her. Tr. 1454.

The State then played an irrelevant and prejudicial phone call for the jury. Tr. 1455, Ex. 77. In the telephone call McKelton spoke crudely to Dumas and asked her to send him money. *Id.* Dumas said she would not play her role anymore because McKelton had a baby with Crystal Evans, and McKelton got angry and tried to make Dumas do what he told her and threatened to have her tires slashed. *Id.* The State played this call for the jury again in closing argument. Tr. 1993. The call made McKelton look like a bad man but that had nothing to do with the crimes with which he was charged.

After playing the irrelevant and improperly introduced phone call, the State asked irrelevant and misleading questions:

The State: * * * [D]id you hear him say that you need to, quote, play your role to the fullest? Did you hear that? * * * Isn't it true that your role for a while now has been to have a business that generates income that you turn over to him?

Dumas: No.

The State: Isn't it true that part of your role was to set up guys at Vito's to then get robbed later by Mr. McKelton?

Dumas: No.

The State: Isn't it true that that's where the \$50 was always coming from and that's where the money from the summer was supposed to be coming from.

Dumas: * * * I send him \$50 every two weeks when I got paid. That's where that came from.

The State: Okay. That wasn't the answer to my question. Isn't it true that that's the business? That when he tells you to start your business back up and start sending money to him and play your role to the fullest, it's not about being a friend or even being a girlfriend. It's about being a source of income and in this case, an alibi witness for him?

Dumas: No. You got it all wrong.

The State: Okay. If I got it wrong, could you please explain to the jury why when you expressed resistance to playing your role to the fullest, he then threatened to have somebody come up and flatten your tires and started asking you what job you were at?

Tr. 1457-58. This questioning ran afoul of Evid.R. 402, 403, and 404. Nothing in the call suggested anything about McKelton or Dumas robbing anyone. Even if it did, it would have been inadmissible as other acts under Evid.R. 404(B) and unfairly prejudicial under Evid.R. 403. None of McKelton's charges had anything to do with robberies, but the State still sought to introduce evidence of these other acts.

Throughout the trial, the State elicited from other witnesses that McKelton had committed robberies, that he was referred to as a "robbery boy," and the State referred to the graphic on McKelton's irrelevant tattoo as a "robbery boy" in closing. The State also elicited from Marcus Sneed that Dumas ("50") would set people up for robberies with McKelton, and repeated this at closing. Tr. 1604, 1967. The State further misled the jury by asking Dumas if "her role" was to give McKelton money and be his alibi witness, but nothing from the evidence suggests McKelton used "role" to mean alibi. Similarly, the State suggested that the fifty dollars always came from robberies, even though nothing in the call suggested that.

10. The Statement of Crystal Evans and letters to Crystal Evans

The transcript of Crystal Evans' March 2, 2009 interview with detectives was admitted into evidence. Tr. 1871. In this statement, Luke told Evans that McKelton "Beat the living shit out of" Tiffany Austin and Andrea Jackson, who Evans identified as McKelton's "two babies' mommas." Ex.56, p. 26. Luke also told Evans that McKelton "hung out with" Ken Lawson, who "knew Calvin, really well." *Id.* at p. 29. In addition to being infamous in Cincinnati, Lawson was a lawyer who represented McKelton in previous matters. *See* Ex. 70. Luke told Evans "Bet

you'd shit your pants if you knew what" Lawson said about McKelton. Ex. 56, p. 29. Evans told Luke "Everybody keep on saying I should be scared" of McKelton. *Id.* at 36. Irrelevant acts, innuendo, and anonymous warnings about McKelton are inadmissible under Evid.R. 402, 403, and 404.

The State introduced, through Evans, a series of letters that McKelton had sent to her while in jail awaiting trial. Tr. 1870, Exs. 47-51. All of these letters were introduced into evidence and were given to the jury during both trial and sentencing phase deliberations. Exhibit 47 says nothing at all about any events relating to the charges, but does contain explicit language about the sexual acts that McKelton says he wished he could have engaged in with Evans before being arrested and also contains an explicit drawing. In exhibit 49, McKelton tells Evans "I don't like how we been behaving lately. Keep blaming these white folks for everything." The only discussion of anything related to the charges is when McKelton says he is innocent and that he has to get media attention. Ex. 49. He tells Evans that when he gets the list of the State's witnesses, they should post their records "all over Buttler Co." *Id.* In exhibit 51, McKelton talks about Evans' family believing that he was involved in Germaine's murder or knows something about it. There is profanity used throughout the letter. Ex. 51.

11. Additional irrelevant or unfairly prejudicial evidence

In its campaign to depict McKelton as the type of person who would commit crimes like those charged, the State introduced additional irrelevant or unfairly prejudicial evidence:

- The State played for the jury the phone call that Allen's niece, Ziala Danner, made to 911 on the night Allen broke her ankle. State's ex. 2, Tr. 349. After the relevant portions of the call, Ziala tells the 911 operator that McKelton's "daughter warned me about him because she said that he choked her mother with a phone cord," and that happened "not too long ago. [McKelton's daughter] told me I had to watch out for my aunt." State's ex. 2. As discussed in Proposition of Law XI, this was improperly allowed as hearsay under the excited utterance exception. Tr. 349. It was also irrelevant and evidence of other bad acts, and prohibited under Evid.R. 402, 403, and 404.

- The State introduced evidence of a copy of the *Anarchist Cookbook* found in McKelton's bedroom. Tr. 823. The *Anarchist Cookbook* is a collection of instructions for creating, among other things, explosive devices. This book was irrelevant.
- The State asks Mindie Nagel, Allen's physical therapist "if [Allen] had told you her boyfriend broke her ankle by slamming a car door on it repeatedly, would that have changed your treatment plan or your suggestions for avoiding future reinjury?" Tr. 481-82. No evidence in the record suggests this was how Allen broke her ankle. This question was improper, baseless, and inflammatory.
- When questioning the inmate Charles Bryant, the State elicited that Bryant had spoken to McKelton while the two of them were driving with "[n]o destination, just riding – I was smoking and we was drinking." Tr. 987. The State then elicited that Bryant was smoking marijuana and they were drinking Grey Goose. Not satisfied, the State then asked, "how was he drinking his and how were you drinking yours?" *Id.* Bryant replied, "He was drinking his straight, and I had some cranberry in mine." *Id.* Eliciting that McKelton drove around drinking straight vodka without so much as a destination was irrelevant and unfairly prejudicial to McKelton.
- The jury heard Detective Gregory testify that Michael Nix reported being shot at in order to prevent him from testifying at McKelton's trial. Tr. 1812-15. Assuming *arguendo* that it satisfied 404(B), the likelihood of the jury finding from the prior conviction that McKelton was the type of person who would commit the crimes he was accused of substantially outweighs any probative value in showing McKelton's identity. Tr. 1812-14. The trial court permitted this to show Michael Nix's the state of mind. Tr. 1812-13. The marginal probative value of Nix's state of mind is substantially outweighed by the danger of unfair prejudice from the jury hearing evidence that suggests McKelton tried to kill Nix, and the evidence was also an impermissible introduction of other acts. Evid.R. 403(A), 404(B).
- The State introduced evidence of McKelton's prior intimidation conviction for use pursuant to Evid.R. 404(B). Dkt. 146, Tr. 991. This ran afoul of Evid.R. 404(B) and 403(A). The fact that it was the same crime is not sufficiently specific to provide the unique and identifiably behavioral fingerprint required by Evid.R. 404(B). *Lowe*, 69 Ohio St. at 531-2, 634 N.E.2d at 619-20.
- The State elicited from the inmate Marcus Sneed that he knew an unrelated person who went by "Fat Boy." Tr. 1640. The State elicited that Fat Boy, "[e]nded up alongside of a road." *Id.* The State also elicited that Sneed had conversations with McKelton about McKelton wanting to set Sneed up to be robbed. *Id.* Upon mention of McKelton setting Fat Boy up to be robbed the trial court sustained an objection on relevance grounds.
- On direct examination, Detective Gregory indicated that McKelton's street name was "C Murderer." Tr. 1805. This had overwhelming potential to cause unfair prejudice. This Court found that it was improper for the State to refer to a defendant as "Dirty John," a

far less prejudicial nickname than C-Murderer. *State v. Gillard*, 40 Ohio St. 3d 226, 230, 533 N.E.2d 272, 277 (1988).

12. Gruesome Photographs

The autopsy photos of Margaret Allen and other pictures of her body were unfairly prejudicial and should not have been admitted. Allen's body was outside in July for days before it was discovered. Tr. 1443. In the autopsy photos it appeared bloated, decomposed, and discolored by insect activity. *See Exs.* 67A-O. Allen was unrecognizable to an officer who knew her well from the courthouse. Tr. 696. This was shown to the jury, comprised of at least one member who could not tolerate gruesome images and was prone to faint at the sight of them. *See Tr.* 255, 1409.

In capital cases, the standard for gruesome photographs is stricter than Evid.R. 403(A). "To be admissible in a capital case, the probative value of each photograph must outweigh the danger of prejudice to the defendant." *State v. Morales*, 32 Ohio St. 3d 252, 257, 513 N.E.2d 267, 273 (1987). The probative value of these gruesome photographs was minimal. Defense counsel never challenged the manner and cause of death, nor did they raise any issue relating to the killer's intention. The photographs should have been excluded. *See State v. Watson*, 61 Ohio St. 3d 1, 7, 572 N.E.2d 97, 104 (1991) (Autopsy photographs erroneously admitted under Evid. R. 403(A) where defense never challenged the manner and cause of death, nor did they raise any issue relating to the killer's intention).

McKelton was further prejudiced when the autopsy photographs were reintroduced at mitigation, which was also erroneous on grounds other than prejudice, as discussed in Proposition of Law VIII. *See State v. Thompson*, 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 421-22 (1987) (death sentence reversed where prosecutor improperly referenced gruesome photographs in argument during penalty phase, but photographs were not shown again to the jury in penalty

phase). When admitting the photographs, the trial court found that they had "limited probative value" but still admitted them. Mit. Tr. 27. The photographs were gruesome and danger of prejudice outweighed their "limited" probative value; the photographs should have been excluded. *Morales*, 32 Ohio St. at 257, 513 N.E.2d at 273.

C. Conclusion

The overwhelming volume of prejudicial and irrelevant testimony offered at McKelton's trial rendered it fundamentally unfair. Many errors above were objected to (*see* tr. 348, 404-05 (continuing objection to Allen's statements including 490-1, 497-8, 498-9, 500), 1604, 1640, 1741, 1781, 1975-56), and others were not. *See* Tr. 481, 558, 823, 876, 913, 987, 988, 991-92, 1065, 1368, 1453-55, 1456-68, 1871, 1975. However, even the more stringent plain-error standard is satisfied. It would be a miscarriage of justice to uphold a death sentence where the State's entirely circumstantial case was dominated by irrelevant, inadmissible, and prejudicial information. Along with the long list of improper and prejudicial evidence listed above, the State had its witnesses testify that McKelton was responsible for the murders individuals known only as "Boo," "Butter," "Wilkes," "Fat Boy," and other unnamed individuals. Tr. 1600, 1640, 1781.

The prejudicial impact of the jury's exposure to such inflammatory and irrelevant information deprived McKelton of his right to a fair trial, due process, and a reliable determination of his guilt and punishment in a capital case as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10 and 16 of the Ohio Constitution. For these reasons, McKelton's convictions should be overturned, or, at a minimum, his death sentence vacated.

Proposition of Law No. VI

Improperly impeaching a witness with a prior inconsistent statement and then playing a recording of the prior inconsistent statement to the jury violates a defendant's due process rights. U.S. Const. amend. XIV.

The State improperly impeached Gerald Wilson with a prior inconsistent statement and then played a recording of that statement for the jury. The prior statement was used as substantive evidence of McKelton's guilt.

A. Law

Evidence Rule 607(A) allows a party to impeach its own witness "by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage." *State v. Keenan*, 66 Ohio St. 3d 402, 412, 613 N.E.2d 203, 211 (1993). However, when the State impeaches its witness with a prior out-of-court statement that would otherwise be inadmissible as hearsay, there is the grave risk that the defendant will be convicted on the basis of unsworn testimony. It is a fundamental constitutional precept that a defendant should not be convicted on the basis of unsworn testimony. *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975) (internal citations omitted). And excessive impeachment increases that risk. *Id.*

Evidence Rule 607 seeks to ameliorate that risk by limiting the use of prior inconsistent statements to instances in which the party demonstrates surprise and affirmative damage. *See State v. Tyler*, 50 Ohio St. 3d 24, 34, 553 N.E.2d 576 (1990) (quoting Giannelli, *Ohio Rules of Evidence Handbook* (2d Ed. 1986)). But even when these requirements are met, there is a limit to how much questioning the party may indulge in when impeaching its own witness. Here, the excessive impeachment and subsequent playing of the statement for the jury went too far.

On direct appeal, constitutional error is harmless only if the prosecution proves it to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 26 (1967). When the

record on direct appeal establishes constitutional error, the burden is on the State to prove that the error is harmless beyond a reasonable doubt. *Id.* “The harmless error standard is even more stringent when applied to errors committed at the penalty phase of a capital trial. ‘The question . . . is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *State v. Fears*, 86 Ohio St. 3d 329, 354, 715 N.E.2d 136, 158 (1999) (*Moyer, C.J., dissenting*) (quoting *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988)).

B. Argument

Gerald Wilson gave a statement to investigators that inculpated McKelton in both Allen’s and Evans’ deaths. The substance of the statement was that he was in a car with McKelton who admitted having committed both murders. Ex. 78. In the statement, Wilson claimed that in April or May of 2009 he was at a club called Annie’s, that Jello had given him a ride home, and that McKelton was in the car. Tr. 1649-50. When the prosecutor questioned Wilson about these events on the stand, he denied all of it. Tr. 1648-49.

The State proceeded to impeach Wilson with his prior inconsistent statement. Tr. 1649. The prosecutor was able to get the substance of Wilson’s prior statement before the jury via that impeachment. Defense counsel objected but was overruled. Tr. 1650.

The prosecutor’s questions indicated that Wilson told police that McKelton was texting a woman while they were in the car, and that he was complaining that she was going to give his belongings away. Tr. 1650. Wilson agreed that he said these things to the police. *Id.* The questioning also revealed Wilson told police that McKelton said “something to the effect that if she gave his shit away, he was going to choke her like he did Margaret and get away with it.” *Id.*

But Wilson denied even telling the police this. *Id.* The prosecutor then told Wilson to look at his statement to refresh his memory. Tr. 1651. Wilson still denied having said that. *Id.* The prosecutor then asked, “Do you remember that at that point in time that Jello kind of spazzed out and told Calvin not to be talking in front of you?” Tr. 1651-52. Wilson said, “no.” Tr. 1652.

The questioning continued:

Q: *** And do you remember McKelton saying, G ain’t going to say nothing. If he did, he’s going to end up like Mick?

A: No.

Q: Would it refresh your memory to hear your own words out of your own mouth?

A: Yeah, I was lying. I was lying.

Tr. 1653.

The State did not establish surprise or affirmative damage (or even claim that they existed) prior to impeaching Wilson and playing his statement. After Wilson left the stand, the State put on the record that it was surprised by Wilson’s recantation of his prior statement. Tr. 1666. The trial court then noted that, “clearly, there were surprises and affirmative damage.” Tr. 1667. The affirmative damage requirement is meant to “eliminate an ‘I don’t remember’ answer or a neutral answer by the witness as a basis for impeachment by a prior inconsistent statement.” *State v. Dickie*, No. 2009-CA-00029, 2009 Ohio App. LEXIS 4594 (Licking Ct. App. Oct. 8, 2009) (quoting Evid.R. 607 Staff Note); *see also State v. Crosky*, No. 06AP-655, 2008 Ohio App. LEXIS 108 (Franklin Ct. App. Jan. 17, 2008) (“Affirmative damage is not shown where the witness denies knowledge of the facts contained in the prior statement or where she states that she does not remember the facts.”), *State v. Ridsen*, No. 22930, 2010 Ohio App. LEXIS 812 **13 (Montgomery Ct. App. Mar. 12, 2010). To satisfy the requirement, the witness’ testimony

must “contradict, deny, or harm” the calling party’s trial position. *Dickie*, 2009 Ohio App. LEXIS 4594, at **9 (citing *State v. Stearns*, 7 Ohio App. 3d 11, 15, 454 N.E.2d 139 (1982); *State v. Holmes*, 30 Ohio St. 3d 20, 23, 506 N.E.2d 204 (1987); *State v. Cantleberry*, 69 Ohio App. 3d 216, 222, 590 N.E.2d 342 (1990)).

Affirmative damage was not established in this case because Wilson denied knowledge of the facts contained in his prior statement. His responses were neutral and did not “contradict, deny, or harm” the State’s trial position. None of his answers cut against McKelton having killed Germaine. The existence of affirmative damage is left to the discretion of the trial court. *Crosky*, 2008 Ohio App. LEXIS 108, at **68. A trial court abuses its discretion when the “court’s attitude is unreasonable, arbitrary or unconscionable.” See *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140, 1142 (1983). Here the trial court abused its discretion because Wilson’s responses put him squarely outside the type of case in which impeachment with a prior inconsistent statement is meant to apply. See Evid.R. 607 Staff Note (1980) (“Requiring a showing of affirmative damage is intended to eliminate an ‘I don’t remember’ answer or a neutral answer by the witness as a basis for impeachment by a prior inconsistent statement.”).

The impeachment questioning, even if it had been proper to begin with, went on well after the State had succeeded in impeaching Wilson. The purpose of impeachment is to neutralize the damaging testimony given, and therefore “should be carefully restricted to compensating for the injury inflicted.” *United States v. Coppola*, 479 F.2d 1153, 1158 (10th Cir. 1973). The questioning about Wilson’s prior statement went on and on even after the State had established that his testimony was inconsistent with his statement to investigators. In this case, the examination was not “designed to undo whatever affirmative harm had been done without

unreasonably prejudicing the [McKelton]. On the contrary, it appears to have been calculated to affirmatively aid the [State] in establishing [McKelton's] guilt" *United States v. Miles*, 413 F.2d 34, 38 (3d Cir. 1969).

But making the problem exponentially worse, the State played the recorded statement for the jury. Defense counsel objected. Tr. 1654. The trial court stated, "it's a 607(A) issue, okay. And I think that there has been reasonable ground." *Id.* But this Court has clearly held that while a prior statement may, under certain circumstances be used to impeach (Evid.R. 607) or refresh the recollection (Evid.R. 612) of a witness, "a party may not read the statement aloud, have the witness read it aloud, or otherwise place it before the jury." *State v. Ballew*, 76 Ohio St. 3d 244, 254, 667 N.E.2d 369, 379 (1996).

A prior inconsistent statement is only admissible to impeach the declarant, not to prove the truth of the matter asserted. Ohio has long adhered to this principle. *State v. Dick*, 27 Ohio St. 2d 162, 165, 271 N.E.2d 797, 799 (1971). Even when a limiting instruction is given, juries are likely to treat the impeaching statement as substantive evidence. *Morlang*, 531 F.2d at 190; *see also United States v. Coppola*, 479 F.2d 1153, 1158 (10th Cir. 1973). In this case, even the questionable safeguard of a limiting instruction was missing.

The State itself used Wilson's statement as substantive evidence. In its closing, the State argued that McKelton bragged about "doing Mick like to Gerald." Tr. 2002-03. The prosecutor went on:

All I know is that Calvin talks about if this doesn't give me my clothes, I'll choke her out like I did Missy and get away with it. And Jello tells him, Dude, you have to keep your mouth shut. You know, we got people in the car. And Calvin goes, Oh, G? He's cool. He knows if he says anything, I'll do him like I did Mick.

Tr. 2003. There is little doubt that the jury must have considered Wilson's statement as substantive evidence of McKelton's guilt. With the State using the statement as evidence of

McKelton's guilt and without a limiting instruction, the jury had no reason to treat the statement in any other way. The use of Wilson's prior statement as evidence of the truth of the allegations contained in it would "allow [McKelton] to be convicted on unsworn testimony of [a] witness[]"—a practice which runs counter to the notions of fairness on which our legal system is founded." *Dick*, 27 Ohio St. 2d at 165, 271 N.E.2d at 799 (quoting *Bridges v. Wixon*, 326 U.S. 135, 153 (1945)).

The State's use of Wilson's prior statement as substantive evidence is particularly damaging in this case because there was no physical evidence connecting McKelton to Germaine's murder. And, the only testimony connecting him to Germaine's death was the highly questionable testimony of Marcus Sneed and Lemuel Johnson. *See* Proposition of Law No. XIII. The State never even posited a theory about the circumstances surrounding his death—seeming to flip-flop between suggesting that McKelton himself did the shooting (tr. 1136) and suggesting that McKelton had someone shoot Germaine (tr. 1288-89). Moreover, the death sentence in this case is only for Germaine's murder, and the specification was O.R.C. § 2929.04(A)(8)—the killing of a witness to prevent his testimony. The information contained in Wilson's out-of-court statement went directly to this specification. Thus, McKelton's sentencing was also improperly impacted by unsworn testimony.

Furthermore, McKelton was prejudiced at sentencing as a result of the improper impeachment of Wilson. The trial court noted in its sentencing opinion that "[t]here was extensive testimony by many witnesses, some voluntary and others involuntary, that Mr. McKelton murdered Germaine Lamar Evans to prevent him from being a witness against McKelton in the death of Margaret Allen." Sent. Op. p. 4. There was not, in fact, extensive testimony about that. Only Marcus Sneed and Lemuel Johnson testified as to this point—both of

highly questionable credibility. Those two witnesses also testified voluntarily to this point. The trial court was likely referring to the evidence used to impeach Wilson when it refers to witnesses “involuntarily” testifying about McKelton killing Evans because Evans had witnessed Allen’s murder. This also goes to demonstrate that even the trial court treated the evidence used for impeachment purposes as substantive evidence. Certainly the jury did the same.

B. Conclusion

The impact of the jury considering Wilson’s testimony as though it were substantive evidence deprived McKelton of his right to a fair trial, due process, and a reliable determination of his guilt and punishment in a capital case as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10 and 16 of the Ohio Constitution. For these reasons, McKelton’s convictions should be overturned, or, at a minimum, his death sentence vacated.

Proposition of Law No. VII

A defendant's due process right to a fair trial is violated when a trial court improperly allows leading questions and the State is resultantly able to present inflammatory evidence to the jury. U.S. Const. amend. XIV.

The trial court erroneously found that Audrey Dumas was an adverse witness pursuant to Evid.R. 611(C), allowing the State to ask her leading questions on direct examination. The trial court then failed to control the extent of those leading questions pursuant to Evid.R. 611(A). McKelton's due process rights were violated as a result of these errors.

A. Law

Evidence Rule 611(C) provides that leading questions "should not be used on the direct examination of a witness," but may be used "[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party" Evid.R. 611(A) provides that the trial court must "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence." This exercise of control is so as to "(1) make the interrogation and presentation effective for the ascertainment of the truth (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Evid. R. 611(A).

B. Argument

1. Dumas was improperly declared an adverse witness.

The State called Audrey Dumas to the stand. Tr. 1365. Dumas is an ex-girlfriend of McKelton's. Tr. 1367. They dated on and off for six years—ending their relationship at the beginning of 2010. *Id.* Before Dumas took the stand, the State made a motion to use leading questions pursuant to Evid. R. 611(C). Tr. 1363-64. The State argued that Dumas was identified with McKelton—that she had been visiting calling, writing, and giving him money. *Id.* The State also noted that Dumas was an alibi witness for Margaret Allen's death. *Id.* The trial court

indicated that the State would have to establish this relationship on the record. Tr. 1364. Defense counsel objected. *Id.*

The State asked about Dumas' past relationship with McKelton. Tr. 1367. Dumas testified that when she and McKelton first started dating, McKelton was incarcerated (on unrelated charges), and she would send him fifty dollars every two weeks. Tr. 1368. She also testified that since McKelton had been in jail awaiting trial in the instant case, she had visited him, but had not done so in the month or so leading up to her testimony. Tr. 1371. She said that McKelton still sometimes called her and that she still sometimes sent him money. *Id.* Dumas testified that the last time they had had a substantive telephone conversation was about a month prior to her testimony. *Id.* At that point, the trial court allowed the State to proceed with leading questions. Tr. 1373.

The decision whether to allow leading questions is in the discretion of the trial court. *State v. D'Ambrosio*, 67 Ohio St. 3d 185, 190, 616 N.E.2d 909, 914 (1993). A trial court abuses its discretion when the "court's attitude is unreasonable, arbitrary or unconscionable." See *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140, 1142 (1983).

"An adverse witness is a witness aligned with an opposing party because of a relationship or common interest in the litigation." *State v. Clay*, 187 Ohio App. 3d 633, 644, 933 N.E.2d 296, 304 (2010). Audrey Dumas may have had some relationship with McKelton, but it is distinguishable from cases in which a relationship supported a finding that a witness was adverse. For example, in *State v. Fields*, No. 88916, 2007 Ohio App. LEXIS 4485 (Cuyahoga Ct. App. Sept. 27, 2007), the witness (who was also the victim) was married to the defendant. She testified that she wished to reconcile with the defendant and that she did not wish to testify. *Id.* In *State v. Darkenwald*, No. 83440, 2004 Ohio App. LEXIS 2394 (Cuyahoga Ct. App. May

27, 2004), the witness was the defendant's daughter, was evasive and uncooperative, and stated that she did not want to testify. Dumas was not evasive or uncooperative. Moreover, her romantic relationship with McKelton had ended months before trial, and by that time they were communicating only sporadically. There was an insufficient basis for declaring her adverse and allowing the State to use leading questions, and the trial court abused its discretion in allowing such questions.

2. The State used excessive leading questions to improperly put words in Dumas' mouth and place improper insinuations before the jury.

The State called Dumas because she had provided an alibi for McKelton for the night of Margaret Allen's death and to a lesser degree for the night of Germaine Evans' death. The State believed Dumas was lying and sought to demonstrate that to the jury. Through its excessive use of leading questions, the State put words in Dumas' mouth and placed improper insinuations before the jury. Moreover the State used Dumas to put highly inflammatory evidence that should have been excluded under Evid.R. 403(A) in front of the jury. *See* Proposition of Law No. VII.

The State elicited testimony from Dumas about a night that she and McKelton had gone out to a bar in July of 2008. Dumas testified that McKelton picked her up at her home around 11:00 p.m. They then went to a bar called Vito's and they left Vito's around 2:15 or 2:30 a.m. According to Dumas' testimony, after leaving Vito's, she and McKelton drove around for an hour or so with two other people (tr. 1385-86) and McKelton then dropped her off at home (tr. 1388-90). Dumas stated that she could not remember the exact date of these events, but that she had spoken to attorney Richard Goldberg when her memory was fresher and had told him the date. Tr. 1377.

The State then proceeded with a line of questioning designed to make it appear that Dumas was being manipulated by McKelton into providing an alibi for Allen's death. The State

asked Dumas about a call she had received from McKelton in early September 2010. Tr. 1453. Dumas testified that McKelton had called her and told her to get her business going again and start bringing him money. Tr. 1453-54. Dumas testified that she told McKelton that that was no longer her role. *Id.* The State then played a recording (ex. 77) of the call for the jury. Tr. 1455. In the call, McKelton tells Dumas that she needs to start playing her role to the fullest and bringing him money. Ex. 77. When Dumas says that this is not her role anymore, McKelton says he will have someone come flatten her tires while she is at work. *Id.* At that point, the prosecutor began to question Dumas about what McKelton meant when told her to "play her role." Tr. 1457. The prosecutor asked, "[i]sn't it true that your role for a while now has been to have a business that generates income that you turn over to him?" *Id.* Dumas responded, "no." The prosecutor then asked, "[i]sn't it true that part of your role was to set up guys at Vito's to then get robbed later by Mr. McKelton?" *Id.*

This line of questioning went on for two transcript pages, and then the prosecutor became more explicit about suggesting that McKelton was pressuring her into providing a false alibi:

Q: Okay. So but isn't it true that the role that you're being expected to play now here and now is to be an alibi witness for him, right?

A: I spend one night with my ex. I did not expect to be up here being questioned.

Q: That's right. You didn't, did you? You expected, right, to fulfill your role that sometime in early August you would go with him to Rich Goldberg's office and you'd tell his attorney whatever it was you needed to say about being at Vito's that night, and then that would be the extent of it. That would be the end of it. That's what you thought your role was going to be; isn't it?

A: No. I just thought we was going out that night just to hang out and chill.

Q: And what did you think when you were being taken to his attorney's office a week later to talk about hanging out and chilling?

Tr. 1459-60.

The prosecutor also asked questions designed to remind the jury that McKelton was out with Dumas just after his live-in girlfriend died:

Q: Okay. So are you . . . telling this jury that after being on that courtship date at Vito's on the weekend and then hearing Margaret Allen, whose BMW you were riding around in –

A: Uh-huh.

Q: --turned up dead two days later, and then sending Calvin the text message when you found out, that you didn't talk to him or hear from him for another week or two?

Tr. 1400-01. The prosecutor followed this up with questions about McKelton and Dumas' interactions the first time they saw one another after Allen's body was found:

Q: So at most, a week after his live-in girlfriend is murdered and dumped, and you've asked about it, he comes to your house. Doesn't say anything about it and lays down and goes to sleep?

A: Yeah. I was already in bed. So when he came, we went directly into the room and just, you know, like a three-minute conversation, just asked him was he all right. Are you okay. And he said, I'm sorry for, you know waking you up or whatever, and laid back down. ***

Tr. 1401-02.

The State then asked questions designed to show that Dumas was not hesitant to ask questions and that there must have been a reason she didn't ask McKelton about Allen's body.

The prosecutor asked about the day Dumas showed up for court pursuant to her subpoena:

Q: And in fact, as soon as you laid eyes on me, you wanted to talk to me and find out why am I here? What am I – why am I subpoenaed? What am I a witness for, correct?

A: Yes

Q: You weren't even hesitating about asking me, why am I here? I want to know. You wanted information from me, right?

A: No, I wanted to know why the prosecutor office subpoenaed me versus the defense. That's what I was asking. So if you got that mixed up, I'm sorry.

Q: Okay. My point is, you were not shy about trying to get information from me to answer the questions in my mind?

Tr. 1402. Next the prosecutor asked:

Q: You contacted Calvin asking him what's going on, I'm hearing stuff. And when he comes to your house, you didn't ask him to actually talk to you and tell you what happened to Margaret. You didn't ask him that?

A: No.

Q: You didn't ask him to have – has the police talked to you? Have you talked to them?

A: No.

Q: Was he depressed?

A: I don't know.

Q: Did he cry?

A: No.

Q: Did he express any kind of heavy emotions that he needed a friend to talk to, just to process and deal with what he was going through?

A: No. I mean, he wasn't happy-go-lucky, but I don't know.

Q: He just laid down and went to sleep?

A: Yeah, we just laid down and went to sleep.

Tr. 1403-04.

***⁵

Q: Did he at any time after her body was found, up to and including yesterday, has he ever talked to you about what happened to Margaret Allen?

A: No.

⁵ The court recessed for the day during the course of Dumas' testimony. The next morning, the State proceeded with another witness before Dumas returned to the stand.

Q: Have you ever asked him what happened to Margaret Allen, beyond that first text message you sent him?

A: No.

Q: And so in that end of July, early August, after finding out that Margaret Allen has been murdered and her body dumped and him not telling you what happened and you not asking what happened, after all of that, you resumed a dating relationship with him?

A: Yes.

Tr. 1448-49. This line of questioning continued on redirect:

Q: Isn't it true that you didn't ask him about any details about – let me back up and ask you this. Didn't it creep you out that when you found out that Margaret Allen was dead the weekend you were driving around with her boyfriend in her car, didn't that creep you out?

A: I mean, a little, but it didn't really – it didn't really bother me because I didn't just – I don't think he's capable of nothing like that.

Q: I didn't ask you if he was capable. I asked you didn't it creep you out to realize you were riding around in a dead woman's car the weekend she's killed with her boyfriend?

A: After the fact, yeah.

Q: Yeah, right, but you didn't – no matter what you felt about the situation you ended up finding yourself in, you didn't ask him any questions about it, did you?

A: No.

Q: Because you knew those were not questions you were allowed to be asking, right?

Tr. 1504-05.

The State then went back to the issue of Dumas talking to attorney Richard Goldberg:

Q: And in fact, when he later then after you discovered this and were creeped out, when he later asked you to go to his attorney's office later that week or the next week to talk about that with his attorney, you didn't ask him why you were doing that either, did you?

Tr. 1506.

The State also painted the picture that McKelton used Dumas as an extra layer of alibi for the night of Germaine Evans' death. On cross-examination the defense had questioned Dumas about texts and phone calls she had made to McKelton on the night of Evans' death. Tr. 1468-76. On redirect, the State used leading questions to suggest to the jury that McKelton had told Dumas to "blow up" his phone that night as part of his alibi plan. The prosecutor asked questions spanning six transcript pages trying to establish that the reason for Dumas' calls and texts to McKelton on that night was not because they were in a relationship and she was angry that he was at Crystal's apartment. Tr.1494-99. The prosecutor also made the point that Dumas did not "blow up" McKelton's phone when he was with Margaret Allen and that February 27th, 2009 was the only time she had done this. Tr. 1498. With the clear implication that McKelton had told Dumas to call and text him that night as part of his alibi plan, the prosecutor asked: "And when – when he told you in February 27th, 2009, you started blowing his phone up for the next three hours, you didn't ask him about why he wanted you to do that either, did you?" Tr. 1506.

Even if the use of leading questions was appropriate to start with, the State's use of leading questions was excessive, and the trial court had a duty to exercise control over the interrogation when the State took its use of leading questions too far. Evid. R. 611(A).⁶

Allowing unfettered leading questions carries the risk that the State will "smuggle 'self-serving statements' into trial under the cloak of hostility." *See United States v. Crockett*, 813 F.2d 1310, 1313-14 (4th Cir. 1987). That is precisely what the State did in this case. The State used leading questions to insinuate to the jury to McKelton had used Dumas to prey on other people for his own gain; that Dumas had some questionable "business" that brought in money

⁶ There are many more leading questions in the State's examination of Dumas that are not covered here for the sake of brevity.

that she gave to McKelton; that McKelton had manipulated Dumas into providing a false alibi for him; and that McKelton's first attorney had told Dumas the date of Allen's death so that she could falsify an alibi.

C. Prejudice

McKelton was prejudiced by the trial court's errors in finding that Dumas was an adverse witness for purposes of Evid. R. 611(C) and failing to control the State's use of leading questions as it should have under Evid. R. 611(A).

The State made much use of the implications it had put before the jury in its questioning of Dumas. In its closing, the State reiterated the themes it developed during its questioning of Dumas. The State argued that McKelton used Audrey as an alibi for both murders:

On February 27th . . . what did Audrey do? She proceeded to play her role that night. Her role in July was supposed to be his alibi. And tonight it was going to be like a double alibi, because I'm going to be in bed asleep with Crystal, and she'll say that. And I'm going to have a double layer of proof on this one because I get to plan this one out.

Tr. 1993. The State argued that after Margaret Allen's death, McKelton had to come up with an alibi after the fact: "And so it's kind of haphazard how he kind of tries to cover it up and set up some alibis with Audrey later that night and take her to Rich Goldberg's the week later to her what, you know." Tr. 1994. But, according to the State's argument, McKelton was able to pre-plan his alibi for Germaine Evans' death: "But for this one, there was time. *** So I'm going to be with Crystal, and I'm going to have Audrey blowing my phone up all night long, so that later I can say, hey, I'm asleep with Crystal." *Id.* Dumas, according to the State, was "crazy enough, she can pull off this stalker kind of, you know, hates Crystal kind of thing." *Id.* So, the prosecutor argued that "that's her role that night, and she played it[,] [a]nd she made phone call after phone call and sent texts [sic] after text." *Id.* The prosecutor argued again later that Dumas

had “a role to play[,] [a]nd she’s there to play it[,] [and] if she doesn’t, he just flat out threatens her.” Tr. 1996. The prosecutor went on to argue that this happened all the time. The prosecutor paraphrased Dumas’ testimony as: “If I don’t like start my business up and bring him money again, he’s going to send his . . . goons out. . . to flatten her tires, and he starts grilling her about where she’s out.” *Id.*

The prejudice to McKelton is made worse because of his degree of the lack of overwhelming evidence against him. The State’s proof of guilt, especially regarding the aggravated murder of Germaine Evans and accompanying death specifications, was problematic. *See* Proposition of Law No. XIII. This case does not present overwhelming proof of McKelton’s guilt on all of the charges.

Furthermore, McKelton was prejudiced at sentencing. The trial court specifically noted in its sentencing opinion, when weighing the aggravating circumstances against the mitigating factors, that “[t]he evidence at trial was that Mr. McKelton engaged in extensive prior planning in order to murder Mr. Evans and provide himself with an alibi.” Sent. Opin. p. 7. The improper questioning of Dumas brought out evidence that went directly to this point.

B. Conclusion

The impact of the insinuations contained in the State’s questions to Dumas deprived McKelton of his right to a fair trial, due process, and a reliable determination of his guilt and punishment in a capital case as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10 and 16 of the Ohio Constitution. For these reasons, McKelton’s convictions should be overturned, or, at a minimum, his death sentence vacated.

Proposition of Law No. VIII

The accused's right to due process is violated when the cumulative effect of prosecutor misconduct renders the accused's trial unfair. U.S. Const. amend. XIV; Ohio Const. art. I, § 16.

Multiple instances of prosecutor misconduct were committed in the first phase of McKelton's capital trial. The cumulative effect of the professional misconduct violated McKelton's due process rights.

A. Legal standards for prosecutor misconduct claims.

A prosecutor "may strike hard blows, [but] he isn't at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). When a prosecutor strikes foul blows, the Due Process Clause provides a remedy. *See id.* To succeed on his claim of prosecutor misconduct, McKelton must demonstrate either — that the prosecutor's misconduct prejudiced a constitutional right or — that the misconduct rendered his trial fundamentally unfair. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) ("when specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them"); *United States v. Carter*, 236 F.3d 777, 785 (6th Cir. 2001).

The United States Court of Appeals for the Sixth Circuit analyzes a due process claim of prosecutor misconduct under a two part test. The court first determines if the prosecutor's acts "were improper." *Washington v. Hofbauer*, 228 F.3d 689, 698-99 (6th Cir. 2000) (citation omitted). The court then looks at "four factors" to "determine if the comments were sufficiently flagrant to warrant reversal" *Id.* (citation omitted). The four factors are: 1) whether the comments would likely mislead the jury or prejudice the accused; 2) whether the comments were extensive or merely isolated; 3) whether the comments were made deliberately or accidentally, and; 4) the strength of the evidence against the accused. *Id.* (citation omitted).

A. Argument

1. Questions without basis.

Mindie Nagal was Margaret Allen's physical therapist after Allen's ankle injury. Tr. 459-60. Nagal had testified that it is important for treatment to know how an injury occurred. Tr. 473-74. She explained on cross-examination that it would not have mattered what Allen tripped over, but how she fell—the direction, if her foot got stuck, etc.—that was important for determining what type of exercises to give the patient. Tr. 479-80. On redirect, the prosecutor asked: "if she had told you her boyfriend broke her ankle by slamming a car door on it repeatedly, would that have changed your treatment plan or your suggestions for avoiding future injury?" Tr. 481-82.

The State improperly painted the picture that McKelton used Audrey Dumas as an extra layer of alibi for the night of Germaine Evans' death. (*See* Proposition of Law No. VII). On cross-examination the defense had questioned Dumas about texts and phone calls she had made to McKelton on the night of Evans' death. Tr. 1468-76. On redirect, the State used leading questions to suggest to the jury that McKelton had told Dumas to "blow up" his phone that night. The prosecutor asked questions spanning six transcript pages trying to establish that Dumas was not calling and texting McKelton that night because they were in a relationship and she was angry that he was at Crystal's apartment. Tr. 1494-99. The prosecutor also made the point that Dumas did not "blow up" McKelton's phone when he was with Margaret Allen, and that February 27th, 2009 was the only time she had done this. Tr. 1498. The prosecutor then asked: "And when – when he told you in February 27th, 2009, you started blowing his phone up for the next three hours, you didn't ask him about why he wanted you to do that either, did you?" Tr. 1506. There is no evidence in the record that supports this implication.

The State may not ask a question when there is no “good-faith belief that a factual predicate for the question exists.” *State v. Gillard*, 40 Ohio St. 3d 226, 231, 533 N.E.2d 272, 277 (1988). There was no suggestion that Allen’s ankle was broken by being slammed repeatedly by a car door. There was no good faith basis for this inflammatory question.

2. Victim impact evidence.

Victim impact evidence must be excluded from the trial phase because it “serves to inflame the passion of the jury with evidence collateral to the principal issue at bar.” *State v. White*, 15 Ohio St. 2d 146, 239 N.E.2d 65, 70 (1968). The prosecutor may only introduce victim impact evidence at the trial phase when it relates to the “facts attendant to the offense.” *See State v. Fautenberry*, 72 Ohio St. 3d 435, 650 N.E.2d 878, 883 (1995); *State v. Allard*, 75 Ohio St. 3d 482, 663 N.E.2d 1277, 1292 (1996).

The State brought in victim impact evidence about Margaret Allen’s niece, Ziala Danner, who was eleven years old when Allen died. The prosecutor asked the officer who responded to Ziala’s 911 call about Ziala’s demeanor. The officer answered: “She was visibly shaking *** Her knees were actually knocking together. Her eyes were wide. When she tried to speak her voice was shaking. Anytime she thought she would hear something, she would jerk and look over her shoulder.” Tr. 370. The officer continued, stating that it was clear that Ziala “didn’t even feel safe with [her and the other officer] in the house,” and that she “could tell that [Ziala] believed there was something in the house that she felt possibly could harm her.” Tr. 370-71. The prosecutor followed up with a series of questions:

Q: And the emotions that you’re seeing from Ziala didn’t dissipate even with you both there?

A: No sir.

Q: Okay. And just to be clear, what emotion or what did you observe in her? What emotion as you were interacting with her did you detect?

A: Extreme fear.

Q: You use the word extreme compared to what?

A: I've never seen anyone that scared in my life.

Q: Never in the context of working as a police officer or in any context?

A: Any context.

Tr. 371.

The State used various witnesses to elicit testimony about the kind of person that Margaret Allen was. Her physical therapist described Allen as "very bright," "vibrant," "outgoing," and "really sweet." Tr. 460. Allen's friend Shaunda Luther testified that Allen was "fun, funny, outgoing, full of life, energetic, motivated, spirited, outspoken, just a ball of fun" Tr. 485.

Through Allen's friend Charia Mam, the prosecutor, over defense objection, elicited testimony that Allen's funeral was large and that a lot of friends attended. Tr. 563-64. Mam testified that it was "packed" and that she had "a hard time finding a seat." *Id.*

Sheridan Evans testified that she had never met Allen, but that Germaine had talked about Allen and said what a good person she was. Tr. 1833.

The State also elicited testimony about Germaine Evans being a good, kind person. Over defense objection, the prosecutor asked Andre Ridley how he would describe Evans. Tr. 904. Ridley testified that Evans "was a good person," that he had a "big heart," was "likeable," and was a great friend to everybody." *Id.*

The State elicited testimony from Det. Eric Karaguleff about the emotional reaction of Evans' family when his body was found. The Det. Karaguleff testified that while at the scene people began to assemble. Tr. 1314. The following questioning ensued:

Q: How would you describe the emotional state of the people assembled there?

A: They were upset, emotional. Some were crying. At one point they started to get angry with us because we're not reacting to what they are saying in the way they felt that we should react.

Q: Who were they as a class?

A: It was pretty much the Evans family and close friends led [] by Sheridan Evans, the mother of Germaine.

Q: And as the people in this were, you said upset?

A: They were upset. Some were crying. They were emotional, yelling, screaming, wailing.

Tr. 1315.

The State also undermined McKelton's right to a fair trial by eliciting testimony, over defense objection, about Allen's friends Shaunda Luther and Quisha running into McKelton at the Fairfield police department. Luther testified that she and Quisha were sitting in the lobby after meeting with a detective when McKelton walked in. Tr. 505. According to Luther, they were sitting in the lobby because they were too upset to drive. *Id.* Luther said that Quisha jumped up and began beating on McKelton's chest—"she's asking him for explanations, and she's crying. She's hysterical." *Id.* Luther went on: "She's screaming at him, Tell me what happened. You owe me an explanation. You need to explain to me what happened. And she's saying the same thing over and over again while she's beating on his chest and grabbing him . . .

.” Tr. 505-06. The prosecutor asked if McKelton said anything in response. Tr. 506. Luther said he did not, but he tried to hug her. *Id.*

The State “inflame[d] the passion of the jury” by improperly eliciting victim impact testimony that was collateral to the issues in the case. *White*, 239 N.E.2d at 70.

3. Evidence that McKelton was a bad person.

The State exacerbated the effects of the victim impact evidence by juxtaposing the victims against McKelton and painting him as a cold, unrepentant criminal who used threats to control people. It used its questioning of witnesses to remind the jury that McKelton was a drug dealer who had had other run-ins with the law.

The prosecutor asked Det. Gregory, “just so we’re clear, prior to this investigation, did you know who Calvin McKelton was?” Tr. 704. The detective answered in the affirmative. *Id.* The prosecutor also asked Det. Gregory about how he was able to verify that a phone number belonged to McKelton during the course of his investigation. Tr. 705. Gregory testified that he had heard McKelton speaking with Angelo Howard on recorded jail calls (while Howard was in jail). Tr. 705-06. Gregory added that Howard would call his mother and have his mother call McKelton for him. *Id.* The prosecutor then asked, “And prior to those phone conversations that you had in whatever capacity, you heard Calvin McKelton’s voice before so you would recognize it?” Tr. 706. Gregory responded that he had listened to “hundreds of hours of tapes involving Calvin McKelton.” *Id.* This was gratuitous given that the State had already established that Gregory knew the number at issue was McKelton’s because he had gotten the number from Allen’s cell phone (tr. 705).

The prosecutor asked Crystal Evans what business McKelton was in on March 2, 2009. Tr. 1065. Crystal responded: "I guess he probably was selling drugs, doing whatever it was he was doing. I don't know what all he was doing." *Id.* The prosecutor pushed the issue further:

Q: He was paying – he was bringing home money from somewhere, right?

A: I was paying my own rent.

Q: Okay. But he had money, didn't he?

A: Yeah.

Q: He didn't come to you asking for money?

A: No.

Q: You weren't paying for the cell phone . . . right?

A: No.

Q: No. You weren't paying for whatever the business phone in the records you've got in front of you, right?

A: Right.

Q: And you weren't paying for him to get a new cell phone every week, right?

Tr. 1066.

Det. Witherell testified that he reviewed letters sent by and received by McKelton while he was in jail awaiting trial. Tr. 1527. The State elicited testimony from Det. Witherell, over defense objection, that one particular letter, exhibit 49, "was significant because it specifically speaks to ascertaining, receiving information about a witness list." *Id.* Det. Witherell read from the letter to Crystal: "in July when we find out everyone they are using, we . . . get the records and post them all – up all over Battles CO period, which . . . I'm assuming that he meant company, Battles Company." Tr. 1544. The prosecutor asked what that brought to the detective's mind. *Id.* Det. Witherell responded, "A funeral parlor, JC Battles" and

acknowledged that this funeral parlor is in the general vicinity of where Crystal lived at the time. *Id.* The prosecutor then, through his questions, put before the jury that the significance of July is that the rules would change and witness statements would have to be turned over to criminal defendants. Tr. 1545-46. The implication was clearer on redirect when the Det. Witherell pointed out that the funeral home is in “a very centralized area within the City of Cincinnati area in which someone could disseminate information very easily to potential witnesses in the case.” Tr. 1568. When asked why it makes sense for someone to say that he is going to post names at the funeral home, Det. Witherell replied that it was a “scare tactic.” Tr. 1569. He elaborated: “[I]n posting potential witnesses’ names in public like that, number one, you identify who they are. Secondly, I think the underlying message is . . . we’re going to put this witness list up at the funeral home, and that’s meant for people to draw their own conclusions in terms of their safety.” *Id.*

At a sidebar, the defense had argued that McKelton was saying in the letter that they should post the names up in Butler County. Tr. 1540. McKelton’s handwriting is sometimes difficult to decipher, and his writings contain numerous misspellings. The word in the letter could just as easily be Butler (misspelled as Buttler). Moreover, the name of the funeral home is not Battles (with an “s” on the end) Company, it is JC Battle & Sons Funeral Home.⁷ Def. Ex.

IV. The pertinent portion of the letter reads:

I wish I had some way to get some media attention Bae. We could get alot done thru the media Bae thats how they are trying to win the case. What do you think about posting up flyer’s Bae. I know that will get some attention. Im gone ask Rich is that a good ideal. Let the world know about these lier’s they are using.

⁷ The State was aware that the name of the funeral home was not Battles (with an “s”) Co., but J.C. Battles & Sons because the defense had filed a printout of the funeral home’s website for the Hearing on Certification of Non-Disclosure held on September 27, 2010. Def. Ex. IV. And, in fact, the prosecutor referred to it as “Battle [without an “s”] Funeral Home” during that hearing. 9/27/2010 Hrg. Tr. 30.

Bae in July when we find out everyone they are using, we gone get there records and post them up all over [Buttler or Battles] Co. And hopefully the news get ahold to one and talk about it.

Ex. 49 (errors in original). The context of the letter—talking about getting publicity for his case—makes it more likely that McKelton was suggesting that they post the information in Butler County. The State elicited this highly prejudicial testimony without a basis for doing so.

4. Unsworn statement improperly used as substantive evidence.

The State improperly impeached Gerald Wilson with a prior inconsistent statement, and then played a recording of his prior statement for the jury to hear. *See* Propositions of Law VI. This Court has clearly held that while a prior statement may, under certain circumstances be used to impeach (Evid.R. 607) or refresh the recollection (Evid.R. 612) of a witness, “a party may not read the statement aloud, have the witness read it aloud, or otherwise place it before the jury.” *State v. Ballew*, 76 Ohio St. 3d 244, 254, 667 N.E.2d 369, 379 (1996).

The State then used Wilson’s statement as substantive evidence in its closing argument, telling the jury that McKelton bragged to Wilson about killing Germaine and saying:

All I know is that Calvin talks about if this doesn’t give me my clothes, I’ll choke her out like I did Missy and get away with it. And Jello tells him, Dude, you have to keep your mouth shut. You know, we got people in the car. And Calvin goes, Oh, G? He’s cool. He knows if he says anything, I’ll do him like I did Mick.

Tr. 2003. The use of Wilson’s prior statement as evidence of the truth of the allegations contained in it would “allow [McKelton] to be convicted on unsworn testimony of [a] witness[]—a practice which runs counter to the notions of fairness on which our legal system is founded.” *State v. Dick*, 27 Ohio St. 2d 162, 165, 271 N.E.2d 797, 799 (1971) (quoting *Bridges v. Wixon*, 326 U.S. 135, 153 (1945)).

5. Mischaracterization of evidence.

The prosecutor must guard against “insinuations and assertions calculated to mislead.” See *Caldwell v. Mississippi*, 472 U.S. 320, 336 (1985); *Berger v. United States*, 295 U.S. 78, 85 (1935) (finding reversible error where prosecutor made “improper insinuations and assertions calculated to mislead the jury.”); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 436 (1988) (“Neither paid nor appointed counsel may deliberately mislead the court with respect to either the facts or the law.”). While the prosecutor may comment on a witness’s testimony, and even suggest conclusions for the jury to draw, the prosecutor may not misrepresent a witness’s testimony during closing. *Carter*, 236 F.3d at 785.

The State improperly used McKelton’s tattoos as evidence that he had committed the murders. The prosecutor, in closing, told the jurors that the photos of McKelton’s tattoos were in evidence to verify that it was him with Margaret Allen in the photos from the cruise, and told the jury, “and you’ll see these same tatoos [sic], straight killer, the grim reaper with a pistol.” Tr. 1975. But then he went on to say, “It’s almost beyond parity [sic] to sit here and imagine how it happened, the defendant having a tatoo [sic] that says, straight killer, but that’s his tatoo [sic].” *Id.*

The State then mischaracterized testimony related to McKelton’s tattoos. The prosecutor brought up the tattoo that says “scandalous life” with a masked “robbery boy” holding pistols. *Id.* The prosecutor said, “And that’s a strange word, scandalous. Do you remember hearing scandalous come up again?” *Id.* He went on, “when Calvin tells Charles that he choked the bitch out” and then noted that McKelton referred to Margaret as a “scandalous bitch.” Tr. 1976. But this is not what Charles Bryant said in his testimony. Bryant testified that McKelton had said that Allen “was scandalous and running her mouth, and it was a whole lot of foul words.”

Tr. 989. Bryant also stated that McKelton said that if he found out that his girlfriend was unfaithful that he “might choke her up or slap her or something like that.” *Id.* Bryant never testified that McKelton called Allen a “scandalous bitch” or that he said he would “choke the bitch out.”

The State also mischaracterized a comment made by Gerald Wilson when he got off the stand. As Wilson left the stand, he said, “Later on, Bro.” Tr. 1660. In closing arguments, the prosecutor discussed, at length, Wilson’s prior statement as though it were substantive evidence (*see* Proposition of Law No. VI). Tr. 2003. He then asked the jury if they saw what happened when Wilson got off the stand and said, “He got up and looked at Calvin and goes, I got you. I got you, bud or bro, whatever the last word was.” Tr. 2003-04. The implication was that Wilson lied when he said he did not know McKelton and that he had done McKelton a favor in his testimony. This compounded the prejudice to McKelton caused by Wilson’s improper impeachment and the playing of his statement. *See* Proposition of Law No. VI.

The State mischaracterized evidence related to Audrey Dumas—about the calls that she made to McKelton’s phone on the night of Germaine Evans’ death and about a conversation between Dumas and McKelton about “playing her role.” *See* Proposition of Law VII. In its closing argument the State argued that McKelton used Dumas as an alibi for both murders:

On February 27th . . . what did Audrey do? She proceeded to play her role that night. Her role in July was supposed to be his alibi. And tonight it was going to be like a double alibi, because I’m going to be in bed asleep with Crystal, and she’ll say that. And I’m going to have a double layer of proof on this one because I get to plan this one out.

Tr. 1993. The State argued that after Margaret Allen’s death, McKelton had to come up with an alibi after the fact: “And so it’s kind of haphazard how he kind of tries to cover it up and set up some alibis with Audrey later that night and take her to Rich Goldberg’s the week later to her

what, you know.” Tr. 1994. But, according to the State’s argument, McKelton was able to pre-plan his alibi for Germaine Evans’ death: “But for this one, there was time. *** So I’m going to be with Crystal, and I’m going to have Audrey blowing my phone up all night long, so that later I can say, hey, I’m asleep with Crystal.” *Id.* Dumas, according to the State, was “crazy enough, she can pull off this stalker kind of, you know, hates Crystal kind of thing.” *Id.* So, the prosecutor argued that “that’s her role that night, and she played it[,] [a]nd she made phone call after phone call and sent texts [sic] after text.” *Id.* The prosecutor argued again later that Dumas had “a role to play[,] [a]nd she’s there to play it[,] [and] if she doesn’t, he just flat out threatens her.” Tr. 1996. The prosecutor went on to argue that this happened all the time. The prosecutor paraphrased Dumas’ testimony as: “If I don’t like start my business up and bring him money again, he’s going to send his . . . goons out. . . to flatten her tires, and he starts grilling her about where she’s out.” *Id.*

The State denied McKelton a fair trial by using “improper insinuations and assertions calculated to mislead the jury.” *Berger*, 295 U.S. at 85.

6. Leading questions

The prosecution improperly asked leading questions of several witnesses. A leading question is “one that suggests to the witness the answer desired by the examiner” and “should not be used on the direct examination of a witness except as may be necessary to develop the witness’s testimony.” *State v. Diar*, 120 Ohio St. 3d 460, 481, 900 N.E.2d 565 (2008). The continued use of leading questions after sustained objections from defense counsel can constitute prosecutorial misconduct. See *id.* at 485. (“[T]he prosecutor committed misconduct by continuing to ask leading questions after the trial court had sustained objections to such questioning.”)

The State used leading questions throughout the trial. Some of the most egregious examples are the examinations of the State's informants. The State leads Lemuel Johnson for his entire redirect examination. Tr. 1779-81. The State also lead Johnson on direct examination. Tr. 1745, 1747. The State also liberally cross examined Marcus Sneed for some of direct examination and the majority of redirect examination Tr. 1600, 1637-1642, 1646. The State essentially testified for its informants in their redirect examinations. The State had already been improperly leading witnesses throughout the trial and objections to leading questions had been sustained several times. Tr. 406, 432, 498, 500, 658, 897-8. The State's persistent use of leading questions even after objections had been sustained was misconduct. *Diar*, 120 Ohio St. at 481.

7. Failure to give witnesses' address

The State gave defense counsel an address for Andre Ridley at which he had not lived for four years. Tr. 917, 1086. When Ridley spoke with the police he gave them his correct address, but the State provided defense counsel with an outdated address. Tr. 976, 1086. The State was quick to acknowledge the error, but asked "[w]here is there any prejudice?" Tr. 1087-89. As discussed in Proposition of Law no. II, McKelton was already given insufficient time to prepare for trial because his attorneys received the names and statements of eight witnesses the night before trial. Furthermore, Ridley's testimony that Allen's death was an accident could have been use to contradict the State's assertion that Allen's death was done with a particular purpose, as discussed in Proposition of Law No. IV. The State's failure to give the correct address for Andre Ridley was a violation of Crim.R. 16, and McKelton was prejudiced as a result.

C. Prejudice to McKelton.

The cumulative effect of the prosecutor's misconduct prejudiced McKelton's right to a fair trial. The State played on the jurors' emotions by introducing victim impact evidence and played on the jurors' fears by painting McKelton as an unrepentant criminal. The impact of this evidence served to create undue sympathy for the victims and an inference that McKelton acted in conformity with a bad character. *See Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Even more damaging was the use of inculpatory impeachment evidence as substantive evidence of McKelton's guilt. *See United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975); *United States v. Miles*, 413 F.2d 34, 38 (3d Cir. 1969). And the mischaracterization of the evidence presented at trial in the State's closing would have served to make that evidence weigh even more heavily in favor of guilty verdicts. The frequency of the misconduct negates any likelihood that the challenged instances occurred accidentally.

McKelton was also prejudiced based on his degree of the lack of overwhelming evidence against him. The State's proof of guilt, especially regarding the aggravated murder of Germaine Evans and accompanying death specifications, was problematic. *See* Proposition of Law No. XIII. This case does not present overwhelming proof of McKelton's guilt on all of the charges. Accordingly, the cumulative effect of prosecutor misconduct violated McKelton's right to a fair trial.

Furthermore, McKelton was prejudiced in the sentencing phase. Much of the evidence and innuendo that was improperly placed before the jury tended to suggest that McKelton had put a great deal of effort into ensuring that he had an alibi for the night of Germaine Evans' death. The trial court, in its sentencing opinion, specifically citing as the fact that "Mr. McKelton engaged in extensive prior planning in order to murder Mr. Evans and provide himself

with an alibi” as a reason that the aggravating circumstances outweighed the mitigation factors.

Sent. Op. p. 7.

D. Conclusion.

Pervasive and deliberate prosecutor misconduct undermined Calvin McKelton’s due process rights. *See Payne*, 501 U.S. at 825. McKelton is therefore entitled to a new trial, or alternatively, a new penalty phase under O.R.C. § 2929.06(B).

Proposition of Law No. IX

It is a violation of a capital defendant's right to Confrontation and Due Process for a trial court to improperly limit cross-examination of a jail house informant witness. U.S. Const. amends. VI, VIII, XIV; Ohio Const. art. I, §§ 10, 16.

A. Facts

At trial, the State relied heavily on the testimony of jail house informants to help convict McKelton. Charles Bryant, Lemuel Johnson, and Marcus Sneed were all incarcerated and facing felony convictions at the time they provided testimony at McKelton's trial. All three informants provided damaging and prejudicial evidence to support the State's theory of the case.

Charles Bryant testified that McKelton confessed to him that he killed Margaret Allen in an argument that went too far. Tr. at 989. Bryant also testified that the day after McKelton confessed to him, he made the comment, "Remember what happened to Mick," which Bryant took to be a threat or a warning. *Id.* at 1022. Bryant admitted on direct that his attorney told him that it would be in his best interest to testify against McKelton. *Id.* at 992. However, when defense attorneys attempted to question Bryant about possible consideration offered for his testimony or about how much time he was facing under his current indictment, the Court sustained the State's objection. *Id.* at 998. The trial court would not allow counsel to ask how many times his case had been set for trial. Tr. 996. Additionally, the court would not allow counsel to ask whether his current charges included a trafficking charge. Tr. 998

Lemuel Johnson testified that McKelton offered to kill witnesses in the murder case against Johnson's brother. Tr. 1746. According to Johnson, McKelton told him that he had killed Germaine Evans, who was the "only person that can connect him to [Margaret Allen's] murder." *Id.* at 1748. Defense counsel questioned Johnson about his desire to help the police only after getting arrested on his own charges. *Id.* at 1757. Johnson claimed that he never came

forward before because he thought that “me just coming and saying well, look, he said he did this, I didn’t think that it would matter.” *Id.* at 1758. When defense counsel asked why he believed his testimony mattered now, the prosecutor objected and the court sustained the objection. *Id.* He claimed that he was not expecting “that [testifying] is going to do something” for him with regard to the charges against him. *Id.*

Marcus Sneed claimed that McKelton confessed to him about the murders. Tr. 1599, 1602. Sneed claimed he came forward to the police because “enough is enough about, you know, senseless murders and robberies in the neighborhood” and because he “just had this conscious [sic] on my mind for a long time.” *Id.* at 1603. Defense counsel attempted to question Sneed regarding whether he would be getting consideration for his testimony. However, counsel was either cut off by objections (that were sustained), or Sneed claimed there was no significance to the fact that his case was continued until after he testified against McKelton. *Id.* at 1606-08. Sneed claimed his purpose in coming forward was not because he wanted consideration, but when asked if he was looking to help himself out, he stated, “If it does, it does. I’ve not discussed no time with my lawyer.” *Id.* at 1631. Nevertheless, the trial court would not allow defense counsel to ask why Sneed’s case was continued (tr. 1608), would not let counsel ask Sneed how many counts were in his conspiracy indictment (tr. 1612), and would not let counsel ask Sneed how he got Germaine Evans confused with McKelton (tr. 1618).

B. Argument

1. The failure to allow cross-examination of witnesses is contrary to Ohio’s Rules of Evidence and is prejudicial per se.

Ohio evidentiary rules provide a mechanism to allow counsel to impeach the credibility of a witness. Ohio Rule of Evidence 611(B) allows cross-examination on all relevant matters affecting credibility. Moreover, Evidence Rule 607(A) provides that the “credibility of a

witness may be attacked by any party.” Evid.R. 607(A). Evid. R. 616(A) addresses acceptable methods of impeaching witnesses: “(A) Bias. Bias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence.” Thus, Evid.R. 611 and 616, by specifically mentioning credibility, bias, and prejudice as appropriate subjects of cross-examination, are a testament to the inherent probative value of such evidence. *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St. 3d 169, 171, 743 N.E.2d 890, 892 (2001).

This Court has recognized that a witness’s credibility “is always at issue.” *Westinghouse Elec. Corp. v. Dolly Madison Leasing & Furniture Corp.*, 42 Ohio St. 2d 122, 132, 326 N.E.2d 651, 658 (1975). In *State v. Hannah*, 54 Ohio St. 2d 84, 88, 374 N.E.2d 1359, 1362 (1978), this Court discussed the wide latitude which must be given defense counsel on cross-examination. This Court recognized that “[a]ny abrogation of the defendant’s right to a full and complete cross-examination of such witnesses is a denial of a fundamental right essential to a fair trial and is prejudicial per se.” *Id.* (citing, *Pointer v. Texas*, 380 U.S. 400 (1965); *Martin v. Elden*, 32 Ohio St. 282 (1877); *State v. Huffman* 86 Ohio St. 229, 99 N.E. 295 (1912)). Although the Court in *Hannah* was discussing the importance of being able to cross-examine a victim-witness, the rationale behind this Court’s conclusion fits within the context of the jail house informants in McKelton’s case. The jail house informants who testified in McKelton’s case, similarly to a victim witness, were the only witnesses who could identify McKelton as being the individual who killed Germaine Evans. Without their testimony, there was only the testimony of witnesses that Evans was a witness to a criminal act. Therefore, the testimony of the jail house informants was essential for the State to be able to convict McKelton of the aggravated murder charge. The credibility of jail house informants should be tested vigorously. The State has the power to

reduce charges or sentences of jail house informants. Therefore, there is a great risk posed by a motive to misrepresent. The jury should have been allowed to hear testimony regarding the informants' motive to testify in order to judge the credibility of their testimony. "The refusal by the trial court to allow questions concerning the credibility of the only witness who substantially identified the appellant as the assailant was prejudicial error." *Id.* at 91, 374 N.E.2d at 1364.

2. The failure of the trial court to allow cross-examination of witnesses violated McKelton's right to Confrontation and right to Due Process under the Sixth and Fourteenth Amendments to the United States Constitution.

The Sixth Amendment's guarantee of an accused's right to confront witnesses is a fundamental right imposed on the states via the Fourteenth Amendment. *Olden v. Kentucky*, 488 U.S. 227, 331 (1988); *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *Pointer v. Texas*, 380 U.S. 400, 403 (1965). This right is "essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). The confrontation right includes both the right to face the State's witnesses and the right to cross-examine them. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987). In fact, cross-examination is the primary right that the Confrontation Clause secures. *Davis*, 415 U.S. at 316 (citing, *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)).

The right to cross-examination promises the defendant the opportunity to demonstrate bias as well as that testimony is "exaggerated or unbelievable." *Id.* (internal citations omitted) Moreover, cross-examination is invaluable to "exposing falsehood and bringing out the truth in the trial of a criminal case." *Pointer*, 380 U.S. at 404 (citing 5 Wigmore, Evidence § 1367 (3d ed. 1940)). Beyond merely delving into the witness's story, cross-examination is "the principal means of testing the believability and truth of a witness's testimony." *Davis*, 415 U.S. at 316-17. See, *Lilly v. Virginia*, 527 U.S. 116, 124 (1999).

Oftentimes, a criminal defendant's sole defense presentation is the cross-examination of the State's witnesses. The United States Supreme Court's jurisprudence recognizes the reality of witness testimony embraced by practitioners - discrepancies matter. Probing for inconsistencies on cross-examination is vital because "[t]he best means of destroying the persuasiveness of an opponent's case is to discredit the evidence that has been offered by the witnesses in its behalf." 59 Am. Jur. Trials 1, § 42 (2004). "Consistency testing" is frequently employed in the courtroom as a means of testing credibility, and empirical evidence supports the assumption that people telling the truth are more consistent and detailed than people who are lying. See Chris William Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 Stan. L.R. 291, 315-17 (2004).

Thus, any infringement on that right can impact the defendant's ability to present a defense. The Due Process Clause guarantees every defendant "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984); see also *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). Defendants must be given more than cross-examination in name, it must be also meaningful. See *Davis v. Alaska*, 415 U.S. 308 (1974); *Olden v. Kentucky*, 488 U.S. 227 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

While a trial court has discretion as to the scope of the inquiry "to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant," it cannot act in ways that undermine the purpose of the opportunity to conduct an effective cross-examination. See *id.* at 679.

The United States Supreme Court has limited the scope of a trial court's discretion in imposing restrictions on cross-examination when the restrictions were meant to prevent a witness

from being discredited. *See Alford v. United States*, 282 U.S. 687, 694 (1931). Instead of acting to protect witnesses' credibility, the trial court's duty is to ensure that the constitutionally protected right to cross-examine is upheld.

McKelton's trial counsel attempted to impeach the State's witnesses by calling into question their motivations for testifying. The Court erred when it sustained the State's objections to the questioning. *Davis*, 415 U.S. at 315; *Lilly*, 527 U.S. at 124. The conduct by the trial court in limiting cross-examination ensured McKelton would not be able to demonstrate the jail house informants' testimony was not credible. McKelton was denied a meaningful opportunity to conduct an effective cross-examination.

C. Conclusion.

McKelton's right to cross-examination was rendered a futile act. The "diminution" of McKelton's right to confrontation and cross-examination "calls into question the ultimate integrity of the fact-finding process." *Chambers*, 410 U.S. at 295. The jury in McKelton's case was not able to adequately judge the credibility of the State's witnesses. There were no procedural safeguards to ensure the reliability of the testimony of the State's informants, who were key witnesses in the case. *See Mooney v. Holohan*, 294 U.S. 103 (1935); *Giglio v. United States*, 405 U.S. 150 (1972). The trial court's limitation of defense counsel's cross-examination infringed on McKelton's confrontation rights, his right to present a meaningful defense, as well as his rights to due process and equal protection. This Court must vacate McKelton's convictions and remand his case for a new trial.

Proposition of Law No. X

The State's use of a prior statement to demonstrate that a witness called by the State lied to law enforcement and admission of that statement into evidence violates a capital defendant's right to a fair trial, due process, a reliable determination of guilt, and a reliable sentencing determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and of Article I, §§ 9, 10, and 16 of the Ohio Constitution.

The prejudicial impact of the improper impeachment, on direct examination in the State's case-in-chief, of Crystal Evans and the admission into evidence of her statement to law enforcement⁸ as well as communications between her and McKelton deprived McKelton of a fair trial, due process, a reliable determination of guilt, and a reliable sentencing determination. Evans' prior statement, used in her questioning and then admitted as evidence, had virtually no probative value but was highly prejudicial and therefore should have been excluded by the trial court.

A. Law

When evidence is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Moreover, when an individual's life is at stake, the Supreme Court has repeatedly insisted upon higher standards of reliability and fairness. *See e.g., Beck v. Alabama*, 447 U.S. 625 (1980) (need for heightened reliability); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (the penalty of death is qualitatively different from any other sentence and requires a heightened degree of reliability).

Evidence Rule 403(A) provides that evidence is not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of

⁸ The transcript of Evans' March 2, 2009 interview is also replete with inadmissible hearsay statements made by the detectives. They are discussed in Proposition of Law No. XI.

misleading the jury. The determination of whether a piece of evidence is inadmissible under this standard is left to the sound discretion of the trial court. *State v. Crotts*, 104 Ohio St. 3d 432, 437, 820 N.E.2d 302, 308 (2004). All evidence that tends to prove the State's version of the facts necessarily is prejudicial to the defendant. *Id.* Thus, the Rules of Evidence do not bar all prejudicial evidence, only unfairly prejudicial evidence is excludable. *Id.*

Evidence is unfairly prejudicial when it may result in an improper basis for the jury's decision. *Id.* If the evidence "arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial." *Id.* In other words, if the evidence appeals to the jury's emotions rather than its intellect, it is usually prejudicial. *Id.*

Further, a Rule 403 objection requires heightened scrutiny in capital cases. *State v. Morales*, 32 Ohio St. 3d 252, 257-58, 513 N.E.2d 267, 273 (1987). Whereas exclusion under 403 generally requires that the probative value of the evidence be minimal and the prejudice great, in capital cases, the probative value of each piece of evidence must outweigh any potential danger of prejudice to the defendant. *Id.* at 258, 513 N.E.2d at 274. If the probative worth of the evidence does not outweigh the danger of prejudice to the defendant, it must be excluded. *Id.*

On direct appeal, constitutional error is harmless only if the prosecution proves it to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 26 (1967). When the record on direct appeal establishes constitutional error, the burden is on the State to prove that the error is harmless beyond a reasonable doubt. *Id.* "The harmless error standard is even more stringent when applied to errors committed at the penalty phase of a capital trial. 'The question . . . is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *State v. Fears*, 86 Ohio St. 3d

329, 354, 715 N.E.2d 136, 158 (1999) (*Moyer, C.J., dissenting*) (quoting *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988)).

B. Argument

The State called Evans to testify during its case-in-chief. The State moved pursuant to Evid. R. 611(C) to be able to use leading questions. Tr. 1026-27. The State argued that Evans was clearly aligned with McKelton because she was his girlfriend, was the mother of his only son, had been visiting and communicating with McKelton while he was in jail, and was McKelton's alibi witness for Germaine's death. *Id.* Defense counsel objected. Tr. 1027-28. The trial court required the State to establish that Crystal Evans had an affiliation with McKelton, noting that it would be sufficient to show that she's his alibi and that she has contact with him. Tr. 1029.

Evans testified that she was in a relationship with McKelton, that he is the father of her child, and that they continue to communicate often. Tr. 1031-33. At that point, the trial court allowed the State to use leading questions. Tr. 1033. A leading question is "one that suggests to the witness the answer desired by the examiner" and "should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony." *State v. Diar*, 120 Ohio St. 3d 460, 48, 900 N.E.2d 565 (2008). The State took the use of leading questions to the extreme, essentially testifying for Evans. But the State did not stop at using leading questions. The State went on to question Evans, at length, about her statement to detectives. The State did this without first asking Evans about the night of her brother's death. And, the trial court allowed the transcript of the statement itself into evidence with no proper basis for doing so.

Evans began a relationship with McKelton in September of 2008 (tr. 1040) and at the time of her brother, Germaine's, death, McKelton was living with her (tr. 1042). Evans spoke to detectives and prosecutors on several occasions prior to testifying.⁹ Tr. 1255, 1260, 1261-62. During all of those conversations, she maintained that McKelton was with her, in her home, on the night of her brother's death. In her initial interview with detectives, she told them that she had arrived home around 5:30 or 6:00 p.m. after getting her hair done and picking up McDonalds (ex. 56 at 15-17), that McKelton arrived at her apartment shortly before 9:00 p.m. (*id.* at 19-21), that the two of them had fallen asleep on the couch watching TV (*id.* at 65), and that he was there all night (*id.* at 19). The following day, Evans remembered that she had left her apartment after McKelton's arrival. Ex. 46. She called Det. Luke and left a voicemail stating that she had forgotten to tell Det. Luke that after McKelton came in, she left and rode around until about 10:00 p.m. *Id.* She also stated that when she returned, McKelton was not at the apartment, but arrived a few minutes later. *Id.*

Also in her first interview with Det. Luke, Evans was asked about McKelton's phone number. Ex. 56, p. 18. Evans responded that McKelton had two phone numbers—a family line and a business line. *Id.* at 18-19. Evans told Det. Luke what McKelton's "family line" number was but said that she did not know what the other number was. *Id.* at 18.

When Evans took the stand at trial, the State did not ask her a single question about the night of her brother's death before questioning her about what she told detectives in her interview.

⁹ Crystal was interviewed by Dets. Jenny Luke and Keith Witherell on March 2, 2009. Crystal left a voicemail for Det. Luke on March 3, 2009. Det. Luke took Crystal and Sheridan Evans to the crime scene. Det. Luke and another detective met with Crystal at her home on August 11, 2010. Assistant Prosecutor Salyers met with Crystal just prior to trial.

The prosecutor asked Evans if she remembered telling Det. Luke, in that initial interview, that she did not know McKelton's "business number" and that she had flipped her phone open during that interview. Tr. 1058. Evans indicated that she recalled this. *Id.* The prosecutor then asked Evans to look at phone records for February 27, 2009 (Ex. 65, p. 10), the day that Germaine was killed. Tr. 1059-60. The records contain three calls between Evans and McKelton. *Id.* The following exchange then took place:

Q: . . . you're only talking to Detective Luke like two days later, three days later, right?

A: Right.

Q: So those phone calls should have still been in your phone log to be able to look up for Detective Luke and say, see, Here's where he called me, right?

A: Right. Most likely they was still in there.

Q: Okay. But you didn't tell her about that phone number, did you?

A: I really don't remember what number I told her about. I gave her the number that I knew.

Tr. 1060-61. The prosecutor then asked her if it would help refresh her memory about what she told Det. Luke if she looked at a transcript of her interview. Tr. 1061. The prosecutor had Evans look at her statement (Ex. 56), pointing her to where she told Det. Luke that McKelton did have another number but that she didn't know it. Tr. 1062. The prosecutor then asked, "Are you saying that your phone somehow didn't record those calls from that other phone of his that just occurred two or three days later?" *Id.* The prosecutor then pointed Evans to a section of the transcript in which Det. Luke asked her what time she thinks McKelton called her to say he was on his way to her apartment. Tr. 1063. Evans read her response aloud: "No, no, no. I wish I could print off my call log. I don't remember. I got a bad memory." *Id.* The prosecutor asked her, "You had your cell phone with you at that interview, right? *** Why didn't you just flip it

open right then and say well, let me show you?" *Id.* This line of questioning goes on for several pages.

The prosecutor then began questioning Evans about the phone calls she received from McKelton after she returned home in the evening on February 27, 2009, specifically asking if Evans remembered what time she received these calls. Tr. 1070-71. Evans indicated that she did not remember. Tr. 1071. The prosecutor asked her, again, to look at the cell phone records (ex. 65). Tr. 1071. The prosecutor used this line of questioning to insinuate to the jury that Evans had lied to Det. Luke about what time McKelton arrived at her home and that she had lied to Det. Luke and on the stand about the fact that she and McKelton had been talking and texting all day.

Still having not asked any questions about the night of Germaine's death, the prosecutor asked, "Now, do you remember telling Detective Luke that the day after your brother's body was found, that you knew for certain, absolutely certain, that Calvin was in your house with you before 9:00." Tr. 1071-72. The prosecutor also asked, "according to those records, those are the first times he's called you on that phone all day since like 1:00 in the morning, right?" Tr. 1071.

The State drove the point home to the jury that Evans was not honest with the detectives about the time McKelton arrived at her house:

Q: . . . Do you remember telling [Det. Witherell], well, I'm a clock watcher. I'm like one of those people if I'm watching TV and when Calvin strolls in, I would look always look at the cable box to see what time it was?

A: Yeah, I do that.

Q: Right, because you said, Hey, you said you were coming home 20 minutes ago. What happened?

A: Yeah, I look at the time.

Q: Okay. And you told them on March 2nd, I looked at the clock when he walked in, and I know it was before 9:00?

A: I told them it was around nineish, yes.

Q: You them before 9:00, didn't you?

A: Yeah, but – I mean, like 9:00, 9:05 is like a – in my eyes, it's like around the same time.

Q: Okay. Well, do you remember telling them – well, in fact, you did tell them, you used the words, I promise, like he was in my house like at nine something. And then you went on, No, no, no. It was like 8:00 something, because this had just happened three, four days ago, two days ago?

Tr. 1073.

Evans called Det. Luke the day after her interview and left a voicemail message informing her that she had forgotten that she had left shortly after McKelton arrived on the night in question. Ex. 46. The State played the recording of this voicemail for the jury (tr. 1105), and then asked a series of questions regarding the call (tr. 1105-12). The prosecutor pressed Evans on why it was that she remembered this detail the following day. Tr. 1105, 1108.

The prosecutor then called Evans's attention to the phone records again, pointing out a call from Evans to McKelton at 9:21 p.m. on February 27, 2009, and asking why she called McKelton at that time. Tr. 1075. Evans responded that she left shortly after McKelton arrived at her house, and when she came back, he was not there. Tr. 1075-76. She said that she called to ask where he was and that he told her he was walking back from buying a pack of cigarettes. *Id.* Evans testified that she left the house because she had a craving for candy. Tr. 1076. This led to over three pages of questioning about why she went out for candy and where she went to buy it. Tr. 1076-79. The prosecutor asked what kind of candy she wanted (tr. 1076); what her favorite candy is (tr. 1077); why she had not asked McKelton to pick some candy up for her since she was not feeling well (tr. 1077, 1079); why she did not go to the UDF by her apartment (tr. 1078-79); what store she had gone to (tr. 1116); what kind of candy she bought (*id.*); and

how many stores she stopped at to get the candy (*id.*). Later, the prosecutor asked, "Now you would agree with me that the very day after talking to Detective Luke when you had the chance to remember and you make this voicemail to tell her everything else you remembered, you didn't mention anything about going for candy, did you?" Tr. 1109. And, the prosecutor used the voicemail as an opportunity to say in front of the jury:

And are you telling this jury, asking them to believe that two days after your brother gets executed and gets found in a park, and after – the day after you sit in the homicide detective's office for however long it took to make 50, 60 pages worth of transcript, and after they tell you if you remember anything else about this, tell us, and after you remember this stuff, and after you pick up the phone and call and leave that voice mail, at that moment you thought well, I don't have to tell all the details. It is only my brother's death. I'll just tell them this vague – is that what you're asking them to believe?

Tr. 1110-11. Defense counsel objected to this question but was overruled. Tr. 1111.

Over and over again, the State insinuated to the jury that Evans had lied and withheld information from investigators. The prosecutor returned to the issue of whether McKelton was with Evans all night. He elicited testimony from Evans that she may not remember if she or McKelton got up to go to the bathroom during the night, that she does not know the exact time that they fell asleep, and that it is possible that he could have gotten up and left the house without her waking. Tr. 1126-27. The prosecutor then had Evans look at the transcript of her first interview again and asked, "you told [the detectives] . . . he was there all night. And you reiterated it again on the bottom of that page. He was there all night. *** You told these detectives that?" Tr. 1129.

The prosecutor went back to the issue of the time that McKelton arrived at Evans's home, reiterating that Evans was insistent during her interview that she had looked at the cable box and knew that it was around 9:00. Tr. 1132-33. Worse, the prosecutor stated that Evans knew why this time was so important and then asked, "the reason you told Detective Witherell you were

adamant was because you told them you had been hearing from family members that Germaine, your brother, was on the phone with his – your brother – [] Sathon, right? Tr. 1133.

The State also played recordings of two phone calls between Evans and McKelton in which they discuss her statement to the detectives and her subsequent voicemail to Det. Luke. Tr. 1154, 1155; Ex. 52. In the first call, McKelton tells Evans that he has read transcripts of her statement and the voicemail she left for Det. Luke. McKelton sounds upset and tells Evans that her voicemail (saying that McKelton was not in the apartment when she returned at around 10:00) sounds bad for him. Ex. 52. McKelton goes on to say that Evans and her mother are the ones who are putting him in jail because of the things they are saying to police. *Id.* In the second call, McKelton sounds angry and argues with Evans, telling her that she's making stupid decisions. The transcript of Evans's March 2, 2009 statement was entered into evidence and went back with the jury during deliberations. Tr. 1871.

The State called Evans to the stand for the purpose of demonstrating to the jury that she was lying for McKelton's benefit. She was McKelton's alibi witness for the time of Germaine's death. She never changed the crux of her story—that McKelton was with her on the night of Germaine's murder—and the State called her to the stand with the purpose of discrediting her. None of Evans's testimony surprised the State. Every time Crystal Evans spoke to detectives or the prosecutor, she maintained that McKelton was with her the night of her brother's murder. She clarified in her voicemail to Det. Luke that she had left for a time after McKelton's arrival (ex. 46) and clarified in her conversation with Prosecutor Salyers that she had left to buy candy (tr. 1115). The State knew what her story would be when they called her to the stand, and it put her up there to demonstrate that everything that Evans had told the police and the prosecution

were lies. The State tried to paint Evans as yet another woman manipulated by McKelton to serve his purposes.

The State was not impeaching Evans' testimony so much as it was attempting to demonstrate overall that she was not worthy of belief. Although not impeachment in the traditional sense, there still should have been a limitation on how far the State could go to demonstrate that she had not been completely forthcoming with the investigators and that she therefore cannot be believed in general. The purpose of impeachment is to neutralize damaging testimony given, and therefore, "should be carefully restricted to compensating for the injury inflicted." *United States v. Coppola*, 479 F.2d 1153, 1158 (10th Cir. 1973). The questioning about Evans' prior statement went on and on even after the State had established that she had not told the full truth. In this case, the examination was not "designed to undo whatever affirmative harm had been done without unreasonably prejudicing the defendant[]." *United States v. Miles*, 413 F.2d 34, 38 (3d Cir. 1969).

Evans' March 2, 2009 statement should have been excluded as it was inadmissible under the Rules of Evidence—it should neither have been allowed to be used as the basis of questioning nor admitted as an exhibit and given to the jury. As noted above, the State was not surprised by Evans' testimony, making the use of the statement inadmissible under Evid.R. 607(A) as that provision requires "a showing of surprise and affirmative damage." It was also inadmissible under Evid.R. 608(B) which allows questioning about specific instances of conduct that go to the witness's character for truthfulness *on cross-examination* of the witness. Here the State used Evans' prior statement to impeach her after calling her in its case-in-chief. Evid.R. 608(B) also specifically prohibits attacking a witness's character for truthfulness with extrinsic evidence. Evid.R. 612 allows a writing to refresh memory, but only the adverse party may

introduce into evidence “those portions which relate to the testimony of the witness.” Yet the trial court admitted Evans’ statement after being offered by the State. And all portions were admitted—most of which had nothing to do with Evans’ direct examination by the State.

It is also improper for a party to use, for impeachment purposes, a statement it believes to be false. *State v. Cody*, No. 77427, 2002 Ohio 7055, 2002 Ohio App. LEXIS 6865 **8 (Cuyahoga Ct. App. Dec. 19, 2002). Here, the State clearly believed Evans had lied to detectives about the timeframe in which McKelton was at her apartment.

C. Prejudice

Beyond its prejudicial impact in its use as the basis for the State’s questioning of Evans, the transcript of her interview contained other highly prejudicial material that went to the jury. *See also* Proposition of Law No. XI, incorporated herein as if fully rewritten.

Det. Luke gives Evans a hypothetical related to McKelton’s reaction to Allen’s death:

You love a boyfriend. You’re in love or you think you’re in love. And you’ve been on trips with this man, and, and have a baby with this man, and you’re going to marry this man, right. You’re going to marry him. You and this man here, okay. And this man, gets murdered, he’s gone. You guys lived together. And he’s murdered, in your house. And the police come to talk to you because, but you had nothing to do, I mean, truly you had nothing to do with this. You came home. Jesus Christ, my fiancé is murdered. The worst thing that could ever happen to you in your wildest imagination and the police come to you. And you go, what’s the first thing you would do, what, what are you doing right now, what happened to my brother, what happened to my brother?

Ex. 56, p. 33. Det. Luke continued, “What happened in there? How did he die?” “Who did this? . . . [I]s there anything I can do for you?” *Id.* at 33. She then told Evans that what McKelton did in this situation is say, “Give me a lawyer.” *Id.* at 34. She went on, telling Evans that McKelton did not ask for his personal items from the house (*id.*); did not answer questions (*id.*); and did not ask questions about what happened (*id.* at 35).

Det. Luke asked Evans if she could kick McKelton out of her house (*id.* at 36), and then warned her about how McKelton would try to manipulate her. She said,

You don't do it by yourself. Don't, don't go home with nobody there and you, and he comes home and he baby's you this and baby's you that, oh, baby, all nice, nice, nice, nice, nice, nice, cause that's what he's going to do. He's going to love all over you, oh baby, and oh, your brother, and he's going to act so concerned.

Id. at 37

Det. Luke also told Evans that her mother had been trying to warn Germaine to stay away from McKelton but that "he was in too deep." *Id.* at 38.

The transcript of Evans' prior statement¹⁰, the questioning discussed *supra*, and the calls from McKelton had very little probative value as to the charges. McKelton incorporates Proposition of Law No. V as if fully rewritten herein. The State never even posited a theory about the circumstances surrounding his death—seeming to flip-flop between suggesting that McKelton himself did the shooting (tr. 1136) and suggesting that McKelton had someone shoot Germaine (tr. 1288-89). Det. Luke testified that the belief of law enforcement throughout the investigation was that McKelton had paid someone to kill Germaine. Tr. 1288-89. Whether McKelton was at Evans' apartment on the night of Germaine's death is insignificant. The State's attempts at making it appear that Evans was lying for McKelton was especially damaging because there was so little evidence tying McKelton to Germaine's death. There was no physical evidence at all, and the only testimony connecting him to Germaine's death was the highly questionable testimony of Marcus Sneed and Lemuel Johnson. *See* Proposition of Law No. XIII. If the jury believed Evans was lying for McKelton's benefit that would have buttressed the little

¹⁰ The prejudicial impact of this statement is exacerbated by the inadmissible hearsay statements made by the detectives. Those statements and their prejudicial effect are discussed in Proposition of Law XI.

evidence that they had that McKelton had killed Germaine. Moreover, the trial court gave no instruction to the jury limiting their use of this evidence, thus the prejudicial impact was not lessened in any way.

In its closing, the State argued for five transcript pages that Evans had lied for McKelton. Tr. 1985-90. The prosecutor told the jury that they would get the transcript of Evans' interview. Tr. 1986. He then pointed out to them the pages in the interview in which Evans tells the detectives that McKelton was in her apartment before 9:00 and was there all night, noting that she was "unequivocal." Tr. 1986-87. The prosecutor quoted from the interview where Evans said, "I'm not covering up for that man or nothing like that" and "I went to bed early, 9:00." Tr. 1987. He noted that these statements do not match the evidence. *Id.* The prosecutor went on to note that Evans was very specific when she spoke to detectives that she knew what time McKelton arrived because she had looked at the cable box. Tr. 1988. The State then replayed McKelton's September 24, 2010 call to Evans (ex. 52) in which they discuss the voicemail she left for Det. Luke and tells her to think about how it sounds that he did not return to the apartment until after 10:00 p.m. Tr. 1989.

The State is later more explicit when the prosecutor argues that McKelton began dating Evans in September of 2008

[b]ecause Mick is her brother. He was the weak link. He was the only thing that could tie Calvin to Margaret's body. And what better way to keep Mick's mouth shut, to keep him loyal and to keep his ear close to what's going on with Mick than to get with his sister and live right in her house . . . What better way than to hook up with her at that period of time.

Tr. 1999. The prosecutor continued: "And then what happens after Mick is dead, he gets her pregnant, just like he tried to do with Margaret. And once he's in jail tries to propose marriage to her." *Id.* The prosecutor then read from one of the letters McKelton wrote to Evans (ex. 50)

the part in which McKelton says that it looks like Germaine died at 10:00 and that they were home asleep at that time. *Id.* The prosecutor interprets this for the jury as “telling Crystal, get your story straight, remember the line, I was with you all night. I was home by 9:00. We were asleep all night. That’s why I didn’t answer my phone.” Tr. 2000.

This evidence was designed to, and did, appeal to the jury’s emotions, not its intellect. *See State v. Crotts*, 104 Ohio St. 3d 432, 437, 820 N.E.2d 302, 308 (2004). Moreover, it served to confuse the issues in the minds of the jurors. *See Evid.R. 403(A)*.

McKelton was further prejudiced by the introduction of the letters and phone calls in the sentencing phase. The prejudicial impact of this evidence violated the Eighth and Fourteenth Amendment guarantees “that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion.” *Gardner v. Florida*, 430 U.S. 349, 358 (1977); *see also State v. Thompson*, 33 Ohio St. 3d 1, 514 N.E.2d 407 (1987).

Furthermore, McKelton was prejudiced at sentencing. The trial court specifically noted in its sentencing opinion, when weighing the aggravating circumstances against the mitigating factors, that “[t]he evidence at trial was that Mr. McKelton engaged in extensive prior planning in order to murder [Germaine] Evans and provide himself with an alibi.” Sent. Opin. p. 7. The State’s improper questioning of Crystal Evans elicited testimony that went directly to this point. The transcript of Evans’ March 2, 2009 statement as well as the letters and phone calls also went to buttress the idea that McKelton went to great lengths to provide an alibi for himself for the night of Germaine Evans’ death.

Defense counsel objected to the State’s motion to declare Evans an adverse witness. Tr. 1027-28. Counsel noted that Evans had been consistent in her story despite the State trying to convince her to change it and argued that the State was just trying to “crack” Evans because she

would not say what they wanted her to say. *Id.* This was effectively an objection to the manner in which Evans was questioned.

However, if this Court finds that trial counsel did not properly object to the State's examination of Evans, McKelton is still entitled to relief under a plain error analysis. An error is plain when it denies the defendant a fair trial. *See State v. Fears*, 86 Ohio St. 3d 329, 332, 715 N.E.2d 136, 143 (1999) (citing *State v. Wade*, 53 Ohio St. 2d 182, 189, 373 N.E.2d 1244 (1978)). *See also State v. Lilly*, 87 Ohio St. 3d 97, 104, 717 N.E.2d 322, 328 (1999) (Cook, J., concurring) (plain error is obvious, palpable and fundamental to the fairness of the judicial proceedings) (citations and quotation marks omitted).

D. Conclusion

The prejudicial impact of the jury's exposure to this inflammatory questioning and evidence deprived McKelton of his right to a fair trial, due process, and a reliable determination of his guilt and punishment in a capital case as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10, and 16 of the Ohio Constitution. For these reasons, McKelton's convictions should be overturned, or, at a minimum, his death sentence vacated.

Proposition of Law No. XI

The accused's right to confront witnesses against him is violated when testimony from an out of court declarant is admitted against the accused in a criminal prosecution, and the accused lacked a prior opportunity for cross-examination. The accused's right to a fair trial is prejudiced when unreliable hearsay is admitted in a criminal prosecution against the accused. U.S. Const. amend. VI, XIV; Ohio Const. art. I, § 10; Ohio R. Evid. 403(A), 801(C).

Calvin McKelton's Sixth Amendment right to confront the witnesses against him was derogated. The State offered testimonial hearsay evidence, and McKelton had no prior opportunity to cross-examine the out of court declarants. *See Crawford v. Washington*, 541 U.S. 36 (2004). Further, the admission of this unreliable hearsay evidence prejudiced McKelton's right to a fair trial regardless of whether the Confrontation Clause was violated in this case. *See* Ohio R. Evid. 801(C).

A. Hearsay offered by the State

The State offered improper hearsay through the testimonies of Det. Jennifer Luke, Det. Eric Karaguleff, Det. Witherell, and Marcus Sneed, as well as through Ziala Danner's 911 call (Ex. 2) and Crystal Evans' police statement (Ex. 56).

1. Statements offered to explain a subsequent investigative step

a. Det. Luke

During direct examination by the State, Det. Luke testified that she met with Fairfield detectives who informed her that they had met someone who had information. Tr. 1248 Before she could finish her statement, defense counsel objected. *Id.* The trial court sustained the objection (*id.*), but the questioning continued:

Q: *** At that meeting, did you get information about a new lead?

A: Yes.

Q: To take in the Margaret Allen case?

A: Yes.

Q: And what was the name of that new lead that you received from that meeting?

A: Germaine Evans or Mick.

Q: Prior to that meeting, did you or Detective Gregory, who was your partner, independently know who Mick was?

A: Yes.

Q: And did the information you received at that meeting about Mick lead you to take certain steps in your investigation?

A: Yes, it did.

Q: And as predicate to those steps, what was specifically the information you received at that meeting about Mick, not the source that told however about Mick, but just about Mick?

A: We were told that –

Tr. 1248-49. Defense counsel again objected. Tr. 1249.

At that point, the trial court stated that the questioning would be permitted “because it goes to this officer’s state of mind,” but gave a limiting instruction to the jury:

You should not take her testimony at this point for the truth of the matter, only to show that she received this information at the meeting, and as a result of that, did something subsequent. So it’s not being offered for the truth of the matter. It is being offered for her state of mind.

Id. Det. Luke then answered the question: “We were told that Mick was present during Missy’s homicide, that he knew about it and that he was scared and that he may have either helped move the body or that he was present in the house when Missy was killed.” *Id.*

b. Det. Witherell

Det. Keith Witherell testified about the police investigation into Evans’ death. He was asked about how it was that the investigators came to interview a man named Donte Terry:

Q: And can you please describe for the jury how you came into contact with a fellow by the name of Donte Terry for that interview?

A: Well, through the course of the investigation, we received information about an individual that a family member last saw Mick, Germaine Evans, with downtown Cincinnati on the Friday that he went missing.

Q: And would this information – let me ask you this. When you have an investigation like this, did you receive what we've heard described as a lot of rumors about who was involved and who it was and everything like that?

A: Well, yeah. Absolutely. I mean we received initial accounts, initial reports of a variety of – of descriptions on how things could have happened. One of which –

Mr. Howard: Objection.

The Court: Overruled.

A: One of which was Mick, Germaine Evans, was seen with an individual that was initially described as a larger, heavy-set black male in the downtown Cincinnati area. And Mick was possibly seen getting in a car with that -- with that person. It was very general. It was generic.

Q: And was there a street-name description of who this individual was?

A: That was the initial report.

Q: What was the street name?

A: I believe the next day after working on this information, there was a street name developed, and it was the street name of Twin.

Q: And just very succinctly, in the course of your working in the capacity you work, did you independently know of a fellow known by the name of Twin known as Donte Terry?

A: Not initially, no.

Q: Okay. Let me ask you this. Let's go to – how did you actually physically come into contact with Donte Terry to interview him?

A: Detective Karaguleff received information –

Mr. Howard: Objection.

A. – through the course of investigation.

The Court: The Court is going to permit this, but again, this type of thing, it only goes to the officer's state of mind. And so again, out-of-court statements are not being offered for the truth of the matter here unless I tell you otherwise. They are simply going to this officer's state of mind, what he did, what was in his mind so that you have a context so you understand what he was doing, okay. Let's proceed with that.

Tr. 1513-15.

"In some instances, extra-judicial statements made by an out-of-court declarant are admissible to explain a police officer's conduct during the course of investigating a crime," *State v. Holmes*, No. 97APA10-1361, 1998 Ohio App. LEXIS 3797 at *7 (Franklin Ct. App. Aug. 20 1998) (citing *State v. Thomas*, 61 Ohio St. 2d 223, 232, 400 N.E.2d 401, 408 (1980)). However, without a proper limiting instruction, such statements will still functionally be improper hearsay because of the risk that the jury will consider the statement for the truth of the matter. Thus, there are limits to the general rule that out-of-court statements may be used to explain a subsequent investigatory step because the "potential for abuse in admitting such statements is great where the purpose is merely to explain an officer's conduct during the course of an investigation." *State v. Blevins*, 36 Ohio App. 3d 147, 149, 521 N.E.2d 1105, 1108 (1987).

In this case, the "potential for abuse" was high. Det. Luke's statement that the police were told that "Mick was present during Missy's homicide, that he knew about it and that he was scared and that he may have either helped move the body or that he was present in the house when Missy was killed," went straight to the heart of the case. And the trial court's instruction was insufficient to ameliorate the danger that the jury would misuse the statement.

Moreover, a trial court must consider whether the "danger of unfair prejudice, confusion of the issues, or misleading the jury" substantially outweighs the probative value of the statement pursuant to Evid.R. 403(A). See *Holmes*, 1998 Ohio App. LEXIS 3797 at *8; see also *State v.*

Faris, No. 93APA08-1211, 1994 Ohio App. LEXIS 1198 (Franklin Ct. App. Mar. 24, 1994). In this analysis, it is important to consider that the statement goes only to explaining why the investigator took the steps he or she took and so likely has relatively little probative value. And a statement that connects the defendant to the crime or goes to an ultimate fact should generally be excluded.

2. Other hearsay

a. Ziala Danner's 911 call

During Ziala Danner's testimony, the State played a recording of her 911 call from May 4, 2008. Tr. 349. In the call, Danner says to the 911 dispatcher: "His daughter warned me about him cause she said that he choked her mother with a phone cord. *** She told me to watch out for my aunt. I didn't think it was going to happen, but now I heard her screaming, and I don't know what happened." Ex. 2.

Defense counsel objected to the recording being played because of the statement. Tr. 348. The trial court overruled the objection, finding that the statement was an excited utterance and went to Danner's state of mind. Tr. 349. After Danner's testimony, the trial court gave a limiting instruction:

The court permitted it because it believed that it went to her state of mind at the time of the event. Certain things were said which were out-of-court statements which would traditionally be considered hearsay. You should not consider the 911 tape for the truth of the matter. Anything said there only because it goes to her emotions and state of mind at the time it was said, okay.

Tr. 361

The statement did not fit into either the excited utterance (Evid.R. 803(2)) or then existing mental, emotional, or physical condition (Evid.R. 803(3)) exceptions. Danner was not the declarant. McKelton's daughter was the declarant. The fact that Danner was upset and

frightened when she repeated the statement, does not make it an excited utterance. And the statement was not about Danner's emotional state. Moreover this statement should have been excluded under Evid.R. 403. See Proposition of Law No. V.

b. Detectives Luke's and Witherell's statements contained in Crystal Evans' statement to police.

Shortly after her brother's body was found, Crystal Evans gave a statement to Dets. Jenny Luke and Keith Witherell. Ex. 56. A transcript of this statement was admitted into evidence, and the jury had it during deliberations. Statements made by the detectives in this transcript are inadmissible hearsay. Evid. R. 801(D)(1)(b) excludes from hearsay prior statements of a declarant who testifies at trial if the statement is "consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." There was no charge of recent fabrication or improper influence or motive against Det. Luke or Det. Witherell. The transcript is replete with inadmissible hearsay statements made by the detectives.¹¹ Some examples follow.

Crystal tells Det. Luke that she knows Margaret Allen taught McKelton a lot and that Allen knew everything about McKelton:

A: Yeah, I know he's smart because I mean.

Q: He is.

A: Mostly everything he learned at ---, she taught him though.

Q: Very good.

A: She taught him everything, everything. Cause he said he used to read a lot. He said she used to buy him books and stuff and he used to read a lot.

¹¹ The issue of the admissibility of this statement as a whole is addressed separately in Proposition of Law No. X. This section addresses only the statements made by the detectives in the transcript.

Q: Did he say that she taught him a lot?

A: I mean, like, and I heard like that may, was she his lawyer or something?

Q: Yeah.

A: Yeah, like so.

Q: Defense lawyer.

A: And, he said she know everything about him.

Q: Um-hmm.

A: Everything, like she know everything about him, everything.

Q: Um-hmm.

A: Cause it was an incident one day when somebody asked dude, she know who he is, she was like yes, I represent him. I know everything about him.

Q: It's true.

A: She said I know everything about him, so.

Ex. 56, p. 10-11.

Crystal and Det. Luke discussed the incident in which Germaine shot his cousin, Delrico:

Q: We knew [Delrico] made up a lie and said that two people that he didn't know robbed him in the middle of the street and we knew that that was a lie and we knew that it was Germaine who did it, who shot him and took the money. So we knew all that, but without a victim, without him who wants to do anything about it. It just gets filed.

A: So ----- that's, that's all he kept on thinking. He said he kept on saying it was, it was basically like they calling because of him.

Q: Um-hmm.

A: And he was saying that um, that only way that he told my brother like, only way you can get in trouble for your cousin is if, if your cousin say something. If you cousin don't say nothing then you can't get in trouble.

Q: Right. He know that the only way you can get in trouble is if somebody's going to tell on your right?

A: No, he said the only way.

Q: Or somebody else was present when you did that, right?

A: Basically.

Q: Right. So he knows the game. Calvin knows what it takes to get in trouble, and how to get out of trouble. And, and everybody does.

Id. at 12-13.

In response to Crystal saying that McKelton was with her all night the night that Germaine was killed, Det. Luke said, "That's not what your mom said you told her. Why has that changed?" *Id.* at p. 19. She goes on to say, "We know that he was in the car with your brother, because of the phone call from your other brother to Germaine." *Id.*

Det. Luke told Crystal that she should "play it smart" and "pay attention" if she was going to continue her relationship with McKelton. *Id.* at 25-26. In this context, the following ensued:

Q: I want you to understand something. You, and I have no reason to lie to you. Listen to me. Beat the living shit out of Tiffany Austin. Beat the living shit out of um, Andrea Jackson. Okay. No doubt about those, and it, without going into, I, I would no reason [sic] to lie to you.

A: Them his two babies' mommas.

Q: Yes.

A: Yeah.

Q: Okay. And he may tell you different stories.

A: Nah, he don't. I, I, she don't, she can't stand him, like, but I guess Ann more mature.

Q: No, she can't stand him.

A: She.

Q: Neither.

Q: Because they don't have a choice. You don't understand Calvin yet. There is no choice there. Okay. I want you to watch out for you. You are so pretty. And you are so smart. And you so don't need to be with such a.

A: Nah, I ain't never been in an abusive relationship.

Q: Listen to me.

A: Or anything like that, so I know I'm not about to be in that. I don't.

Q: That's what Missy said. Do you know what [sic] she was the mouthiest person, I knew her.

A: Mouthy.

Q: I mean mouthy. I mean, fuck you, -----, you think you can put your fucking hands on me, fuck you. That was Missy. If anybody wasn't going to get hurt, it was her. Right. She's a lawyer. She's a defense lawyer for God's sake. She's smart. She's smart like you. She's with it.

Q: What do you think she was telling her friends? Why do you think she was confiding in her friends behind Calvin's back? You'll hear about it. You'll hear about it. He ain't going to tell you. All these friends, four, five, six, seven, I can't tell you how many, this happened. This happened, this happened, 911 calls from little ten you old girls, telling me what the hell is going on in that house. I can't get into the crux of my case, okay.

A: I know.

Q: But all these girls, and these are just some of them, there's other ones like, they're in my file.

Q: Calvin, all these people around him, hurt, dead, beat up. Who's the problem? Is it her, is it her, is it her, is it your brother? Is he the problem? Is it all these, these people that he's killed? Are they the problem? You know who the problem is, it's the police.

A: Yeah.

Q: Cause we couldn't stop him until now. Okay, cause he's very smart. Don't ever think that he's not smart. You said something, you said well he ain't, oh, girl, he's smart.

A: I know.

Q: He is as smart as a whip.

A: I know he's smart like.

Q: Okay. He is very street smart. He's very, that girl, this girl, one of her biggest mistakes was teaching him stuff. Him, and guess who else he hung out with, remember this?

A: Ken Lawson.

Q: Remember, remember him? Where's he at now? Where's he at? Where do you think he's at? What do you think he'd tell me about Calvin? Bet you'd shit your pants if you knew what he said.

Id. at 26-29.

Det. Luke talked about Germaine's death:

Q: *** And, and, you know, we never solve your brother's case. It may go unsolved. It may never get solved. Chances are that's going to be the case because if nobody comes forward and squeals on Calvin, or maybe the other person that he hired to kill him.

A: Right. That's the thing.

Q: There you go. Bingo.

A: That's the thing.

Q: There's money here.

Id. at 31.

Det. Luke talked about how odd it was that someone would not ask questions of, or offer assistance to, the police after their significant other was killed (*Id.* at 33-34), and then:

Q: Well, do you think Calvin ever said, about this, to the police?

A: Nothing.

Q: Do you know what he said?

A: I don't know.

Q: Give me a lawyer.

Id. at 34.

After Crystal comments about not knowing the people closest to you, Det. Luke says, "Well, your mom should, your mom should've said something. She knew. She knew. *** She, you [sic] mom was trying to tell your brother to stay away from him, but you know he was in too deep." *Id.* at 38.

At some point Det. Witherell joined the interview. *Id.* at 38. He had just come from interviewing Crystal and Germaine's mother, Sheridan Evans. *Id.* He tells Crystal that her mother "was really helpful," and that she thought Crystal "could help out." *Id.* He went on:

QQ: Okay. Um, and talking to your mom, I mean, your mom's lead me to believe and we, we, the entire time you guys have been talking, I've been talking to mom. You, your mom thinks that, that you have information without a doubt, can assist Jenny, can assist me with, with our cases. Okay.

Id. at 40. Crystal tells Det. Witherell that she does not have any information. *Id.* at 40-41. Det.

Witherell says,

QQ: Well, but the fact is, you, you guys, you guys share a bed. You guys live together. Okay. And, you know, if, if the streets are saying the things that I'm hearing, and and there's things flying around already, and then for you to sit in the seat that you're in right now and to act like, and your words were, "I have no information." Well, for number one, that's not true, because you have a lot of information.

Id. at 41-42. Det. Witherell returns to this topic later in the interview:

QQ: Okay. You've got your, your mother. This is your biological mother, your blood mother. This is mom. We're right over here in the next room and she's telling me,

detective, Crystal knows something. I know she knows something. And you know, you're trying to kind of paint a picture.

QQ: Listen to me. The problem is, you, you had discussions with your mother about this. Why, and what, what I don't understand is why everybody else lying on you? That's basically what you're asking me to believe. Because we've got mom, she has no reason.

QQ: Well, listen Crystal, I, I just had a full conversation with your mom, and she gave great detail. She gave great detail about what you and her discussed about what Cal told you about Missy.

Id. at 54-55.

The conversation turned to the events on the night of Germaine's death and what investigators knew about who Germaine was with:

QQ: This is important to us, okay. You're right. We do have information suggesting that I guess it would be his half brother?

A: Yeah, that.

QQ: Sathon.

A: That he was in the car with.

QQ: That Sathon and, and Germaine.

A: Was on the phone talking.

QQ: Were talking, and Germaine said.

A: And he said he with Cal.

QQ: I'm in a car and I'm rolling around with Cal.

A: Yeah.

QQ: And Sathon said that was some time around nine p.m. or after nine p.m. Now you understand why I'm asking you. You're saying that he, that, that Cal was home prior to nine o'clock or right around nine o'clock.

A: Yeah, it was right around nine o'clock.

Id. at 46. The conversation continued:

QQ: Exactly, now, now, we've got, you know, the half brother, Sathon. He's saying.

A: He in the Talbert House.

QQ: And, and, and he's locked down in the Talbert House.

A: Um-hmm.

QQ: And, and there's no reason for him to make this up, right?

A: Yeah, he ain't about to make nothing up.

QQ: So, I, I feel pretty good. Jenny feels pretty good about the fact that, you know, what, Cal and your brother were together in a car.

A: Right.

QQ: Riding around nine p.m.

A: Right.

QQ: On Friday night.

Id. at 48.

Det. Witherell asked Crystal about McKelton and Germaine being together the night of Germaine's death:

QQ: Let me ask you this. How do you feel about the, just the fact that, that Cal was with Germaine right before he was killed? I mean, are, are, are, you?

A: Whoever did it to him, I don't know. Like, but it had to be some people that he trusted like or at least.

QQ: Like Cal.

Id. at 56.

Det. Witherell told Crystal that her family, “put Cal in a car with your brother, right around the time, right around the time that he could’ve been killed[,] [a]nd then all of a sudden Cal’s showing up, acting like he don’t know nothing about nothing, talking to you.” *Id.* at 59.

Det. Witherell asked Crystal if she thought McKelton had something to do with her brother’s death. *Id.* at 62. She responded that she was torn. *Id.* He asked if she knew about Germaine and McKelton’s history—“[a]nd Missy, the connection with all, all that.” This followed:

QQ: Look, even, even your mom was telling me about, you know, Germaine was, Mick, Germaine was in some stuff, and that he wasn’t an angel. And that just through time and talking to different people, and then eventually, in talking to Germaine, that Germaine spoke to her, you know, if [sic] great detail about Cal and, and, and what Germaine had, had done for Cal in terms of Missy, you know. Um, I mean, even your mother is proving information about Cal.

QQ: So, just to make sure I’m clear, this is the first time, today’s the first time?

A: What?

QQ: That you’ve made, you’ve been made aware of, of all this with, with Cal and Germaine and Missy, how the three are connected.

A: As far as like, I guess, since you, is trying to say that they got something to do with her uh, that my brother got something to do with it.

QQ: Oh, yeah. ----- Look.

A: Nah, nah, I’m saying.

QQ: ----- what your mother just told me.

Id. at 62-63.

At the end of the interview, in regards to Crystal’s cell phone, Det. Luke says, “Calvin’s been burning this up.” *Id.* at 67.

c. Det. Eric Karaguleff's Testimony

During direct examination by the State, Det. Karaguleff testified about responding to the scene where Germaine Evans' body was found. Tr. 1300-21. He testified that while at the scene, a group of Evans' family and friends gathered. Tr. 1314-16. Evans had not yet been identified, but the group that had gathered believed the body was Evans'. Tr. 1315. Det. Karaguleff testified that they were providing identifying information about Evans to him. Tr. 1316. The following questioning then ensued:

Q: And were they communicating this information to you in that emotional, excited state?

A: Yes.

Q: Did they communicate any other information to you in that emotional, excited state in reaction to what had happened there?

A: They said he had last been seen Friday night around 9:30 at night.

Q: Okay.

A: They said that he – they believed that he was killed by his friend, Calvin McKelton.

Q: Did they use the term "his friend" or is that your term?

A: That's their term.

Q: Okay.

A: And they said it was because he helped move that lawyer's body.

Tr. 1316.

d. Sheridan Evans' testimony

Sheridan Evans testified, on direct examination by the State, about a conversation that she had with McKelton and "Red" after her son's death. Sheridan testified that McKelton told

her that he did not kill Germaine. Tr. 1839. Sheridan testified that she then said to McKelton what she had heard:

A: *** Well, Pooh said you did it. That's why he left town that next morning after that same night my son was killed. I told Calvin that. He said, --

Q: What was Calvin's response to you then?

A: *** He said we don't even know who the motherfucker is. That's what he said. He said, Do we Red? And Red said, Nah, I ain't never seen him. We don't know him.

Tr. 1839.

e. Marcus Sneed's testimony

Marcus Sneed, on direct examination by the State, testified about conversations he had with McKelton at a bar. He testified that while shooting pool and drinking, he asked McKelton, "was it true what everybody was saying in the street about him killing his girlfriend." Tr. 1599. Sneed then testified that in a later conversation at the same bar, he asked McKelton "was that the guy that help you get rid of the body that everybody saying on the street." Tr. 1602.

B. Improper hearsay statements prohibited.

In *Crawford*, the United States Supreme Court overruled the reliability test set out in *Ohio v. Roberts*, 448 U.S. 56 (1980). *Crawford*, 541 U.S. at 62-68. The *Crawford* court reasoned that the common law roots of the Sixth Amendment require that the accused must be afforded an opportunity to challenge his accusers through live, in court testimony where the core concerns of the Confrontation Clause are implicated. *Id.* at 43-53. Accordingly, the Court held that "[t]estimonial statements of witnesses absent from trial [may be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Id.* at 59; *id.* at 68-69.

The Court's holding in *Crawford* applies only to testimonial statements offered by an out of court declarant that the accused had no prior opportunity to cross-examine. *See id.* However, since the error presented in *Crawford* plainly involved testimony by an unavailable declarant, the Court found it unnecessary to flesh out all the permutations of which statements may be testimonial under the Sixth Amendment. *See id.*

Two years later, the Supreme Court revisited this question in the companion cases of *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813 (2006). Relying on *Crawford*, the court made clear that statements are testimonial under the Sixth Amendment if they were previously made by "sworn testimony in prior judicial proceedings or formal depositions under oath. ..." *Davis*, 547 U.S. at 821-26. The court reasoned, however, that the Confrontation Clause is not so narrowly defined as to be limited only to formal proceedings. *Id.* at 26.

The court found constitutional error in Hammon's case because the unavailable declarant's statements were obtained "under official interrogation" by police officers. *Id.* at 830. Thus, the court held that "[s]tatements [made to law enforcement] are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 822. The court also made clear that its holdings in *Davis* and *Hammon* did not provide "an exhaustive classification of all conceivable statements [that qualify as testimonial under the Sixth Amendment]. ..." *Id.*

Regarding out of court statements that are not testimonial under *Crawford* and *Davis*, the *Roberts* reliability test may be applied to determine if a hearsay violation occurred. *See Crawford*, 541 U.S. at 68. Under the *Roberts* reliability test, the reviewing court must determine if the out of court statement falls within a "firmly rooted" hearsay exception and if it bears

sufficient “indicia of reliability.” *See Crawford*, 541 U.S. at 40. *See* Ohio R. Evid. 801(C), 802, 803, 804.

C. McKelton’s rights violated by hearsay

The State put before the jury out-of-court testimonies from individuals, many not even named, whom McKelton had no opportunity to cross-examine. McKelton was denied his right to confront each of those declarants about their testimonies in violation of the Sixth Amendment. *See Crawford*, 541 U.S. at 68-69.

But even assuming for the sake of argument that the hearsay statements were not testimonial under *Crawford*, McKelton was nevertheless prejudiced by improper hearsay. None of those out-of-court declarants gave detailed accounts and none were in custody subject to a statement against penal interest. *See e.g. People v. Farrell*, 34 P.3d 401-406-07 (Colo. 2001) (hearsay statement more reliable because it was “detailed”); *Nowlin v. Commonwealth*, 40 Va. App. 327, 335-48, 579 S.E.2d 367, 371-72 (2003) (hearsay statement more reliable when made in custody against penal interest).

Moreover, those hearsay statements prejudiced McKelton under Evidence Rule 403(A). The hearsay statements testified to by Dets. Luke and Karguleff was nothing short of assertions that McKelton killed Margaret Allen and then killed Germaine Evans because he witnessed Allen’s murder. These statements served to bolster the testimony of Marcus Sneed and Lemuel Johnson—two witnesses whose credibility was questionable at best. *See* Proposition of Law No. XIII. Similarly, the statements repeated by Marcus Sneed and Sheridan Evans were direct statements of McKelton’s guilt.

McKelton was likewise prejudiced by the statement of his daughter that he had strangled her mother with a phone cord and that Ziala Danner should watch out for her aunt, Margaret

Allen. This statement suggested that McKelton had a history of abusing the women in his life and specifically that he posed a threat to Margaret Allen. The prejudicial impact of this statement was compounded by Crystal Evans' police statement (ex. 56) in which Det. Luke warned her about McKelton and said that he had "beat[en] the living shit out of" two women by whom he has children. Ex. 56, p. 26. (See Proposition of Law No. X).

The statements made by Detectives Luke and Witherell in their interview of Crystal Evans were particularly prejudicial. Det. Witherell made several statements indicating that Sheridan Evans had given information that conflicted with the information Crystal was giving them and indicating that they believed Sheridan and not Crystal. He also indicated that Crystal had told her mother things that she was not telling detectives. Det. Witherell also made statements about McKelton being with Germaine on the night of his death and about what investigators believed was McKelton's motive for killing Germaine. These statements went to the heart of the State's case against McKelton and served to bolster the highly questionable testimony presented about the facts surrounding Germaine's death. Det. Luke's statement that Margaret Allen told her friends—"four, five, six, seven" of them—what was going on in her relationship with McKelton was highly prejudicial. She also indicated that there were more women besides Margaret Allen and the two others she had named as having been abused by them whom McKelton had abused. And Det. Luke mentioned that McKelton may have hired someone to kill Germaine when there was no evidence produced at trial that anyone was hired. Det. Luke's statement about Delrico are problematic because they tend to show that McKelton would have known that Det. Luke was calling Germaine about Margaret Allen's death and not about shooting Delrico, bolstering the idea the McKelton killed Germaine shortly after that call to stop him from talking to detectives.

D. Conclusion

Calvin McKelton's Sixth Amendment right to confront witnesses against him was violated by the admission of testimony by unavailable declarants when McKelton had no previous opportunity to cross-examine. But even if this hearsay was not testimonial under the Sixth Amendment, it was nevertheless unreliable and prejudicial. McKelton's convictions must be reversed and his case remanded for a new trial.

Proposition of Law No. XII

The failure of the state to specify the nature of the charges against a capital defendant and the failure of the trial court to provide a verdict form for complicity after it provides a complicity instruction denies the defendant due process, the right to a fair trial and right to a prepare a defense. U.S. Const. amends. VI, XIV.

A. Indictment and Bill of Particulars

Calvin McKelton was charged with the aggravated murder of Germaine Evans in violation of R.C. § 2903.01(A). Dkt. 1. There were two specifications attached to the aggravated murder count which rendered McKelton eligible for the death penalty. The first capital specification charged that the murder was committed for the purposes of escaping detection from another offense committed by McKelton. R.C. § 2929.04(A)(3). The second capital specification charged that the murder was committed to prevent the testimony of a witness. R.C. § 2929.04(A)(8).

Defense requested a bill of particulars from the State. Dkt. 174. The purpose for giving a bill of particulars is to “elucidate or particularize the conduct of the accused.” *State v. Sellards*, 17 Ohio St. 3d 169, 171, 478 N.E.2d 781, 784 (1985). This allows the defendant the opportunity to prepare a defense. *See State v. Lawrinson*, 49 Ohio St. 3d 238, 239-40, 551 N.E.2d 1261,1262 (1990).

Through the first bill of particulars filed in McKelton's case on February 16, 2010, the State of Ohio specifically set out the nature of the offenses charged against McKelton: “On or about February 27, 2009, the Defendant purposefully and with prior calculation and design cause the death of Germaine Lamr Evans, Sr. by a single gunshot wound to the back of the head.” Dkt. 4. On September 27, 2010, McKelton filed a Notice of Alibi for the aggravated murder charge advising the State that he was at 3012 Burnett Avenue, Cincinnati, Ohio at the time which the alleged offense took place. Dkt. 171. A second bill particulars only clarified who was the

subject of the intimidation of witness charge. Dkt. 174. It is clear from McKelton's notice of alibi that McKelton was defending against the State's contention that he was the person who shot Germaine Evans.

B. State failed to specify a theory that would allow McKelton to prepare a defense

The State never presented a cohesive a theory about the circumstances surrounding Germaine Evans' death. At trial, the State presented a case that suggested that McKelton himself did the shooting. Tr. 1136. However, at other times the State, recognizing the lack of reliable testimony and evidence to support this theory, suggested that McKelton had someone shoot Germaine Tr. 1288-89. However, aside from detectives speculating about this theory, no evidence was ever presented to support a theory that McKelton was complicit.

A review of the interviews between law enforcement and Crystal Evans also demonstrate that the State was proceeding under the theory that McKelton was the individual who shot Evans. The State spent significant time before trial trying to get Crystal Evans to change her statement. Tr. 1255, 1260, 1261-62. During all of those conversations, Crystal maintained that McKelton was with her, in her home, on the night of her brother's death. In her initial interview with detectives, she told them that she had arrived home around 5:30 or 6:00 p.m. after getting her hair done and picking up McDonalds (ex. 56 at 15-17), that McKelton arrived at her apartment shortly before 9:00 p.m. (*id.* at 19-21), that the two of them fell asleep on the couch watching TV (*id.* at 65), and that he was there all night (*id.* at 19).¹²

Before trial, detectives went to Crystal's house to discuss her alibi and to convince Crystal that McKelton had killed her brother. Tr. 1113-14, 1261-62. The State was not

¹² The following day, Evans remembered that she had left her apartment after McKelton's arrival. Ex. 46. She called Det. Luke and left a voicemail stating that she had forgotten to tell Det. Luke that after McKelton came in, she left and rode around until about 10:00 p.m. *Id.* She also stated that when she returned, McKelton was not at the apartment, but arrived a few minutes later. *Id.*

successful in its last attempt to get Crystal to change her story. During the opening statements by the State at trial, the State informed the jury that Calvin McKelton was not the trigger man and that the act was done at his direction. Tr. 318. Despite this argument, the State continued to present evidence that McKelton was the individual who killed Germaine Evans. During Crystal Evans' testimony, the State spent an inordinate amount of time trying to discredit Crystal and disprove that she was with McKelton the entire night of Evan's murder. See Proposition of Law No. X. The State's attempts at making it appear that Evans was lying for McKelton were especially damaging because there was so little evidence tying McKelton to Germaine's death.

C. Trial court instructs on complicity by fails to provide verdict form on complicity charge

Despite the clear direction of the evidence submitted by the State, the trial court while going over jury instructions stated, "I find myself in a position now to start preparing alternative instructions based on whether or not the State intends to proceed with Mr. McKelton as the principal or as a complicitor on the Count 10 of the instructions. And I don't want to pressure you, because I don't know what the evidence is, but if there is evidence that he aided and abetted or procured or conspired with, I want to have those instructions prepared." Tr. 1708. In response to the court's inquiry, the State agreed that those instructions should be prepared. Tr. 1709. It is telling that after 1700 pages of transcript testimony the trial court asked "if there is evidence that he aided and abetted or procured or conspired." *Id.* Later, the trial court determined that "the State can charge the defendant as principal offender and then proceed under the alternative of not only a principal offender, but a complicitor." Tr. 1882. The trial court further noted that the appropriate complicity instruction would be included in the instruction to the jury. When discussing the proposed jury instructions McKelton again objected to the soliciting language being included. Tr. 1922. "We just want to pose a general objection to that

soliciting language being included...Mr. McKelton was indicted for being the principal offender according to the indictment and the bill of particulars in regard to this case.” *Id.* The trial court overruled defense counsel’s objection.

Before the trial court provided the final instructions to the jury, defense counsel requested that the jury should be instructed that it “needs to find unanimously one way or the other that either he did purposely and with prior calculation or design cause the death or that they unanimously find that he solicited, aided, abetted or procured because **what you have is a verdict form or a decision by the jury where some of the jurors think that he did it, did pull the trigger, and other jurors thing that he was only involved in setting it up.** And we think it’s an issue that they need to make a finding one way or the other unanimously in regarding to that issue.” Tr. 1939.

D. Argument

1. The failure of the State to provide a theory of the case and for the trial court to provide a verdict form for the complicit charge was error

The State never provided a cohesive theory of the case. As discussed in Proposition of Law No. XIII, the State did not present sufficient evidence to find that McKelton killed Evans beyond a reasonable doubt. The State’s theory was so unspecific that it denied McKelton the ability to present a defense. The State never presented evidence about who killed Evans, but went to great pains to discount Crystal Evans and Audrey Dumas. Because there was no specificity to the charges, McKelton’s counsel could only prepare a generalized denial. The flip flopping of the theory of the case by the State was at best confusing to the jury and at worst allowed the jury to convict despite doubts.

It was further error for the trial court to fail to instruct the jury of the need to find unanimously the principal offender or complicity charge and to fail to provide a separate verdict

form for the complicity charge. Crim. R. 31. A conviction of aggravated murder with death penalty specifications must be made unanimously by the jury. In the present case, it is unclear whether the jury unanimously found McKelton guilty of being the principal offender or of complicity. The jury could conceivably have been split on the issue.

The instruction compounded the problem with lack of theory from the State because it allowed the jury an easy way out of resolving problems with the State's case and allowed jury to draw impermissible inferences regarding the lack of evidence supporting the State's case.

2. Instructing the jury on complicity was prejudicial error given the fact that it varied from the State's presentation of evidence at trial.

This Court, as well as the United States Court of Appeals for the Sixth Circuit, has held that a defendant charged as the principal offender in an indictment, can be subsequently convicted of aiding and abetting its commission although not named in the indictment as an aider and abettor. *State v. Perryman*, 49 Ohio St. 2d 14, 28, 358 N.E.2d 1040, 1049 (1976); *Hill v. Perini*, 788 F.2d 406, 407 (6th Cir. 1986). The Sixth Circuit has concluded that the ability to convict a principal offender as an aider and abettor does not violate due process because the variance between the indictment and the proof offered at trial is not material. *Stone v. Wingo*, 416 F.2d 857, 864. (6th Cir. 1969). "A variance is not material unless it misleads the accused to his prejudice in making his defense." *Id.*

In *Hill*, the Sixth Circuit, in reviewing Ohio law utilized this Court's holding in *Perryman* to find that, while it is not customary, it is not improper for a defendant to be indicted for the commission of a substantive crime as a principal offender and convicted of aiding and abetting its commission although not named in the indictment as an aider and abettor. *Hill*, 788 F.2d at 407.

The situation in *Perryman* was similar to McKelton's present case. In *Perryman*, the defendant filed a motion for a bill of particulars. In response to the motion, the State said that the defendant shot and killed the victim while committing aggravated robbery. The defendant argued to this Court that once the State particularized that the defendant himself had shot and killed the victim, it could not shift its theory of criminal responsibility. *Perryman*, 49 Ohio St. 2d at 28, 358 N.E.2d at 1049. This Court found *Perryman*'s argument to be without merit:

Upon an examination of the record, it is evident that the state consistently argued that the appellant was the triggerman. It was only on direct examination of defense witnesses that any evidence of aiding and abetting came before the jury. Since **appellant** presented evidence from which reasonable men could find him guilty as an aider and abettor, the court's instruction was, therefore, proper.

Id. (Emphasis added).

This demonstrates the essential difference between McKelton's case and *Perryman*'s: McKelton did not present any evidence to demonstrate that he was an aider and abettor in the commission of the aggravated murder of Evans. In fact, McKelton has, throughout the trial, denied that he was involved in the murder of Germaine Evans. This distinguishing factor is important in this case for it makes the "variance" between the indictment and the final charge material. *Stone*, 416 F.2d at 864.

The variances possible in the state's theory were so wide that they were prejudicial. The State did not even present two alternate theories. Instead, all they said is that McKelton was responsible. He could have been anywhere when it happened. Anyone could have committed the crime. The most detailed explanation of the state's theory are that McKelton somehow was responsible for Evans being shot.

The only refutation to such a broad theory is generalized denial. McKelton was not responsible. Further prejudice to McKelton occurred because the State's theory relied almost

entirely on McKelton's supposed confessions to informants, who McKelton was not even permitted to cross-examine properly. *See* Proposition of Law No. IX. These informants gave no details, they only said that McKelton told them he did it. Tr. 1602, 1747. The jury also heard the unfronted testimonial statements of unnamed parties who told the police that McKelton killed Evans. *See*, Proposition of Law No. XI. Noone provided any more details about the circumstances of McKelton's responsibility. The State's case relied heavily on unfronted testimony that McKelton is guilty, but no specific details McKelton could refute. Accordingly, the wide "variance" of the State's theory was prejudicial to McKelton.

E. Conclusion

Because the trial against McKelton proceeded on the theory that McKelton was the principal offender in the aggravated murder of Germaine Evans, the trial court's instruction on complicity for aggravated murder denied McKelton of his opportunity to adequately defend himself against the charges upon which he was convicted. Moreover, the failure to provide verdict forms to the jury created an unacceptable risk that McKelton was not unanimously convicted of the aggravated murder charge. McKelton's conviction on aggravated murder should be reversed as it is in violation of McKelton's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Proposition of Law No. XIII

When the State fails to introduce sufficient evidence of particular charges and there is not substantial evidence upon which a jury can conclude that all elements have been proven beyond a reasonable doubt., a resulting conviction deprives a capital defendant of substantive and procedural due process. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 9, 16.

A. Aggravated murder charge

Calvin McKelton was charged with the aggravated murder of Germaine Evans. Dkt. 1 This required the State to prove that McKelton purposely with prior calculation and design caused the death of Evans. O.R.C. § 2903.01(A). Despite never identifying a clear theory under which it was proceeding, the State at points during the trial also opined that McKelton may have had Evans murdered. Under that theory, the State had to produce evidence demonstrating that acting with the culpability required in the principal offense, McKelton solicited, procured, aided, abetted or conspired with another to cause the death of Germaine Evans.

B. Sufficiency of the evidence.

The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). See also *State v. Adams*, 62 Ohio St. 2d 151, 404 N.E.2d 144 (1980); *State v. Miclau*, 167 Ohio St. 38, 146 N.E.2d 293 (1957); O.R.C. § 2901.05(A). The test for determining whether the trial evidence was sufficient to establish guilt beyond a reasonable doubt is whether there was "substantial evidence upon which a jury could have reasonably concluded that all the elements of an offense have been proven beyond a reasonable doubt." *State v. Eley*, 56 Ohio St. 2d 169 syl., 383 N.E.2d 132 (1978). In examining claims based upon insufficient evidence a reviewing court must ask whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the

essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). See also *State v. Adams*, 62 Ohio St. 2d 151, 153, 404 N.E.2d 144, 146; *Miclau*, 167 Ohio St. at 41. A conviction based upon insufficient evidence violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson*, 443 U.S. at 316.

C. Manifest weight of the evidence.

In assessing the manifest weight of the evidence, this Court must examine the entire record and determine whether the evidence produced attains the high degree of probative force and certainty required for a criminal conviction.

This inquiry is separate from the examination for sufficiency of the evidence. This review must be directed toward a determination of whether there is substantial evidence upon which a jury could reasonably conclude that all of the elements have been proved beyond a reasonable doubt. *State v. Eley*, 56 Ohio St.2d 169, 172, 383 N.E.2d 132, 134 (1978); *Glasser v. United States*, 315 U.S. 60, 80 (1942). Substantial evidence is more than a mere scintilla. See *United States v. Orrico*, 599 F.2d 113, 117 (6th Cir. 1979). It is evidence affording a substantial basis of fact from which the fact at issue can be reasonably inferred. *Id.*

A claim that a jury verdict is against the manifest weight of the evidence requires the reviewing court to review the entire record, weight the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Scott*, 101 Ohio St. 3d 31, 36, 800 N.E.2d 1133 (2004) see *State v. Thompkins*, 78 Ohio St. 3d 380, 387, 678 N.E.2d 541, 547 (1997), quoting *State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717, 720-21 (1983).

D. Argument

1. It was essential for the State to prove that McKelton cause Germaine Evans' death

In order to convict McKelton of the aggravated murder of Germaine Evans, the State was required to prove that McKelton actually killed Evans or that McKelton had someone else kill Evans. The trial court instructed the jury on the essential element of cause: "Cause is an essential element of the offense of aggravated murder. Cause is an act which directly produces the death of another, and without which it would not have occurred." Tr. 2126.

2. Insufficient evidence to prove McKelton caused Germaine Evans' death

The State presented a great deal of evidence in McKelton's case. Much of the evidence was irrelevant and prejudicial information regarding what a bad person McKelton was. *See* Proposition of Law No. V. The State introduced evidence regarding the fact that Evans was a witness to the murder of Margaret Allen to support the theory that McKelton's reason to kill Evans was to prevent him from talking to law enforcement officials about Allen's murder. Assuming *arguendo* that the State's evidence was sufficient to support the claim that Evans was witness to the Allen murder, this is not where the inquiry for an aggravated murder charge ends. The State also had to prove that McKelton caused the death of Evans.

The State presented virtually no admissible evidence that McKelton actually killed or had someone else kill Evans. There was no evidence presented that he was in the park the night Evans was killed. And, there was no evidence that identified an individual who killed Evans at McKelton's request. There were, however, unopposed testimonial statements by unknown declarants that McKelton was guilty. Tr. 1316; *See* Proposition of Law No. XI. The only evidence that the State could produce on this matter was testimony from two jail house informants. Lemuel Johnson testified that McKelton told him that he had killed Germaine

Evans, who was the “only person that can connect him to [Margaret Allen’s] murder.” *Id.* at 1748. Marcus Sneed claimed that McKelton confessed to him about the murders. Tr. 1599; Tr. 1602. The only competent and credible evidence of McKelton’s involvement in Evans’ death was Detective Luke calling Evans shortly before he died. This may speak to McKelton’s motive, but without evidence of causation it is insufficient to establish McKelton’s guilt beyond a reasonable doubt.

The State’s case was insufficient as to the element of cause. Resultantly, McKelton’s aggravated murder conviction as well as his death sentence, violate his rights to substantive and procedural due process. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

3. McKelton’s conviction was against the manifest weight of the evidence

In assessing the manifest weight of the evidence, this Court must examine the entire record and determine whether the evidence produced attains the high degree of probative force and certainty required for a criminal conviction. This Court must review the credibility of the evidence submitted to support McKelton’s conviction when reaching this determination.

“Weight of the evidence concerns ‘the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of the proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the great amount of credible evidence sustain the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.”

Thompkins, 78 Ohio St. 3d at 387, 678 N.E. 2d at 547. When reviewing for manifest weight, the reviewing court can consider the credibility of witnesses. *Id.*

When considering the credibility of the State’s witnesses, their testimony seems absurd. According to Marcus Sneed, McKelton told him that he killed Evans because Evans “was the only guy that could link him to the murder.” Tr. 1602. In telling Sneed this, McKelton created another “guy that could link him to the murder.” Similarly, Lemuel Johnson testified that

McKelton confessed to him that he killed Evans because he was “the only person that can connect him to Missy Murder.” Tr. 1748. By telling Johnson this, McKelton created another person who could connect him to the crime. Similarly, Sneed testified that “everybody was saying” McKelton killed his girlfriend, and that McKelton confessed to him at the bar, while shooting pool. Tr. 1598.

The jury clearly lost its way when it found McKelton guilty of the aggravated murder of Evans. This was in caused in part by the jury being overwhelmed with inadmissible evidence about what a bad person McKelton was as well the flagrantly inadmissible hearsay evidence from Germaine Evans’ family at the park when they identified the body. Tr. 1316. *See*, Propositions of Law No. V and XI. To add to this error, defense counsel was not able to properly cross-examine Sneed and Johnson, the jail house informants who provided the most damaging testimony against McKelton. *See*, Proposition of Law No. IX. This did not allow the jury to properly test the credibility of the State’s witnesses. The evidence was further confusing to the jury because the State was allowed to lead the testimony of the jail house informants. Tr. 1637-1642, 1646, 1779-81.

This Court when assessing the manifest weight of the evidence should ignore the improperly admitted evidence that the jury was able to consider. This includes the recording of Gerald Wilson’s statement, where he tells the police McKelton suggested that he killed Evans. *See*, Proposition of Law No. VI. The jury also heard the unfronted testimonial statements by unknown declarants that McKelton was guilty. *See* Proposition of Law XI. Detective Karaguleff testified that a group of Evans’ family and friends gathered at the park where his body was found. Tr. 1314-16. Karaguleff testified that the group told him that Evans was killed by

McKelton, because he helped move Allen's body. Tr. 1316. This was inadmissible but was likely given considerable weight by the jury.

As outlined above, the only evidence to demonstrate that McKelton caused the death of Evans was the testimony from two jail house informants who had incentive to testify for the State. This testimony was not corroborated by any physical evidence or other testimony to support its accuracy. There was simply no credible evidence upon which the jury could have determined that McKelton was the individual who caused Germaine Evans' death.

Ultimately all the State presented was the testimony of Nix placing McKelton with Evans earlier that night, and two unfronted informants. This Court should find that the testimony of incentivized informants was unreliable and uncorroborated and cannot sustain an aggravated murder conviction.

E. Conclusion.

There was insufficient evidence that McKelton caused the death Germaine Evans. Moreover, a review of the entire record demonstrates that McKelton's conviction was against the manifest weight of the evidence. McKelton's convictions therefore violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson*, 443 U.S. at 316. His conviction on the aggravated murder charge and his death sentence must be vacated.

Proposition of Law No. XIV

It is error for the trial court to admit prejudicial domestic violence expert testimony when the credibility of the victim was not challenged by defense. U.S. Const. amend. XIV; Ohio Const. art. I, § 16.

A. Domestic violence expert testimony was not admissible.

In *State v. Koss*, this Court first recognized the admissibility of expert testimony regarding battered woman syndrome when in support of a self-defense claim. *State v. Koss*, 49 Ohio St. 3d 213, 551 N.E.2d 970 (1990). This Court, in *State v. Haines*, expanded the use of such expert testimony to include admission by the State, holding that, “when the credibility of an alleged victim of domestic violence has been challenged on cross-examination during the State’s case-in-chief, the State may introduce limited expert testimony regarding the ‘battered woman syndrome’ to aid the judge or jury in determining the victim’s state of mind in returning to or remaining in a relationship with the defendant despite the abuse.” *State v. Haines*, 112 Ohio St. 3d 393, 406, 860 N.E.2d 91, 104 (2006). However, before the State may offer such rehabilitative evidence it must set forth an evidentiary foundation showing that the witness is in fact a battered woman. *Id.* at 401-02. Even if those requirements have been met, a court must still consider whether the expert’s testimony poses the danger of unfair prejudice, and, thus violates Evid.R. 403(A). *Id.* at 403.

The trial court abused its discretion when it admitted testimony, provided by the State’s domestic violence expert witness, that exceeded the limitations of admissible battered woman testimony established by this Court in *Haines*. Additionally, the testimony was not admissible under Evid.R. 403(A) because its probative value was substantially outweighed by the unfair prejudice to McKelton.

B. The expert witness testimony exceeded the limitations of domestic violence expert testimony established by this Court in *Haines*.

“Experts who are called to testify in domestic violence prosecutions must limit their testimony to the general characteristics of a victim suffering from the battered woman syndrome.” *Haines*, 112 Ohio St. 3d at 403, 860 N.E. at 104. State use of expert witness testimony on battered-woman syndrome is permissible when it “is offered as background for understanding the victim’s behavior.” *Id.* “When the credibility of an alleged victim of domestic violence has been challenged on cross-examination during the State’s case-in-chief, the State may introduce limited expert testimony regarding the ‘battered woman syndrome’ to aid the judge or jury in determining the victim’s state of mind in returning to or remaining in a relationship with the defendant despite the abuse.” *Id.* at 406. Specifically, the expert [1] cannot opine that [an alleged victim] was a battered woman, [2] may not testify that defendant was a battered woman, [3] may not testify that defendant was a batterer or that he is guilty of the crime, and [4] cannot comment on whether [alleged victim] was being truthful. *Id.* at 403 (quoting *People v. Christel*, N.W.2d 194 (Mich. 1995)). The expert may however answer “hypothetical questions regarding specific abnormal behaviors exhibited by women suffering from the syndrome, but should never offer an opinion relative to the alleged victim in the case.” *Id.* at 403 (internal citations omitted); see also *State v. Sorah*, 117 Ohio St. 3d 1458, 884 N.E.2d 67 (2008). “Trial courts should tailor the scope of the state’s questioning and should also ensure that jurors are instructed as to the limits of the expert’s testimony.” *Id.*

- 1. The trial court abused its discretion when it admitted testimony that exceeded the limitations of admissible battered woman expert testimony under *Haines*.**

Any question concerning the admission or exclusion of expert testimony is within the trial court’s discretion, and the court’s decision will not be reversed absent an abuse of that

discretion. *State v. Jones*, 90 Ohio St.3d 403, 414, 739 N.E.2d 300 (2000). A trial court abuses its discretion only when the court's decision is arbitrary, unconscionable, or unreasonable. *State v. Wolons*, 44 Ohio St. 3d 64, 68, 541 N.E.2d 443 (1989). The trial court abused its discretion when it admitted testimony, provided by the State's domestic violence expert witness, that exceeded the limitations of admissible battered woman testimony established by this Court in *Haines*. The State's expert witness went beyond the realm of carefully tailored general statements designed to inform the jury when it used personal characteristics of the alleged domestic violence victim and case-specific hypothetical examples.

a. Personal characteristics of alleged victim were improperly admitted.

"Experts who are called to testify in domestic violence prosecutions must limit their testimony to the general characteristics of a victim suffering from the battered woman syndrome." *Haines*, 112 Ohio St. 3d at 403, 860 N.E. at 104. The use of case-specific victim characteristics oversteps the current limitations imposed by *Haines* which permit only generally shared characteristics amongst victims suffering from the battered woman syndrome. *See id.*

The trial court failed to properly tailor the scope of the state's questioning and failed to instruct as to the limits of the expert's testimony. Margene Robinson was permitted to testify that during the course of her career with the Dayton Police Department she had personally observed cases of domestic violence involving women of Allen's socioeconomic status, education level, and precise profession, who had suffered a similar injury. Tr. 661-62; 668. Defense counsel repeatedly objected throughout the improper questioning of the expert. Tr. 660-75. Lead by the prosecutor, Robinson answered in the affirmative to questions directly targeting unique characteristic of the alleged domestic violence victim in this case, Margaret Allen. The testimony was that the thought process of a domestic violence victim was not "limited to low-

income, uneducated” (tr. 670), those who “don’t have the education or resources to make it on their own” (tr. 671), but rather encompassed “middle class, upper middle class” (tr. 661) women who are “college educated, post grad educated, professional, working people” (tr. 662) within the “legal profession” (tr. 662) who “made good money and had the resources to leave.” Robinson even alluded to Allen’s broken ankle, testifying that these women even suffered similar injuries of “broken bones” Tr. 668. The income and education factors were stressed numerous times during the course of the testimony. Tr. 661-62; 670; 671-72; 675. The State stressed over and over the victim-specific characteristics of a high education level and high income—highlighting factors which set Allen apart from the stereotypical victim of domestic violence. It takes the testimony beyond the permissible scope how victims tend to behave to the impressible scope of how this alleged victim would tend to behave.

The State also asked a series of “specific hypotheticals.” Tr. 673. After objection by defense counsel, the trial court instructed the State to ask the question in terms of consistency with a domestic violence victim: “At this point I think it’s important not that she’s seen it, but it’s consistent with the person who has been a victim of domestic violence.” Tr. 674. After another defense objection a short while later, the State was reminded to properly frame the questions to the expert. Tr. 675. The State wandered impermissibly away from the proper framing of the domestic violence issue as a general issue to a case-specific one. The State did the same with the victim-specific characteristics. The State went so far as to admit in a bench conference that “experts like this are not here to diagnose victims as suffering from a particular syndrome or to say that she’s a victim of battered relationship or to say the defendant is a batterer. And while it was my intention to ask [the expert witness] her opinion, if this happened

in the honeymoon phase, I decided to stay away from that.” Tr. 677. While the State may have tried, it failed. It’s intention of case-specific application was achieved.

Experts who are called to testify in domestic violence cases must limit their testimony to general characteristics of a victim suffering from battered woman syndrome. *Haines*, 112 Ohio St. 3d at 403. The State did not stay within the lines drawn by this Court for the proper use of battered woman syndrome testimony, and the trial abused its discretion in admitted the prejudicial victim-specific characteristics.

b. The expert witness testimony usurped the jury’s function of issue determination.

“[G]eneral testimony regarding battered-woman syndrome may aid a jury in evaluating evidence and that if the expert expresses no opinion as to whether the victim suffers from battered woman syndrome or does not opine on which of her conflicting statements is more credible, such testimony does not interfere with or impinge upon the jury’s role in determining the credibility of witnesses.” *Haines*, 112 Ohio St. 3d at 403, 860 N.E. at 104 (quoting *State v. Townsend* 186 N.J. 473, 496-98, 897 A.2d 316, 330-31 (2006)). Additionally, under *Haines* an expert cannot opine that an alleged victim was a battered woman, nor may an expert testify that defendant was a battered woman. 112 Ohio St. 3d at 403, 860 N.E. at 104. Robinson’s expert witness testimony violated *Haines*’ prohibition on victim-specific assessments, addressing whether or not the Allen’s behavior was in conformity with the general behavior of a domestic violence which goes to the ultimate issue to be determined by the jury.

Though the expert witness did not explicitly say Allen was a battered woman, she said everything but. The expert witness acknowledged she had personally observed cases of domestic violence involving women of Allen’s socioeconomic status, education level, and precise profession, with similar injuries. Tr. 661-62; 668. The specific characteristics narrowed the

general pool in such a manner that they were eventually indicative of only Margaret Allen. It is one thing to explain the cycle of violence and leave it to the jury to determine if the relationship at issue fits that pattern; it is quite another for the expert witness to testify that she has personally observed cases of domestic violence involving women who possessed Allen's exact traits. The specific expert testimony takes away the jury's ability to make its own determination as to whether or not Allen was a victim of domestic violence – an ultimate issue of this case reserved for the providence of the jury, not an expert witness. When an authoritative figure testifies to such facts, there is no room left for the jury to make its own determination because all the questions have been answered and all the gaps filled by the excessive application of details which should have been left for the jury to apply and decide for itself. The victim-specific characteristics commented on in Robinson's testimony usurped the jury's role in determining whether Allen was a battered woman. The court's failure to instruct the jury to the proper use and limitation of the testimony was error resulting in prejudice to the McKelton.

C. The expert testimony should have been excluded under Evidence Rule 403(A) because it is more prejudicial than probative.

Robinson reviewed Allen's journal and other writings as well as a letter written to Allen by McKelton. Tr. 654. The presentation to the jury that these intimate, personal writings were reviewed by the expert gives the expert witness's weight it should not be afforded, in violation of Evid.R. 403(A). Because only general characteristics can be shared to educate the jury and no assessment can be made about a particular alleged victim, the entirety testimony is tainted by the expert witness's underling knowledge of the specific contents of Allen's writings. There was no need to make this information known, and it served to confuse the jury and prejudice McKelton.

The domestic violence expert witness was provided by the State only with limited materials, excerpts from the journal written by Allen, "some writings that she had done" and a

letter from Margaret Allen allegedly from Mr. McKelton. Tr. 654. The implication is that the domestic violence expert was called because the materials' contents revealed incidents of domestic violence or symptoms of battered woman's syndrome. The contents were not disclosed during the course of her testimony. Defense counsel objected during and after the completion of her testimony, noting, "She never identified what portions of the journal. She said a letter written by the defendant. Tr. 677. If the expert was there to testify in generalities, no personal information should have been necessary; and if it is was deemed necessary it should have been made known so its contents could be properly challenged.

Prior to the expert witness's testimony, the State indicated in its discovery responses to defense counsel that Robinson would be speaking in generalities regarding the dynamics of domestic violence. The State conceded that it "didn't particularly note why she was being called." Tr. 650. Further the State conceded that *Haines* "specifically held that experts in this type of testimony cannot get specific about the particular victim and make a finding about a particular victim" and that Ms. Robinson would testify "within the limitations of that case." Tr. 652. The limited purpose for which the expert witness was called to testify was impermissibly expanded at trial by the State and erroneously allowed by the trial court which resulted in prejudice to the McKelton.

D. Conclusion

The testimony of the State's domestic violence expert was both improper and unfairly prejudicial under Evid.R. 403(A). McKelton is therefore entitled to a new trial, or alternatively, a new penalty phase under O.R.C. § 2929.06(B).

Proposition of Law No. XV

The right to the effective assistance of counsel is violated when counsel's deficient performance results in prejudice to the defendant. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 10.

Calvin McKelton's Sixth Amendment right to effective counsel was violated by the cumulative effect of errors and omissions by his trial counsel.

A. Standards for ineffective counsel claim.

The standard for assessing attorney performance found in *Strickland v. Washington*, 466 U.S. 668 (1984) applies to this claim. Under *Strickland*, this Court must determine if counsel's performance was deficient in view of "prevailing professional norms." 466 U.S. at 687, 689.

Counsel's actions are presumed reasonable. But *Strickland* also establishes that a reasonable investigation of both law and facts is required before a choice by counsel may be deemed strategic or tactical. *Id.* at 691. "[S]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation. ... A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (citations and internal quotation marks omitted).

When assessing the performance prong in a capital case, this Court is informed by the American Bar Association Guidelines for the Appointment of Counsel in Death Penalty Cases (ABA Guidelines). *See Wiggins*, 539 U.S. at 524. "The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence ..." *Id.* (citation and internal quotation marks omitted with emphasis in original). And in reviewing McKelton's claim that relevant mitigation was not presented, "[the] focus [is] on whether the investigation supporting counsel's decision not to

introduce mitigating evidence ... was *itself reasonable*.” *Id.* at 523 (citations omitted and emphasis in original).

If counsel’s performance is deficient, this Court must determine whether McKelton suffered prejudice resulting from counsel’s error. *Strickland*, 466 U.S. at 687. Prejudice results when this Court’s confidence in the result of McKelton’s trial is undermined by counsel’s error. *Id.* at 694. McKelton has no requirement to demonstrate that counsel’s error was outcome determinative under the *Strickland* prejudice prong. *Id.* at 693. Regarding McKelton’s claim that relevant mitigating evidence was not presented, this Court “[i]n assessing prejudice, reweigh[s] the evidence in aggravation against the totality of available mitigating evidence.” *Wiggins*, 539 U.S. at 534. *See also, Dickerson v. Bagley*, 453 F.3d 690, 699 (6th Cir. 2006) (quoting *Wiggins*, 539 U.S. at 537).

B. Argument

1. Counsel not prepared to defend.

Counsel failed in several ways to provide a basic defense for McKelton. To a degree, counsel’s failure may be attributed to the non-disclosure of certain witnesses until the end of voir dire. McKelton incorporates Proposition of Law No. IV hereby reference to highlight the adverse impact that the withholding of these witnesses’ names had upon counsel’s trial performance. Regardless of the effect on counsel’s performance, counsel breached their duty to McKelton with the following errors and omissions. *See* ABA Guidelines 10.7, 10.10.1.

2. Counsel failed to object to the State’s misconduct

Counsel were ineffective for failing to object to questions asked by the State that were without a good faith basis. *See* Proposition of Law No. VIII. The State improperly asked Margaret Allen’s physical therapist, Mindie Nagal, if her treatment plan would have differed “if

she had told you her boyfriend broke her ankle by slamming the car door on it repeatedly.” Tr. 481-82. The State also improperly ask Audrey Dumas, “And when – when [McKelton] told you in February 27th, 2009, you started blowing his phone up for the next three hours, you didn’t ask him about why he wanted you to do that either, did you?” Tr. 1506.

In addition, counsel failed to object in numerous instances:

- (a) Counsel failed to object to the victim impact evidence admitted during the trial. *See* Proposition of Law No. VIII. This included the following testimony:
- Officer Kelly Smith testified that Allen’s niece, Ziala Danner, was so scared that her knees were knocking together and said she had never seen anyone that scared in her life.
 - Mindie Nagal testified that Allen was “very bright,” “vibrant,” “outgoing,” and “really sweet.” Tr. 485.
 - Det. Eric Karaguleff testified that when Germaine Evans’ body was found, his family and friends were “upset,” “emotional,” “crying,” “yelling,” “screaming,” and “wailing.” Tr. 1315.
- (b) Counsel failed to object to gratuitous evidence of McKelton’s bad character.
- Det. Gregory testified that he had listened to “hundreds of hours of tapes involving Calvin McKelton” referring to jail phone calls made and listened to prior to this investigation. Tr. 706.
 - The State asked a series of questions of Crystal Evans about where McKelton’s money came from, clearly implying that he was a drug dealer. Tr. 1065-66. Even after Evans admitted that “he probably was selling drugs,” the State continued asking questions about McKelton’s money.
- (c) Counsel failed to object to the improper use of Gerald Wilson’s prior, unsworn statement (admitted for impeachment purposes) as substantive evidence. *See* Propositions of Law VIII and VI.
- (d) Failed to object to the State’s using of this information in closing argument. “All I know is that Calvin talks about if this doesn’t give me my clothes, I’ll choke her out like I did Missy and get away with it. And Jello tells him, Dude, you have to keep your mouth shut. You know, we got people in the car. And Calvin goes, Oh, G? He’s cool. He knows if he says anything, I’ll do him like I did Mick.”

Tr. 2003. This information comes entirely from Wilson's statement to detectives that was admitted for the purpose of impeaching Wilson.

(e) Counsel failed to object to the State's mischaracterization of evidence. *See* Proposition of Law VIII.

- In closing arguments, the State argued that, "[i]t's almost beyond parity [sic] to sit here and imagine how it happened, the defendant having a tattoo [sic] that says, straight killer . . ." Tr. 1975.
- In closing arguments, the State misstated Charles Bryant's testimony, saying McKelton told Bryant that "he choked the bitch out" and that Allen was a "scandalous bitch." Tr. 1975-76. Bryant never used the word "bitch." Tr. 989.
- The State, in its closing, told the jury that Gerald Wilson, as he got off the stand, said to McKelton, "I got you, bud or bro." Tr. 2003-04. What Wilson said was, "Later on, Bro." Tr. 1660. The implication was that Wilson lied on the stand to help McKelton.
- The State, in its closing, mischaracterized evidence related to Audrey Dumas. The prosecutor argued that Dumas' role was to be McKelton's alibi for Allen's death and provide an extra layer of alibi for Evans' death. Tr. 1993. The State told the jury that McKelton planned to have "Audrey blowing [his] phone up all night long, so that later [he] can say, hey, I'm asleep with Crystal." Tr. 1994. Dumas never said this in her testimony.

3. Counsel failed to object to the State's questioning and improper admission of evidence during Crystal Evans' testimony

The trial court allowed the State to use leading questions in its direct examination of Crystal Evans pursuant to Evid.R. 611(C). Counsel objected to the State's use of leading questions with Evans. Tr. 1027-28. However, counsel did not object when that questioning went beyond what was necessary to "develop [Evans'] testimony." Evid.R. 611(C). Counsel also failed to object to the use of Evans' prior statement in the State's questioning and to its admission into evidence. Counsel also failed to object to the admission of the communications—in the form of letters and phone calls—between Evans and McKelton. *See* Proposition of Law No. X. McKelton incorporates Proposition of Law No. X herein as if fully rewritten.

4. Counsel failed to object to hearsay

Counsel failed to object to certain hearsay testimony (*see* Proposition of Law No. XI):

- The transcript of Crystal Evans' March 2, 2009 statement to detectives was admitted into evidence. Included in that transcript were many hearsay statements made by the detectives. McKelton hereby incorporates Proposition of Law No. XI as if fully rewritten herein.
- Det. Karaguleff's testimony repeated what Germaine Evans' family members and friends said to him at the crime scene. McKelton hereby incorporates Proposition of Law No. XI as if fully rewritten herein.
- Sheridan Evans testified about a conversation she had with McKelton and "Red." She repeated statements made by "Red" in her testimony. McKelton hereby incorporates Proposition of Law No. X as if fully rewritten herein.
- Marcus Sneed testified about what he had heard "in the street" about McKelton killing Allen and Evans. Tr. 1599, 1602. McKelton hereby incorporates Proposition of Law X as if fully rewritten herein.

5. Counsel failed to request limiting instructions

Counsel were further ineffective because they failed to request limiting instructions to the use of Crystal Evans' and Gerald Wilson's prior statements. *See* Propositions of Law X and VI.

6. Counsel failed to object to irrelevant, prejudicial, and inadmissible evidence

The jury in McKelton's case did not need to know McKelton tattoos of pistols and phrases like "straight killer." They did not need to know that he had a copy of The Anarchist Cookbook in his bedroom. They did not need to know he "beat the living shit" out of his "babies' mammas". They did not need to hear about "rumors" or how "everybody on the street" was saying he was guilty of the crimes he was charged with. Inexplicably, McKelton's attorneys failed to object to all these prejudicial and irrelevant items and more. The inadmissibility of the items discussed below are discussed in more detail in Proposition of Law No. V. The staggering list of what McKelton's attorneys failed to object to includes:

- Pictures of his irrelevant tattoos. The tattoos that had pictures of pistols and phrases like “straight killer.” Tr. 877-9 Ex. 45D, 45F, 45G. Defense counsel explicitly declined to object before the photographs were published. Tr. 876. Defense counsel did not object when the State used McKelton’s tattoos to argue that he was guilty in closing. Tr. 1975.
- The statement of Crystal Evans to Detective Luke. This which contained hearsay, including that McKelton “beat the living shit” out of his “babies’ mammas,” that “everybody” was telling Crystal Evans she should be scared of McKelton, and that his former attorney Ken Lawson knew things that Luke tells Evans she “bet you’d shit your pants” if she knew. Ex. 56, pp. 26, 29, and 36. Defense counsel specifically declined to object. Defense counsel did not even request any portion of the statement be redacted, even though much of it was irrelevant, prejudicial, and improper hearsay. Tr. 1871.
- Photographs of a book called “The Anarchist’s Cookbook” in McKelton’s bedroom. Tr. 822-3.
- Repeated mentions of McKelton’s involvement with selling drugs. Tr. 913-4, 992, 1065-6, 1734. These included prejudicial details like McKelton being involved with tens of thousands of dollars’ worth of crack cocaine and that McKelton had been selling drugs since the late 1990s. Tr. 913-4, 1734.
- Irrelevant questioning and testimony about McKelton being involved in robberies and murders. Tr. 1457-8, 1600, 1604.
- Vulgar and irrelevant letters from McKelton to Crystal Evans. Tr. 1870, Exs. 47-51. McKelton’s attorneys did not even request any of the most explicit portions of the letters be redacted. Tr. 1870.
- Prejudicial and inadmissible autopsy photos introduced at trial. Tr. 1872.
- The irrelevant detail about McKelton getting an idea from a rap song, in order to appeal to the prejudices of the jury. Tr. 915. This detail was repeated in closing arguments and the mitigation phase of trial. Tr. 1979, Mit. Tr. 19.
- When Detective Gregory referred to McKelton as “C-murderer.” Tr. 1805.
- When Sheridan Evans testified that the police knew McKelton was a “serial killer.” Tr. 1836.
- The improper introduction of McKelton’s intimidation conviction. Tr. 991. McKelton’s attorneys never even filed a response to the State’s notice that it intended to use the conviction pursuant to 404(B). Dkt. 146.

- When Eric Karaguleff testified that some unknown members of a group at Inwood Park “communicated” to him that Evans had “killed by his friend, Calvin McKelton. . . And they said it was because he helped move that lawyer’s body.” Tr. 1316.
- When Marcus Sneed testified “everybody was saying in the street” that McKelton had killed Allen and Evans. Tr. 1598-9, 1602.
- When Crystal Evans testified that there were “rumors” that McKelton was involved in Evans’ death. Tr. 1108.
- The irrelevant phone call where McKelton swears at Audrey Dumas and demands she bring him money, and the misleading line of questioning that followed. Tr. 1455-8.
- The State’s comments in closing about its witness testifying McKelton called Allen a bitch, when the witness never made any such comments. Tr. 1975-6, *see* Tr. 989.
- Jenny Luke’s hearsay in her interview with Crystal Evans where she tells Crystal McKelton “Beat the living shit” out of former girlfriends and that Evans would “shit (her) pants” if she knew what Ken Lawson said about McKelton. Tr. 1871, Ex. 56 at p. 26, 29. Counsel never even requested any of the most inflammatory portions of the statement be redacted.

McKelton received a death sentence where the State was unrelenting in introducing irrelevant, inadmissible, and prejudicial information and his attorneys often did not bother to object. This is a far from the “skill and knowledge” that *Strickland* demands, and the consequence of counsels’ deficiencies is that the jury was overwhelmed with prejudicial information throughout McKelton’s entire trial. *Strickland*, 466 U.S. at 684 (1984).

6. Counsel failed to adequately object to the introduction of the statements of Margaret Allen

McKelton received ineffective assistance of counsel where his attorneys failed to adequately object to State’s use of the statements of Margaret Allen and the reply to the State’s Notice of Intent to Use Evidence Pursuant to R. Evid. 804(B)(6). Dkt. 147. Evid.R. 804(B)(6) requires the proponent of the statement to give “advance written notice” and “a fair opportunity to contest the admissibility of the statement” as a protection for the adverse party. Defense

counsel failed to avail McKelton of this protection, which resulted in confusion, the introduction of inadmissible hearsay, and prejudice to McKelton.

As discussed in Proposition of Law No. IV, the statements of Allen were not admissible. Defense counsel should have briefed the issue for the court, and explained that the forfeiture doctrine does not apply without a showing that the wrongdoer made the declarant unavailable with the purpose of preventing them from testifying as a witness. *Giles v. California*, 554 U.S. 353, 368 (2008); Evid.R. 804(B)(6) No reasonable strategy justifies defense counsel's oversight.

While counsel did object and preserve the issue, failure to reply to State's Notice of Intent to Use Evidence Pursuant to Evid.R. 804(B)(6), (dkt. 147) led to an uninformed judge who made an incorrect decision using an incorrect standard. The discussion of the issue at trial was dominated by the distracting issue of when the correct time was for the defense to object, rather than the substantive issue. Tr. 403-04. When making his ruling in the heat of trial, Judge Sage ignored the purpose requirement, stating "Clearly the allegation in this case is that this defendant murdered the victim, Ms. Allen, and I think this is exactly what the forfeiture by wrongdoing exception is. So therefore, I'm going to permit it under that exception to the hearsay rule." Tr. 404. The trial court later applied incorrect standards again. Tr. 610. As a result of his counsel's failure, the jury heard a barrage of prejudicial statements, including McKelton and his friends being referred to as "killers." (See Proposition of Law IV for the complete list)

7. Counsel failed to request a voir dire of the jury after a courtroom incident

On October 8, 2010, there was an incident in the courtroom. Nothing appears on the record at the time that the incident occurred. However, at the end of the day, the State asked to put on the record that as they were taking an afternoon break, a man who was leaving the courtroom "turned and said something towards the prosecution table and towards the defense

table” and then left. Tr. 1408. According to the prosecutor, it caused a security concern in the hallway. *Id.* The prosecutor stated that the jury was not in the courtroom when this occurred.

The trial court noted that the man was quickly escorted out and that he believed that this man was associated with the victim. Tr. 1409. The trial court also noted that the incident occurred as the jury was leaving. *Id.* Defense counsel put on the record that the jury was still in the courtroom when the “outburst” occurred, and that juror number six remained and watched as the man was escorted out while still saying something. Tr. 1409-10.

At the same time that the incident with the man being escorted out was occurring, Juror Number 2 was either not feeling well or actually fainted. Again, perceptions varied. During voir dire, Juror Number 2 indicated that she suffers from a medical syndrome that causes her to pass out extremely easily. Tr. 115-18. The trial court said the juror was feeling uneasy. Tr. 1409. Defense counsel stated for the record that she fainted and was escorted out of the courtroom. *Id.* The State noted that she did not faint. Tr. 1412.

The trial court offered to voir dire the jury to make sure that none of the jurors saw anything that would prejudice their ability to be fair and impartial. Tr. 1410. Defense counsel declined. *Id.*

Defense counsel should have requested that the jurors be voir dired. Given the confusion about what the man said and whether the jury was in the courtroom and heard him as well not being sure about whether Juror Number 2 fainted, a voir dire of the jury was the only way to be sure that each of them could remain fair and impartial.

8. Counsel failed to move to sever Counts One and Two from the remaining counts in the indictment

The indictment against McKelton included eleven counts. Count One of the indictment charged McKelton with felonious assault of Margaret Allen from a May 4, 2008 incident in

which she broke her ankle. Count two charged McKelton with domestic violence from the same incident. The State tried the murder and aggravated murder charges with the felonious assault and domestic violence charged from May of 2008. The felonious assault and domestic and violence charge were not related to the murder which occurred in July of 2008 and should not have been tried together.

Ohio R. Crim. P. 8 provides in part:

(A) Joinder of offenses. Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.

Ohio R. Crim. P. 14 provides in part:

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires.

Defense counsel was deficient for failing to request that counts one and two be tried separately from the remaining convictions in the indictment because McKelton was prejudiced by the joinder of the offenses. The benefit in the economy of a single trial must be considered against the disadvantages to the defendant. *Drew v. United States*, 331 F.2d 85, 88 (C.A.D.C. 1964) ("the justification for a liberal rule on joinder of offenses appears to be the economy of a single trial"). Among the arguments against joinder due to prejudice to the defendant are "(1) he may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered

separately, it would not so find." *Id.* The court in *Drew* noted also that "a less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one." *Id. see State v. Roberts*, 62 Ohio St. 2d 170, 405 N.E.2d 247 (1980).

Relevant to McKelton's case is the observation in *Queen v. King* by Justice Hawkins:

***I pause here to express my decided opinion that it is a scandal that an accused person should be put to answer such an array of counts containing, as these do, several distinct charges. Though not illegal, it is hardly fair to put a man upon his trial on such an indictment, for it is almost impossible that he should not be grievously prejudiced as regards each one of the charges by the evidence which is being given up on the others.

Id., citing *Queen v. King*, 1Q.B. 214, 216 (1897).

Joinder is not proper where the counts are not "for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence." *Drew*, 331 F.2d at 88, citing *McElroy v. United States*, 164 U.S. 76, 79-80 (1896).

In this case there was a danger that "the jury used the evidence of the one crime to convict of the other or cumulated the evidence to find guilt under both charges." *Drew*, 331 F.2d at 89. Because of the nature of the testimony, "...the possibility of the jury's becoming hostile or inferring guilt from belief as to criminal disposition is...substantial." *Id.* at 91.

It has long been a principle of law that evidence of a particular crime is inadmissible to prove a disposition to commit crime, whereby the jury may infer the defendant committed the crime charged. "...[T]he likelihood that juries will make such an improper inference is high, [therefore] courts presume prejudice and exclude evidence of other crimes unless that evidence can be admitted for some substantial, legitimate purpose. The same dangers appear to exist

when two crimes are joined for trial, and the same principles of prophylaxis are applicable." *Id.*, at 89-90.

If the jury may become confused, the court should order severance. *Drew*, 331 F.2d at 92. In McKelton's case the evidence and arguments of the prosecutor were so improperly intertwined as to create an unfair danger of confusion in the minds of the jurors when they came to consider the charges of aggravated murder. The prosecutor further guaranteed that the evidence would not maintain the required simplicity by including testimony of "bad character" and other acts to the prejudice of Appellant. (See Proposition of Law No. V). The combination of the separate offenses had a cumulative effect on the jury. In fact, the evidence of aggravated murder in the present case was actually very weak; this made joinder prejudicial. *Torres*, 66 Ohio St. 2d 340 at 343, 421 N.E.2d 1288 at 1291, citing *United States v. Ragghianti*, 527 F.2d 586 (9th Cir. 1975) See Proposition of Law No. XIII. The prejudicial effect of the joinder prejudiced McKelton in the penalty phase as well, as the trial court allowed the admission of evidence from the trial phase in the penalty phase.

The felonious assault and domestic violence counts and aggravated murder offenses in McKelton's case were distinct offenses, "not provable by the same evidence and in no sense resulting from the same series of acts." *Id.* The prejudice in McKelton's case arose because the jurors were likely to use the evidence of counts one and two in their consideration of the aggravated murder charge.

It was deficient for defense counsel to fail to move to sever the charges in this case given the fact that joinder was not proper in this case. Counsel deficiency prejudiced McKelton. The admission and consideration by the jury of evidence of counts one and two was prejudicial to

McKelton. Moreover, there is an unacceptable risk that the jury considered evidence of these two counts when reaching its determination to sentence McKelton to death.

9. Further evidence of ineffectiveness.

Further demonstrating that they were ineffective, counsel failed to question a juror who was dismissed during the penalty phase deliberations. Six hours into penalty phase deliberations, the jury sent a note to the court indicating that Juror Number 31 was not participating in deliberations. Mit. Tr. 147. The trial court asked the jury for clarification. Mit. Tr. 149. The trial court noted on the record that it needed to determine whether the juror had a personal reason for not participating or was just sticking to her decision. Mit. Tr. 149-50. The jury responded to the court, stating that the juror did not want to be there because “[s]he has plans for this week that were supposed to start today” and indicating that when asked which way she would vote, she said she did not care. Mit. Tr. 151. While the court and attorneys were discussing what to do next, defense counsel pointed out that all of the jurors had indicated that they could sit for the full time on this case, and that when told when they would have to return for the penalty phase, none voiced an objection. Mit. Tr. 155. Before the trial court took any further steps, while dinner was being brought into the jury, Juror Number 31 told the bailiff that her mother was scheduled to have surgery the following day and that she did not think deliberations would take an inordinate amount of time. Mit. Tr. 160.

The trial court brought Juror Number 31 out to the courtroom where there was media present (although they were ordered not to film or record). Mit. Tr. 164. The following questioning took place:

The Court: *** First of all, I’ve had some indication through communication that you’ve had with Ms. Jones that apparently a family member –

Juror: I need to be in Virginia in the morning.

The Court: I received several communications from the other members of the jury that you're – that you are now refusing to participate.

Juror: I can't, correct.

The Court: You're just – you cannot because due to stress of –

Juror: I can't think of anything else.

The Court: Okay. So unequivocally you just do not want to continue and you're refusing to participate in any further discussions; is that an accurate statement?

Juror: Uh-huh.

Mit. Tr. 164. The trial court asked defense counsel if they had any questions for the juror. *Id.* Defense counsel declined. *Id.* The trial court dismissed the juror (*id.*), replaced her with an alternate (mit. tr. 168), and instructed the jury to begin deliberations anew (mit. tr. 169). Defense counsel objected to the juror being excused but offered no alternative suggestion. Mit. Tr. 167.

R.C. § 2945.29 provides that if “a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged.” An alternate juror must then be selected to take the place of the discharged juror. *Id.*

Given that this was a capital case and the juror was refusing to participate in the penalty phase deliberations, greater precautions were needed than what was given in this case. It is possible that this juror was a holdout for a life sentence. She herself did not go to the court asking to be dismissed. The rest of the jurors wrote to the court saying that Juror Number 31 was refusing to participate in deliberations. If the Juror Number 31 was in need of getting to her mother's side, presumably she would have approached the court. Moreover, not participating in deliberations would only serve to prolong the process, something she stated that she did not want to do. If the real problem was that Juror Number 31 was a holdout and was therefore struggling with the other jurors, it seems unlikely that she would have said this in a courtroom with media

present. It is all the more suspicious because once Juror Number 31 was replaced, it took only two or three hours for the jury to reach a verdict for a death sentence. Mit. Tr. 176.

Defense counsel had a duty to ensure that Juror Number 31 was not a holdout for a life sentence.

D. Conclusion.

The “cumulative effect” of counsel’s errors and omissions violated Calvin McKelton’s Sixth Amendment right to effective counsel. *See State v. Gondor*, 112 Ohio St. 3d 377, 392, 860 N.E.2d 77, 90 (2006) (citing *State v. DeMarco*, 31 Ohio St. 3d 191, 196, 509 N.E.2d 1256, 1261 (1987); *Stouffer v. Reynolds*, 168 F.3d 1155, 1163-64 (10th Cir. 1999)). McKelton is entitled to a new trial or alternatively a new penalty phase under O.R.C. § 2929.06(B).

Proposition of Law No. XVI

The right to the effective assistance of counsel is violated when counsel's deficient performance results in prejudice to the defendant in the sentencing phase of his capital trial. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 10.

Calvin McKelton's Sixth Amendment right to effective counsel was violated by the cumulative effect of errors and omissions by his trial counsel in the sentencing phase of his capital trial.

A. Standards for ineffective counsel claim.

The standard for assessing attorney performance found in *Strickland v. Washington*, 466 U.S. 668 (1984) applies to this claim. Under *Strickland*, this Court must determine if counsel's performance was deficient in view of "prevailing professional norms." 466 U.S. at 687, 689.

Counsel's actions are presumed reasonable. But *Strickland* also establishes that a reasonable investigation of both law and facts is required before a choice by counsel may be deemed strategic or tactical. *Id.* at 691. "[S]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation. ... A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (citations and internal quotation marks omitted).

When assessing the performance prong in a capital case, this Court is informed by the American Bar Association Guidelines for the Appointment of Counsel in Death Penalty Cases (ABA Guidelines). *See Wiggins*, 539 U.S. at 524. "The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence ..." *Id.* (citation and internal quotation marks omitted with emphasis in original). And in reviewing McKelton's claim that relevant mitigation was not

presented, “[the] focus [is] on whether the investigation supporting counsel’s decision not to introduce mitigating evidence ... was *itself reasonable*.” *Id.* at 523 (citations omitted and emphasis in original).

If counsel’s performance is deficient, this Court must determine whether McKelton suffered prejudice resulting from counsel’s error. *Strickland*, 466 U.S. at 687. Prejudice results when this Court’s confidence in the result of Dean’s trial is undermined by counsel’s error. *Id.* at 694. McKelton has no requirement to demonstrate that counsel’s error was outcome determinative under the *Strickland* prejudice prong. *Id.* at 693. Regarding McKelton’s claim that relevant mitigating evidence was not presented, this Court “[i]n assessing prejudice, reweigh[s] the evidence in aggravation against the totality of available mitigating evidence.” *Wiggins*, 539 U.S. at 534. *See also, Dickerson v. Bagley*, 453 F.3d 690, 699 (6th Cir. 2006) (quoting *Wiggins*, 539 U.S. at 537).

B. Argument

The record demonstrates a lack of preparation by trial counsel in the penalty phase. The mitigation case presented by counsel was paltry. *See* ABA Guidelines 10.7, 10.11. Counsel’s opening statement took up barely more than two pages of transcript, and it was devoid of advocacy. Counsel told the jury they would be calling several witnesses, including family members and other people, to give the jury some insight into Calvin McKelton. Mit. Tr. 22. The witnesses gave lukewarm testimony and the presentation was not cohesive. No expert was presented, or even retained. And counsel’s closing essentially gave the jury an out to vote for death.

1. The mitigation presentation was barebones and not cohesive.

Defense counsel called three witnesses: McKelton's thirteen-year-old daughter, Kayla; McKelton's mother, Audrey; and Crystal Evans. Kayla's testimony was a mere three pages. Mit. Tr. 32-35. She testified about getting good grades in school (mit. tr. 33); said that she loves her father and that he is always there for her (mit. tr. 34); and told the jury that her father stresses the importance of education (mit. tr. 35). She then stated that "[i]t would be crazy if he wasn't around because he's an innocent man" and said that she did not "understand why he's guilty of facing the death penalty." *Id.* Defense counsel asked if her mother had kept her from media reports about the case, and Kayla said yes. *Id.* While it was clear that Kayla loved her father and did not want to see him face the death penalty, it would also have appeared to the jury that Kayla was not aware of the evidence against her father.

Next, McKelton's mother, Audrey McKelton testified. Ms. McKelton testified about the fact that she was very young—fourteen or fifteen—when she had McKelton. Mit. Tr. 39. She told the jury that McKelton's father was not around when he was a child. *Id.* at 40. She testified at length about her struggles with crack cocaine abuse (*id.* at 42-43, 44, 45, 49, 51); the fact that she supported her family by engaging in prostitution (*id.* at 42-43, 46-47, 49); and her own arrests, convictions, and incarcerations (*id.* at 46-47, 49-50, 51). She also told the jury that her oldest son was murdered. *Id.* at 38. And she testified that McKelton began living with her mother around age eight. *Id.* at 49.

Last, Crystal Evans testified. She testified that she has a child by McKelton. *Id.* at 60. At best her testimony was tepid. When asked what she wanted to see happen to McKelton for the death of her brother, she said, "I don't believe in the death penalty, so I don't want Calvin to get the death penalty. And think it's kind of like the easy way out, but I believe he should get

life in prison.” *Id.* at 61. She said that she had mixed emotions. *Id.* And when asked if McKelton would continue to have contact with their child, she said, “I’m in a state of shock. I really don’t know what I –I don’t know.” *Id.* at 62. She was the last of the mitigation witnesses, save McKelton via an unsworn statement. *Id.* at 67-79.

2. Counsel failed to retain a mitigation specialist or mitigation expert.

No experts were presented in mitigation. Despite the importance of utilizing an expert to provide “psychological . . . insights into the client’s mental and/or emotional state and life history that may explain or lessen the client’s culpability” (ABA Guideline 10.11(F)(2)), the record reveals that counsel never even retained a psychological expert to evaluate McKelton.

The trial court told counsel that it would grant funds for an investigator, a mitigation specialist, a mental health professional, and a forensic expert. 2/16/10 Hrg. Tr. 9. The court reduced that to writing in an entry dated March 22, 2010.¹³ Dkt. 20. At a scheduling hearing held in March, the trial court noted that it had earlier granted funds for experts and asked, “I assume . . . those experts have been retained and that they are hard at work; is that an accurate summary of what is happening in this case?” 3/4/10 Hrg. Tr. 9. Counsel responded, “Yes your Honor.” *Id.* This was simply untrue. Counsel never hired a mitigation specialist or a mitigation expert.¹⁴ McKelton informed the trial court of this fact in September. 9/17/10 Hrg. Tr. 12. At that hearing, in which McKelton was seeking to have his attorneys removed from his case, the trial court noted, again, that it had approved funds for experts “because [it] was concerned that [McKelton] should have competent representation.” *Id.* The trial court also noted that counsel

¹³ For reasons that are unclear, counsel filed a generic written motion for funds to hire experts in May. Dkt. 59.

¹⁴ Counsel filed one Request for Court Paid Experts and/or Expenses form in this case. Dkt. 235. That form requests funds for Fitch Reporting, Inc.; Jackson-Whitney Reporting; and Quest Associates of Ohio. *Id.*

had assured him, over six months prior, that “all those experts were engaged and they were diligently working” *Id.* at 11. McKelton told the court, “My lawyers have not hired the special experts needed to assist me in my death penalty case.” *Id.* at 12-13.

Despite having asked for expert funds, during mitigation counsel told the jury that he “could have a psychologists [sic] come in her [sic] to say, well, I went to the jail and I interviewed him and I did this test and it showed this and blah, blah, blah, blah, blah, blah, a bunch of psycho babble.” Mit Tr. 118-19. Counsel went on to say that such an approach would be “trying to offer you an excuse, a justification, a reason for why what happened happened[,] [a]nd we’re not going to do that.” *Id.* at 119. But an expert could have explained McKelton and the crimes and could have given the jury a reason to vote in favor of a life sentence. As it stands, the jury was given no reason to do so. McKelton’s trial counsel failed to conduct a reasonable investigation into his history and background and therefore provided ineffective assistance. *Wiggins*, 539 U.S. 510; *State v. Dixon*, 101 Ohio St. 3d 328, 805 N.E.2d 1042 (2004).

A mitigation specialist could have done a proper investigation into McKelton’s history and background and could have worked with counsel and the witnesses to prepare a more impassioned and more cohesive mitigation presentation. No records were utilized in the mitigation presentation. There were no school, medical, psychological, Department of Youth Services, or Children’s Services records referenced. A mitigation specialist would have requested those kinds of records, which could have contained helpful information about McKelton’s background. Moreover, if an expert had been retained, he or she could have used information contained in any records to help evaluate McKelton and to give the jury a full picture of who McKelton was and how he came to be in front of them. None of this was done.

3. The defense closing was devoid of advocacy and virtually gave the jury all the reasons it needed to vote for death.

Defense counsel's closing did virtually nothing to convince the jury that a life sentence was appropriate. Rather than advocating for a life sentence, counsel told the jury, "[a]nd now you're back today to help us determine what the most appropriate punishment is for Calvin McKelton." *Id.* at 103. The closest counsel came to advocacy, was when he told the jury that the law required them to consider mitigating circumstances. *Id.* at 105. Counsel then told the jury that "mitigating factors are not excuses. They're not reasons. They are not justifications as to why what has happened here has happened. They are to be considered by all 12 of you in order to determine what is the most appropriate sentence in this case for Mr. McKelton." *Id.* at 108. Counsel told the jury that the mitigating factors "reduce or may reduce the appropriateness of a death sentence." *Id.*

Defense counsel moved from a mere lack of advocacy to sounding like a prosecutor. Counsel told the jury that the specification—the killing of a witness—hits at the heart of the judicial system and that every witness to a crime should be able "to come to that witness stand and testify . . . free from bias, influence, coercion and free from death." *Id.* at 110. Counsel told the jury to take the options of 25 to life and 30 to life off the table when they go back to the jury room. *Id.* at 111. He told them, "I don't even want you to consider those, because ladies and gentlemen, I submit to you if you do go back and consider those two options in the facts and circumstances of this case, if you consider those options, they demean the seriousness of this offense." *Id.*

Counsel continued to tell the jury that McKelton was a bad person and to push them in the direction of a death sentence:

- “I’m not asking you to like him. I don’t want you to like him. You shouldn’t like Calvin McKelton, not for who he is, not for what he’s done. That is not what this is about. If you agree, that death is the most appropriate sentence for him, if you believe that the aggravating circumstances outweighs [sic] any of the mitigating factors that we presented, then follow the law and impose the sentence of death on Calvin McKelton. If you think that is what is appropriate in this case.” *Id.* at 12-21.
- “When he’s out on the street, he knows how to do nothing else but to hustle and use drugs and to sell drugs and be a menace to society. He cannot conform his conduct to the requirements of a civilized society.” *Id.* at 125.
- Counsel refers to McKelton’s “scandalous life.” *Id.* at 126.

Defense counsel undercut whatever small effect Kayla McKelton’s testimony may have had on the jury:

- “Does she love her father? Absolutely she loves her father, despite who he is and despite what he’s done. Maybe she shouldn’t love her father, but she does love him.” *Id.* at 112.
- “Mr. McKelton obviously, despite his faults and despite his criminal record and despite what a bad person he is, has had a positive influence and impact on that young lady.” *Id.*
- “Or would you rather have somebody as bad as he is, as bad as Calvin McKelto is, trying to influence his children” *Id.* at 113.
- “Kayla comes in here and tells you all that she’s done and all that she’s been able to overcome despite the fact that Calvin McKelton is her father. And I’m sure her mother had a big part in that too.” *Id.* at 114.
- “That little girl obviously has been influenced by her father, despite everything that he has done.” *Id.* at 127.

Defense counsel went on to tell the jury that McKelton had manipulated and taken advantage of his grandmother who had cared for him when his mother could not:

- “You’ve heard about the horrible things that he’s done. *** You can only imaging [sic] how Calvin McKelton manipulate [sic] that lady to take advantage of her too, to the point where she ultimately threw him out of the house.” *Id.* at 115-16.
- “You have to grow up quickly living on the street without the support of either one of your parents, maybe the support of your grandmother, taking advantage of her and doing what you want to do.” *Id.* at 117.

There had been no testimony suggesting that McKelton had manipulated his grandmother. McKelton's mother testified that McKelton lived with his grandmother (*id.* at 49, 51), and McKelton said in his unsworn statement that his grandmother had put him out because he was not following her rules (*id.* at 71).

Defense counsel further tipped his hand about how he really felt about McKelton when he told the jury that "until today, until he took that witness stand and talked to you ladies and gentlemen, I never really listened to anything he had to say."¹⁵ *Id.* at 124.

A criminal defendant's right to the effective assistance of counsel extends to closing arguments. *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Bell v. Cone*, 535 U.S. 685, 701-702 (2002)). "Closing arguments should 'sharpen and clarify the issues for resolution by the trial of fact.'" *Id.* (citing *Herring v. New York*, 422 U.S. 853, 865 (1975)). Moreover, counsel has a duty to argue, "at every stage of the case," "why death is not suitable punishment for their particular client." ABA Guideline 10.11(L). In this case, counsel virtually told the jury that a death sentence was appropriate for their client and certainly gave the jury all the justification it needed to vote for death.

4. Absent counsel's deficient performance, one juror may have voted for life.

McKelton was prejudiced by counsel's deficient performance in the mitigation phase of his trial. Counsel's duty was to humanize McKelton and give at least one juror a reason to vote in favor of a life sentence. Instead, counsel essentially told the jury that a life sentence was insufficient punishment in this case. Even the State, instead of rebutting the defense argument, took defense counsel's remarks and ran with them. The prosecutor noted what defense counsel

¹⁵ This point is driven home on the very next transcript page when counsel says, "If he's incarcerated, he can get a GED." Mit. Tr. 125. McKelton stated in his unsworn statement that he got a GED while in the Hamilton County Justice Center years earlier. Mit. Tr. 71.

said about killing a witness going to the heart of the judicial system. Mit. Tr. 131. The prosecutor added that the justice system would be unable to function “if we don’t give some weight to the fact that witnesses cannot be intimidated and murdered.” *Id.* at 132. The State also took note of defense counsel’s suggestion to the jury that they should not consider the 25-to-life and 30-to-life options, adding that “counsel realizes that there is only one place that following the law takes you[,] [a]nd they’re hoping that you’ll step down one notch.” *Id.* Surely the jurors had also picked up on that sentiment from defense counsel’s remark. Counsel gave the jurors no reason to vote in favor of life, instead giving them an out for voting in favor of death. Counsel abdicated their duty to advocate for their client’s cause.

Only one juror was needed to obtain a life sentence for McKelton. *State v. Brooks*, 75 Ohio St. 3d 148, 661 N.E.2d 1030 (1996). Thus, there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

Counsel compounded their deficient performance by failing to object to various instances of prosecutorial misconduct during argument. (*See* Proposition of Law No. XV.) McKelton incorporates Proposition of Law No. XV here by reference to further demonstrate the prejudice to him from this error.

C. Conclusion.

The “cumulative effect” of counsel’s errors and omissions violated McKelton’s Sixth Amendment right to effective counsel. *See State v. Gondor*, 112 Ohio St. 3d 377, 392, 860 N.E.2d 77, 90 (2006) (citing *State v. DeMarco*, 31 Ohio St. 3d 191, 196, 509 N.E.2d 1256, 1261 (1987); *Stouffer v. Reynolds*, 168 F.3d 1155, 1163-64 (10th Cir. 1999)). McKelton is entitled to a new penalty phase under O.R.C. § 2929.06(B).

Proposition of Law No. XVII

The accused's right to due process is violated when the cumulative effect of prosecutor misconduct at the sentencing phase of trial renders the accused's trial unfair. U.S. Const. amends. VIII and XIV; Ohio Const. art. I, §§ 9 and 16.

Multiple instances of prosecutor misconduct were committed in the sentencing phase of McKelton's capital trial. The cumulative effect of the professional misconduct violated McKelton's due process rights.

A. Legal standards for prosecutor misconduct claims.

A prosecutor "may strike hard blows, [but] he isn't at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). When a prosecutor strikes foul blows, the Due Process Clause provides a remedy. *See id.* To succeed on his claim of prosecutor misconduct, McKelton must demonstrate either — that the prosecutor's misconduct prejudiced a constitutional right or — that the misconduct rendered his trial fundamentally unfair. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) ("when specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them"); *United States v. Carter*, 236 F.3d 777, 785 (6th Cir. 2001).

The United States Court of Appeals for the Sixth Circuit analyzes a due process claim of prosecutor misconduct under a two part test. The court first determines if the prosecutor's acts "were improper." *Washington v. Hofbauer*, 228 F.3d 689, 698-99 (6th Cir. 2000) (citation omitted). The court then looks at "four factors" to "determine if the comments were sufficiently flagrant to warrant reversal" *Id.* (citation omitted). The four factors are: 1) whether the comments would likely mislead the jury or prejudice the accused; 2) whether the comments were extensive or merely isolated; 3) whether the comments were made deliberately or accidentally, and; 4) the strength of the evidence against the accused. *Id.* (citation omitted).

B. Argument

During mitigation, the State made improper arguments and introduced improper evidence. The State improperly commented about McKelton's silence on certain issues in his unsworn statement. The State also made improper arguments about the aggravating circumstances. The only aggravating factor in the mitigation phase was that Evans was a witness to an offense and was purposely killed to prevent his victim's testimony in any criminal proceeding. *See* Dkt. 1. The State presented facts to the jury which had little to no relevance to the aggravating circumstance. Despite the fact that no aggravating circumstances were charged for Allen's death, the State had her autopsy photos reintroduced, even though they were irrelevant for mitigation purposes. Mit. Tr. 27. The State also improperly told the jury that facts that had nothing to do with the aggravating circumstance were "the weight that goes on the side of that specification." Tr. 99.

1. The State made improper comments on McKelton's unsworn statement.

Improper comments on a defendant's unsworn statement violate a defendant's Fifth Amendment rights and negates his statutory prerogative. *State v. DePew*, 38 Ohio St. 3d 275, 285, 528 N.E.2d 542, 553-54 (1988). Commenting on a defendant's silence on particular issues in his unsworn statement is misconduct. *State v. Lorraine*, 66 Ohio St. 3d 414, 419, 613 N.E.2d 212, 218 (1993) (*citing DePew*, 38 Ohio St. 3d at 285, 528 N.E.2d at 553-54). In closing argument, the State refers to McKelton's silence on particular issues in his unsworn statement:

You heard Calvin McKelton tell you, let me talk to you about why we're here. And you never heard him say Missy's name. You never heard him talk about Germaine Evans' death. And you know because of Specification 2 to Count 10, that those are the reasons we are here, is because in July of 2008 Missy was killed by this defendant. Her body was dumped by this defendant. Her house was attempted to be burned with by this defendant. And Germaine saw all those things and he knew.

* * *

So Germaine met his fate and you know how and you know why. That's why you're here. And you never heard Calvin McKelton say a single word about it. He told you, Calvin did, about going out for Moosewood to the body of his friend Tey and paying respects and putting his hands on his back, went out to Moosewood. He never went out to Inwood to see his friend Germaine, to pay his respects. Like Missy, Germaine's body lay out in the open waiting to be found by people not involved. That is why you're here. That is the weight that goes on the side of that specification.

Tr. 98-99. Commenting on McKelton's failure to talk about Evans and Allen was improper and prejudicial.

2. The State devoted more attention to Margaret Allen than Germaine Evans.

McKelton was capitally convicted in connection with the death of Germaine Evans, not Margaret Allen. Dkt. 1. Had McKelton been convicted for killing Allen but not Evans, he would not have been eligible for the death penalty. In spite of this, the State went beyond the boundaries of its latitude to discuss evidence relevant to the aggravating circumstance by spending more time discussing Allen in its arguments than Evans.

The State turned one aggravating circumstance into two. In its opening statement, the State says that R.C. § 2929.04(A)(8) "really has two parts...Number one, that Mick, Germaine Evans was a witness to an offense." Mit. Tr. 17. The State then argues that the first "part" involves Margaret Allen and dedicated more of its opening statement (and its closing argument) to Allen's death than it did to Evans. Mit. Tr. 17-19, 98-99, 102, 134. R.C. § 2929.03(D)(1) Does permit a prosecutor to consider the nature and circumstances that are relevant to aggravating circumstances. *State v. Gumm*, 73 Ohio St. 3d 413, 422, 653 N.E.2d 253, 263 (1995). However, R.C. § 2929.04(A)(8) is concerned with purposeful killing to prevent a witness' testimony. The State should have limited its "nature and circumstance" arguments to Evans being killed to prevent his testimony as a witness, rather than allowing the underlying offenses to dominate the sentencing phase.

Assuming *arguendo* that it was permissible to argue about crimes to which capital specifications were not attached, the State went overboard in dedicating more attention to Allen than it did to Evans. Presumably it do so because Allen was a more sympathetic victim and was not involved in crime. The State concluded its rebuttal in closing arguments by saying "Counsel suggests there is some good in McKelton. I think Missy thought there was. She was wrong. Thank you." Mit. Tr. 134.

3. The State reintroduced inflammatory and irrelevant autopsy photographs.

As noted above, McKelton was capitally indicted because of the death of Germaine Evans not Margaret Allen. Dkt. 1. In spite of this, the State sought to introduce pictures from Allen's autopsy. Mit. Tr. 26. Pictures of Allen's decomposing corpse are virtually unrelated to the aggravating circumstance of killing Evans to prevent his testimony as a witness. The State connected them, reasoning that it was relevant because it related to the testimony of the doctor who conducted the autopsy and because Evans was a witness to Allen's death. Mit. Tr. 26.

Even if one accepts the State's expansive notion of relevance that incorporates everything Evans "witnessed," these photos are still irrelevant in the sentencing phase. Allen's body had been outside in July for roughly three days after Evans last "witnessed" it before the autopsy was conducted. Tr. 1443. As discussed in Proposition of Law No. V, these photos lacked sufficient probative value to be admissible in the guilt phase of the trial.

In *State v. Thompson*, the prosecutor's improper reference of autopsy photographs that were not even in front of the jury in the penalty phase contributed to the reversal of the defendant's death sentence. 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 420-21 (1987). Similarly, the State in this case committed misconduct by reintroducing the irrelevant and inflammatory

autopsy photographs. Admitting them in the sentencing phase served no purpose other than to unfairly prejudice McKelton.

4. The prosecutor compared his own difficult childhood to McKelton's.

In the State's rebuttal during closing argument, Prosecutor Robin Piper argued:

Mr. Howard told you something about his background and his father being a doctor...I know what it's like to grow up in the projects. I was sitting at the kitchen table, had a single mother open up a can of Spaghetti'Os and offer those to everybody. I didn't grow up to be a murder [sic]. That's going to work for you? That's a mitigating factor because the defense tells you it's a mitigating factor?

Mit. Tr. 128. McKelton had a right to an individualized sentencing determination. *State v. Jenkins*, 15 Ohio St. 3d 164, 192, 473 N.E.2d 264, 291 (1984) (citing *Zant v. Stephens*, 462 U.S. 862, 879 (1983)). How McKelton conducted himself as compared to Robin Piper, who grew up in difficult circumstances, was not a proper consideration in McKelton's sentencing phase. It was improper for Mr. Piper to argue that he had risen above an impoverished childhood and that McKelton should have done the same.

5. The State improperly referred to facts unrelated to the aggravating circumstance as "the weight that goes on the side of that specification."

In *Gumm*, this Court admonished prosecutors against "advising juries that the aggravating circumstances placed on one side of the balance include 'everything that surrounds this crime,' or 'all the nature and circumstances of this crime' or any comparable phraseology." 73 Ohio St. at 422, 653 N.E.2d at 263. The State ran afoul of this Court's warning while it was improperly commenting on McKelton's unsworn statement:

So Germaine met his fate and you know how and you know why. That's why you're here. And you never heard Calvin McKelton say a single word about it. He told you, Calvin did, about going out for Moosewood to the body of his friend Tey and paying respects and putting his hands on his back, went out to Moosewood. He never went out to Inwood to see his friend Germaine, to pay his respects. Like Missy, Germaine's body lay out in the open waiting to be found by

people not involved. That is why you're here. That is the weight that goes on the side of that specification.

Mit. Tr. 99. In addition violating the warning of the *Gumm* court, this was an improper comment on McKelton's unsworn statement. *Lorraine*, 66 Ohio St. 3d at 419, 613 N.E.2d at 218.

C. Conclusion.

Pervasive and deliberate prosecutorial misconduct in the sentencing phase of Calvin McKelton's trial undermined his due process rights under U.S. Const. amend. XIV McKelton is therefore entitled to a new penalty phase under R.C. § 2929.06(B).

Proposition of Law No. XVIII

The capital defendant's right against cruel and unusual punishment and his right to due process are violated when the legal issue of relevance is left to the jury regarding and sentencing considerations. U.S. Const. amends. VIII, XIV.

A. Introduction

The trial court failed to instruct the jury regarding what evidence introduced at the trial phase was relevant and could be considered in its sentencing deliberations. The trial court's failure to provide the jury with the proper guidance resulted in a sentencing proceeding that failed to comply with the commands of the Eighth Amendment as well as the requirements of the Due Process Clause. U.S. Const. amend. VIII, XIV.

B. Facts

After the presentation of mitigation evidence, the trial court instructed the jury regarding the consideration of trial evidence for purposes of reaching a sentencing determination.¹⁶ The trial court instructed the jury to consider all of the testimony and evidence relevant to the aggravating circumstance McKelton was found guilty of committing. Mit. Tr. 138. The trial court cautioned the jury that **some** of the evidence and testimony that was considered during the trial phase of the case could not be considered during the sentencing phase. Mit. Tr. 141 (emphasis added). However, the trial court provided no additional guidance to the jury concerning the use of the trial phase evidence. The trial court further instructed the jury to "also consider all of the evidence admitted during this sentencing phase."

¹⁶ Prior to instructing the jury for the mitigation phase, the trial court determined which of the State's exhibits admitted during the trial phase were to be considered by the jury during the mitigation phase. Mit. Tr. 141. The trial court erroneously admitted gruesome and irrelevant photographs for the jury's consideration during the mitigation phase. See, Proposition of Law No. ____.

The trial court's failure to advise the jury what testimony was relevant to the aggravating circumstance resulted in the jury being left to determine what trial phase evidence was relevant to the sentencing deliberations. By failing to make the legal determination of relevance for the jury, the trial court abdicated the threshold legal determination of relevance to the lay persons of the jury. This Court should have no confidence that the jury understood the legal irrelevance of trial phase testimony that was permitted to be considered. Ultimately, the jury could consider all of the trial phase evidence in its capital sentencing deliberations. Much of that evidence, however, was improperly admitted (*See* Propositions of Law Nos. IV, V, VI, VII, VIII, X, XI, XIV) and irrelevant to the issue of McKelton's moral culpability for aggravated murder. As a result, McKelton's death sentence was rendered unreliable in violation of the Eighth and Fourteenth Amendments.

C. Evidence to Be Considered In Sentencing

Pursuant to O.R.C. § 2929.03(D)(1), "the prosecutor may introduce any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing." This provision renders Ohio's weighing scheme unconstitutionally vague. *See* Proposition of Law No. XX. Assuming *arguendo* that it does not, the application of that statutory provision must nevertheless comport with the commands of the Eighth Amendment and the requirements of the Due Process Clause.

Capital punishment differs in kind from lesser forms of punishment because of its extreme finality. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Resultantly, the Eighth Amendment requires a heightened degree of reliability in the application of the death penalty. *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976). *See also Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring). To ensure reliability, the State cannot channel

the sentencer's discretion to consider and weigh relevant mitigation. *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) (citation omitted). However, the State **must** narrow the sentencer's discretion with respect to aggravating factors in a capital sentencing proceeding. Unconstitutional arbitrariness results when the sentencer has unguided or improperly guided discretion in the imposition of the death penalty. *Furman v. Georgia*, 408 U.S. 238 (1972). To avoid arbitrariness, "there is a required threshold below which the death penalty cannot be imposed [T]he State must establish rational criteria that narrow the decision maker's judgment as to whether the circumstances of a particular defendant's case meet the threshold." *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987) (citations omitted). The criteria established in Ohio to properly guide the jury is found in O.R.C. § 2929.04(A) under Ohio's sentencing calculus which limits the jury's consideration to evidence of the proven aggravating circumstances. *See State v. Wogenstahl*, 75 Ohio St. 3d 344, 662 N.E.2d 311 (1996).

The constitutional principles that require a guided sentencing determination were breached in this case because the jury's discretion was improperly guided by the failure of the trial court to identify relevant trial phase evidence. Juries are capable of understanding capital sentencing issues, however, "they must first be properly instructed." *Mills v. Maryland*, 486 U.S. 367, 377 n.10 (1988). Moreover, this duty arises absent any request from assistance from the jury. "A trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part." *Kelly v. South Carolina*, 534 U.S. 234, 266 (2002). Because of the trial court's instructions in the present case, the jury had no rational framework to discern what trial phase evidence was relevant to its weighing process.

The trial court's failure to properly instruct the jury left the legal determination of relevance to be made by the jury. This Court has made it clear in previous decisions that issues of fact are for the jury but issues of law are for the court. Based on this legal premise, this Court has concluded that it is the trial court's responsibility, not the jury's responsibility, to determine what evidence is relevant for purposes of sentencing. *State v. Cornwell*, 86 Ohio St. 3d 560, 567, 715 N.E.2d 1144, 1152 (1999); *State v. Getsy*, 84 Ohio St. 3d 180, 201, 702 N.E.2d 866, 887 (1998).

D. Unacceptable risk that the jury considered evidence not relevant to sentencing determination

1. Risk of consideration of victim impact and domestic violence evidence

Among the evidence the jury had discretion to consider in imposing the death penalty was the wealth of evidence admitted concerning the domestic violence charges against McKelton. During the trial, the jury heard improperly admitted evidence from a domestic violence expert that could have been considered by the jury since the trial court did not properly limit the consideration of evidence. *See*, Proposition of Law No. XIV. A wealth of prejudicial victim impact evidence was also introduced during the State's case. *See*, Proposition of Law No. VIII. This included the testimony of Ziala Danner regarding the evening Margaret Allen broke her ankle as well as the 911 tape of Danner's call. In addition the jury was able to consider Officer Kelly Smith's testimony regarding how fearful Ziala was that evening. "She was visibly shaking *** Her knees were actually knocking together. Her eyes were wide. When she tried to speak her voice was shaking. Anytime she thought she would hear something, she would jerk and look over her shoulder." Tr. 370. Officer Smith testified that it was clear that Ziala "didn't even feel safe with [her and the other officer] in the house," and that she "could tell that [Ziala]

believed there was something in the house that she felt possibly could harm her.” Tr. 370-71. Officer Smith offered “I’ve never seen anyone that scared in my life.” Tr. 371.

The jury was able to consider testimony about the kind of person that Margaret Allen was. Mindie Nagel, her physical therapist, described Allen as “very bright,” “vibrant,” “outgoing,” and “really sweet.” Tr. 460. Allen’s friend Shaunda Luther testified that Allen was “fun, funny, outgoing, full of life, energetic, motivated, spirited, outspoken, just a ball of fun . . .” Tr. 485. Testimony introduced during the trial phase included information about the fact that Allen’s funeral was large and that a lot of friends attended. Tr. 563-64.

The jury was also allowed to consider victim impact evidence about Germaine Evans. Over defense objection, the prosecutor asked Andre Ridley how he would describe Evans. Tr. 904. Ridley testified that Evans “was a good person,” that he had a “big heart,” was “likeable,” and was a great friend to everybody.” *Id.* The State further elicited prejudicial testimony regarding the emotional reaction of Evans’ family when his body was found and the information the family screamed out while at the scene. Tr. 1314.

While the losses that the victims and their family experienced should in no way be minimized, the evidence regarding the victim’s character and the impact of the crime was not relevant to the narrowly defined aggravating circumstance in this case or to the rebuttal of mitigating factors. *State v. White*, 85 Ohio St. 3d 433, 446, 709 N.E.2d 140, 154 (1999). Moreover, the evidence regarding the victims and the domestic violence was prejudicial to the jury’s determination of McKelton’s sentence. The testimony and evidence appeals to emotions, it creates a sense of outrage which escapes into the sentencing proceedings. There was an unacceptable risk that the jurors would consider that evidence as non-statutory aggravating circumstances to weigh in favor of death. In fact, the evidence invited the jury to improperly

consider non-statutory aggravating circumstances in performing its weighing obligation. *See State v. Green*, 90 Ohio St. 3d 352, 362, 738 N.E.2d 1208, 1223 (2000); *Wogenstahl*, 75 Ohio St. 3d, at 352-55, 662 N.E.2d at 319, 321 (1996); *State v. Davis*, 38 Ohio St. 3d 361, 367-369, 528 N.E.2d 925, 931-933 (1988).

2. Risk of consideration of improperly admitted and prejudicial hearsay testimony

In addition, the jury was able to consider the testimony of Charia Mam and Shaunda Luther regarding the relationship between Allen and McKelton. This included a wealth of improperly admitted hearsay testimony. Proposition of Law No. IV. Luther testified that Allen referred to McKelton and his associates as “killers,” and Allen later clarified that she was “serious meaning killers.” Tr. 497. She also testified that Allen referred to McKelton as a “robbery boy,” which is “a person who robs other drug dealers.” Tr. 498. Mam testified that Allen told her several times that McKelton would kill her if he thought she slept with his friend, was involved with someone else or had an abortion without him knowing. Tr. 547-48, 550, 555. Mam also testified that Allen said, “if Calvin think she had an abortion and she did it without him knowing, he would kill her.” Tr. 555.

3. Risk of consideration of improperly admitted and prejudicial other acts evidence

The State introduced information regarding McKelton’s other acts that were not relevant to sentencing determination. *See*, Proposition of Law No. V. This included information that McKelton went by the nickname C-Murderer and had tattoos with images of pistols and phrases like “straight killer” on him (tr. 877-879), evidence regarding the large quantities of drug McKelton sold since the late 1990s (tr. 1734), evidence that McKelton agreed not to retaliate against another drug dealer in exchange for having another source of drugs (tr. 1736-37), and

evidence that McKelton offered to kill witnesses in the case against one of the witnesses' brother (tr. 1746).

4. Risk of consideration of irrelevant prejudicial testimony

The State further introduced evidence that was irrelevant at trial, but even more so to the jury sentencing consideration. *See*, Proposition of Law No. V. This included testimony about McKelton giving Allen \$7,000 for Christmas presents, \$15,000 on another occasion and a couple stacks of cash for a party. Tr. 490-91. The State also introduced evidence that McKelton threw dope beside Allen's body and that he got the idea from a song of Biggie Smalls, a gangster rapper known as Notorious B.I.G.

The jury was also able to consider testimony from Detective Witherell that indicated that McKelton wanted to intimidate witnesses and had written a letter to Crystal Evans mentioning the name of the funeral home JC Battle & Sons Funeral Home.¹⁷ Tr. 1540, 1544-59.

The jury was able to consider McKelton's relationship with a number of different women and the testimony of two woman who continued to support McKelton after his arrest. Tr. 988-89, 1975-76. The introduced transcripts of Detective Jennifer Luke's interview with Crystal Evans in which Luke states that McKelton "[b]eat the living shit out of" Tiffany Austin and Andrea Jackson. State's Ex. 56 at 26.

The State called and then cross examined both Crystal Evans and Audrey Dumas regarding their relationship with McKelton. The State played telephone calls from conversation with Dumas and Evans in which McKelton spoke crudely and threatened to slash Dumas' tires.

¹⁷ This evidence was merely Detective Witherell's interpretation of McKelton's handwriting. While defense maintained that the words were "Butler Co.", the State argued that the word was "Battles Co." Tr. 1550, 1544-59. There was no evidence to support this beside mere speculation on Detective Witherell's part.

Exs. 52, 77. The State introduced letters from McKelton to Evans which contained explicit language about sexual acts. Exs. 47-51.

Finally, the jury was able to consider additional irrelevant or unfairly prejudicial evidence including evidence of a copy of the Anarchist Cookbook found in McKelton's bedroom (tr. 823), McKelton's drinking straight vodka while driving (tr. 987), and McKelton's prior intimidation conviction (dkt. 146, tr. 991).

5. Consideration of improperly admitted evidence from mitigation phase

The jury was also required, pursuant to the trial court's instructions, to consider the irrelevant and prejudicial autopsy photos admitted during the mitigation phase. *See*, Proposition of Law No. XVII; Exs. 67(A) through (O). The autopsy photos of Allen were prejudicial and were not relevant to sentencing. Allen's body was outside in July for days before it was discovered. Tr. 1443. In the autopsy photos, the body appeared bloated, decomposed and discolored by insect activity. Allen was unrecognizable to an officer who knew her. Tr. 696.

The evidence as outlined in sections 1-5 was not relevant to the narrowly defined aggravating circumstance in this case or to the rebuttal of mitigating factors. *State v. White*, 85 Ohio St. 3d 433, 446, 709 N.E.2d 140, 154 (1999). Moreover, the evidence was overwhelmingly prejudicial to the jury's determination of McKelton's sentence. The importance of narrowing the evidence for the jury's consideration was imperative in a case like McKelton's. A wealth of evidence was introduced that was irrelevant to the sentencing consideration. It was impermissible to leave the tasks of weeding through all of this testimony to determine what was legally relevant and permissible for them to consider during the sentencing determination.

This Court was faced with an almost identical instruction issue in *State v. Jones*, 91 Ohio St. 3d 335, 349-50, 744 N.E.2d 1163, 1179-80 (2001). In *Jones*, the trial court instructed the

jury that “only that testimony and evidence which was presented in the first phase that is relevant to the aggravating circumstances [appellant] was found guilty of committing, or to any of the mitigating factors that will be described below is to be consider by you.” *Id.* at 349, 744 N.E.2d at 1179-80. As in McKelton’s case, the trial court went on to determine which of the exhibits were relevant and could be considered by the jury. *Id.* at 350, 744 N.E.2d at 1180. This Court agreed that the trial court’s instruction “could reasonably be interpreted by one or more members of the jury as implying that it was their responsibility to determine the relevance of evidence presented during the first phase of trial.” *Id.*¹⁸ This Court concluded that, to the extent that the jury interpreted the trial court’s instruction as allowing them to determine relevancy, the trial court’s instruction misled the jury. However, this Court went on to conclude that the trial court’s misstatement did not prejudice the outcome of Jones’ case because much of the trial phase evidence was relevant at the sentencing phase since it was related to the aggravated circumstances in the case. *Id.*

The same cannot be said in the present case. Much of the evidence presented at McKelton’s trial was not relevant to the aggravating circumstances in his case. Because the trial court did not fulfill responsibility to determine what evidence was relevant for consideration in the sentencing phase, the jury was able to consider a wealth of information, much of which was irrelevant to the aggravating circumstances of which McKelton was convicted and much of which was extremely prejudicial to the jury’s consideration of the appropriate sentence in the case.

There was an unacceptable risk that the jurors would consider that evidence as non-statutory aggravating circumstances to weigh in favor of death. In fact, the evidence invited the

¹⁸ This Court also determined that the jury may have interpreted the instruction as instructing them to consider only that evidence that the court deemed relevant.

jury to improperly consider non-statutory aggravating circumstances in performing its weighing obligation. *See, State v. Green*, 90 Ohio St. 3d 352, 362, 738 N.E.2d at 1208, 1223 (2000); *Wogenstahl*, 75 Ohio St. 3d, at 352-55, 662 N.E.2d at 319, 321 (1996); *State v. Davis*, 38 Ohio St. 3d 361, 367-369, 528 N.E.2d 925, 931-933 (1988). The level of risk that arose from the trial court's improper instructions is unacceptable in a capital sentencing proceeding and should result in the reversal of McKelton's death sentences.

E. Conclusion

The court's duty in McKelton's case was to ensure that the jury weighed only evidence of the aggravating circumstance from each count against the mitigating factors. The court breached this duty. As a result, much of the evidence that could have been considered by the jury was legally irrelevant to the nature and circumstances of the aggravating circumstances and should not have been utilized by the jury in rendering a sentencing determination. McKelton's sentencing determination was made with the type of open-ended discretion that the Eighth Amendment forbids. *See Stringer v. Black*, 503 U.S. 222, 237 (1992); *Sochor v. Florida*, 504 U.S. 527, 532 (1992). Therefore, McKelton's death sentence must be vacated. *See* O.R.C. § 2929.06.

Proposition of Law No. XIX

A capital defendant's conviction and death sentence are constitutionally infirm when the trial court continuously and to the point of showing bias permits the admission of prejudicial, irrelevant and otherwise inadmissible evidence and considers that evidence in reaching a decision to sentence a capital defendant to death. U.S. Const. amends. V, VI, VIII, XIV; Ohio Const. art. I, §§ 2, 5, 9, 16.

Calvin McKelton's capital trial was fundamentally unfair as a result of the trial court's numerous errors and its failure to control the presentation of evidence.

A. Law

It is firmly established constitutional law that "a fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955); *see also, Tumey v. Ohio*, 273 U.S. 510 (1927); *Offutt v. United States*, 348 U.S. 11 (1954).

A trial judge is more than a mere moderator. Instead, he or she is the governor of the trial for the purpose of assuring its proper functioning. *Quercia v. United States*, 289 U.S. 466, 469 (1933). It is the trial court's duty to conduct the trial in an orderly manner with a view to eliciting the truth and to attaining justice between the parties. *Glasser v. United States*, 315 U.S. 60, 82-83 (1942).

B. Argument

In the present case the trial court ruled in a manner that deprived McKelton of a fair trial and reliable sentencing determination. The trial court regularly ruled against McKelton and provided the State with substantial leeway in its interpretation of the rule of evidence. The trial court ruled improperly on the following issues:

1. The trial court improperly refused to allow McKelton's counsel's request to withdraw and reasonable requests for continuances. This happened after McKelton's retained attorney, Richard Goldberg, discovered a conflict and withdrew less than one month before trial began. *See* Proposition of Law No. I.

2. The trial court improperly allowed the State to not disclose its witnesses, which lead to McKelton's attorneys getting the names and statements of eight witnesses less than 24 hours before trial began. *See* Proposition of Law No. II.
3. The trial court improperly denied McKelton's requests for sufficient voir dire and for individual sequestered voir dire. *See* Proposition of Law No. III.
4. The trial court erroneously and repeatedly allowed the State to introduce evidence which was irrelevant, prejudicial, or impermissible as evidence of other acts or character evidence, as prohibited by Evid.R. 402, 403(A), and 404. *See* Proposition of Law No. V.
5. The trial court erroneously found that Audrey Dumas was an adverse witness pursuant to Evid.R. 611(C), thus allowing the State to use leading questions on direct examination. The trial court also failed to control the extent of those leading questions pursuant to Evid.R. 611(A). *See* Proposition of Law No. VII.
6. The trial court improperly allowed extensive hearsay evidence in derogation of McKelton's Sixth Amendment right to confrontation of the witnesses against him. The admission of the unreliable hearsay evidence also prejudiced McKelton's right to a fair trial. *See* Propositions of Law Nos. IV, XI.
7. McKelton's due process rights were violated when the trial court allowed the State's improper impeachment of Gerald Wilson. *See* Proposition of Law VI. The trial court also violated McKelton's right to a reliable sentencing determination by considering Wilson's prior statement as though it were substantive evidence. *See Id.*
8. The trial court violated McKelton's right to a fair trial when it allowed the State to use Crystal Evans' statement to police in their questioning of her, failed to control the State's questioning of Evans, allowed phone calls and letters between McKelton and Evans into evidence, and admitted Evans' statement to police into evidence. *See* Proposition of Law No. X.
9. The trial court allowed the State to commit numerous acts of misconduct throughout the course of the trial and penalty phases of McKelton's capital trial. *See* Propositions of Law Nos. VIII, XVII.
10. The trial court erroneously failed to require the State to specify the nature of the charges against McKelton, in violation of his rights of due process and a fair trial. *See* Proposition of Law No. XII.

11. The trial court erroneously allowed the jury to determine whether or not evidence was relevant. This creates a danger that McKelton's sentence was decided based on impermissible considerations. *See* Proposition of Law No. XVIII.
12. The trial court improperly prevented McKelton from sufficiently cross-examining the witnesses against him, in violation of his rights under the Confrontation Clause. *See* Proposition of Law No. IX.

C. Conclusion

The trial court's failure to conduct the trial in an orderly manner with a view to eliciting the truth and to attaining justice, deprived McKelton of his right to a fair trial, effective representation, due process, and a reliable determination of his guilt and punishment in a capital case as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 5, 9, and 16 of the Ohio Constitution. For these reasons, McKelton's convictions should be overturned.

Proposition of Law No. XX

Ohio's death penalty law is unconstitutional. Ohio Rev. Code Ann. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Thompson. 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.¹⁹

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:

A. Arbitrary and unequal punishment

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

¹⁹ 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 Appellant's federal constitutional arguments. *State v. Poindexter*, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).

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.

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.

B. Unreliable sentencing procedures

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

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

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

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor 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 Cir. 1993). This confusion violates the federal and state constitutions. Because of these deficiencies, Ohio's statutory scheme does not meet the requirements of *Furman* and its progeny.

C. 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.

D. 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.

E. 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.

F. 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 v. Stephens*, 462 U.S. 862, 879 (1983); *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 Thompson’s due process and liberty interest in O.R.C. § 2929.05.

G. 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, Thompson’s capital convictions and sentences cannot stand.

1. International law binds 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). In fact, international law creates remediable rights for United States citizens. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal. 1987).

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.

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).

a. 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.

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

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

However, several aspects of Ohio's statutory scheme allow for the arbitrary deprivation of life. *See infra* Sections A–F.

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

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

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

The ICCPR prohibits subjecting any person to torture or to cruel, inhuman, or degrading treatment or punishment. Art. 7. Similarly, the CAT requires that states take action to prevent torture, which includes any act by which severe mental or physical 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. Thus, there is a violation of international law and the Supremacy Clause.

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

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

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

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

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).

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. 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.*

Ohio's statutory scheme is in violation of customary international law.

H. 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. Thompson's death sentence must be vacated.

Proposition of Law No. XXI

The cumulative effect of trial error renders a capital defendant's trial unfair and his sentence arbitrary and unreliable. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 5, 16.

Calvin McKelton raised numerous errors worthy of this Court granting relief both from his convictions and his death sentence. Each error, standing alone, is sufficient to warrant a reversal. However, by viewing the many errors together, it is apparent that their cumulative impact rendered McKelton's trial fundamentally unfair. See *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983). This Court must reverse McKelton's convictions and sentence.

From beginning to end, McKelton's capital trial was replete with prejudicial error. See Propositions of Law Nos. I - XIX. Assuming *arguendo* that none of the errors McKelton raised alone warrant reversal of his convictions and sentence, the cumulative effect of the errors is so prejudicial that this Court must order a new trial.

The adequacy of the legally admitted evidence is only one factor for this Court to consider in determining the influence that an error has on a jury. The Supreme Court made clear in *Satterwhite v. Texas*, 486 U.S. 249 (1988), that it "is not whether the legally admitted evidence was sufficient to support" the verdict, but rather "whether the [prosecution] has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 258-59. Review must also determine whether the cumulative effect of the errors rendered the trial fundamentally unfair. See *Walker*, 703 F.2d at 963. "We must reverse any conviction obtained in a proceeding in which the cumulative impact of irregularities is so prejudicial to a defendant that he is deprived of his fundamental right to a fair trial. Fourteenth Amendment, United States Constitution." *State v. Wilson*, 787 P.2d 821, 821 (N.M. 1990); *United States v.*

Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988); *State v. DeMarco*, 31 Ohio St. 3d 191, 509 N.E.2d 1256, 1261 (1987).

Perhaps the most telling example of the prejudice resulting from the cumulative impact of the errors at McKelton's trial are the trial court evidentiary rulings, ineffective assistance of counsel, and misconduct that combined to deprive McKelton of the opportunity to fully and fairly defend himself against the State's charges. See *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Beck v. Alabama*, 447 U.S. 625, 627 (1980). In general, trial counsel failed to fully investigate this case and present a complete and competent defense. Due to the prejudiced evidence offered and admitted against McKelton in combination with counsel's ineffectiveness and the State's misconduct, McKelton was destined to receive the death penalty.

The result of cumulative error entitles McKelton to a new trial. His convictions based upon cumulative error denied him a fair trial and his right to due process. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 5, 16. Additionally, these same errors render McKelton's death sentence unreliable and arbitrary. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

Conclusion

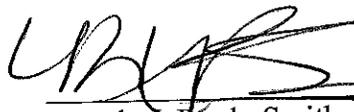
For the foregoing reasons, Calvin McKelton's convictions and sentence must be reversed.

Respectfully submitted,

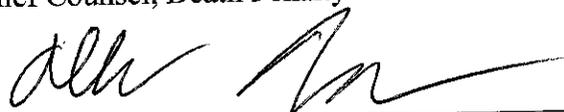
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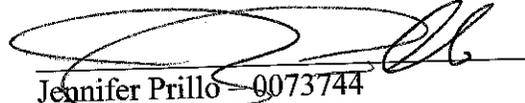
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Certificate of Service

I hereby certify that a true copy of the foregoing Merit Brief of Appellant Calvin McKelton and Appendix were forwarded by regular U.S. Mail to Michael Gmoser, Butler County Prosecutor, 315 High Street – 11th Floor, Hamilton, Ohio 45011, this 17th day of January, 2012.


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360157

In The Supreme Court Of Ohio

STATE OF OHIO,

Appellee,

-vs-

CALVIN MCKELTON,

Appellant.

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Case No. 2010-2198

This Is A Capital Case.

On Appeal From The Court Of
Common Pleas Of Butler County
Case No. CR-10-020189

APPENDIX TO MERIT BRIEF OF APPELLANT CALVIN MCKELTON

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In The Supreme Court Of Ohio

State Of Ohio,

Appellee,

-Vs-

Calvin McKelton,

Appellant.

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:
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:
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Case No.:

10-2198

This Is A Capital Case.

On Appeal From The Court Of
Common Pleas Of Butler County
Case No. CR 2010-02-0189

Appellant McKelton's Notice Of Appeal

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DEC 17 2010
CLERK OF COURT
SUPREME COURT OF OHIO

In The Supreme Court Of Ohio

State Of Ohio, :
Appellee, :
-Vs- : Case No.:
Calvin McKelton, :
Appellant. : **This Is A Capital Case.**

On Appeal From The Court Of
Common Pleas Of Butler County
Case No. CR 2010-02-0189

Appellant McKelton's Notice Of Appeal

Appellant Calvin McKelton hereby gives notice that he is pursuing his appeal as of right to obtain relief from his conviction of aggravated murder, and his death sentence, imposed on November 8, 2010 in the Butler County Court of Common Pleas. See Entry and Sentencing Opinion attached. This is a capital case, and the date of this offense was July 26, 2008. See Sup. Ct. Prac. R. XIX §1(A).

Respectfully submitted,

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I hereby certify that a true copy of the foregoing NOTICE OF APPEAL was forwarded by regular U.S. Mail to Robin Piper, Butler County Prosecutor, 315 High Street, 11th Floor, Hamilton, Ohio 45011, this 17th day of December, 2010.


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COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

JOHN CARPENTER
BUTLER COUNTY
CLERK OF COURTS

STATE OF OHIO	:	CASE NO. CR2010 02 0189
Plaintiff	:	SAGE, J.
vs.	:	
CALVIN S. MCKELTON	:	OPINION
Defendant.	:	

On February 12, 2010, the defendant, Calvin S. McKelton, was indicted with 11 separate crimes by the Butler County Grand Jury. Count 10 of that indictment charged the defendant with the aggravated murder of Germaine Lamar Evans, Sr., with two specifications, each of which carried the possibility of the death penalty. Count 3 of the eleven-count indictment also charged the defendant with the murder of Fairfield Attorney Margaret Allen.

Specification 1 to Count 10 charged that the offense of aggravated murder was committed for the purposes of escaping the detection, apprehension, trial or punishment for another offense, specifically the murder of Margaret Allen. O.R.C. 2929.04(A)(3).

Specification 2 to Count 10 of the indictment charged that Germaine Lamar Evans was a witness to the murder of Margaret Allen and was purposely killed to prevent his testimony in any criminal proceeding, and that the aggravated murder of Germaine Lamar Evans was not committed during the commission of

Judge Michael J. Sage
Common Pleas Court
Butler County, Ohio

the offense to which the victim was a witness. O.R.C. 2929.04(A)(8).

The trial commenced on October 4, 2010. The jury returned a guilty verdict as charged to Count 10, the aggravated murder of Germaine Lamar Evans. The jury also returned a guilty verdict as to Specification 1 and 2 to the aggravated murder. The defendant was also convicted in Count 3 for the murder of Margaret Allen.

After the guilt trial, the Court held a hearing at which time the defendant made a motion to merge the two specifications into a single specification. The prosecutor agreed to only proceed on Specification 2 which was that Germaine Lamar Evans was a witness to the murder of Margaret Allen and was purposely killed to prevent his testimony in that proceeding.

The defendant was also advised at that time of his right to have a presentence report prepared and to have a mental health examination prepared for purposes of mitigation. The defendant, after consultation with his attorneys, declined to have either matter prepared and submitted.

On October 21, 2010, a sentencing hearing was held in which the defendant presented testimony of three witnesses and his own unsworn statement. After closing arguments and instructions of law, the jury commenced its deliberation. The following day, October 22, 2010, the jury unanimously returned a recommendation of the death penalty for defendant's conviction in Count 10 of the indictment.

On November 2, 2010, a sentencing hearing was conducted by this

Court. Based upon relevant evidence presented, the relevant testimony presented at trial and other testimony, including mitigation testimony, the statement of the offender and the arguments of counsel, the Court found by proof beyond a reasonable doubt that the aggravating circumstance in Count 10 outweighed any mitigating factors, and imposed the sentence of death. The Court also imposed a consecutive 15 year to life sentence for the murder of Margaret Allen and further imposed sentences based upon the finding of the jury in Counts 1, 2, 3, 4, 5, 7, 8 and 9 of the indictment.

O.R.C. 2929.03(F) requires the Court, if it imposes a sentence of death, to state in a separate opinion its findings as to the relevance of any mitigating factors set forth in O.R.C. 2929.04(B), the existence of any other mitigating factors, the aggravating circumstance to which the defendant was found guilty of committing and the reasons why the aggravating circumstance the offender was found guilty of was sufficient to outweigh the mitigating factors. The purpose of this opinion is to comply with that requirement.

The evidence presented at trial was that on or about July 26, 2008, the defendant, Calvin S. McKelton and Germaine Lamar Evans, were present in the home of Attorney Margaret "Missy" Allen located in Fairfield, Ohio. The evidence was that the defendant and Missy Allen were engaged in a romantic relationship. Sometime during that day, Mr. McKelton and Ms. Allen argued and the defendant strangled the victim causing her death while Germaine Evans was present in the home. Mr. McKelton and Mr. Evans then drove her body to Schmidt

Field in Cincinnati, Ohio where the body was dumped.

The Cincinnati, Ohio Police Department opened a homicide investigation into Ms. Allen's death. During the course of the investigation, the Cincinnati homicide detectives developed Mr. McKelton as a suspect and became aware that Germaine Lamar Evans may have been a witness to the homicide and may have participated in the dumping of Ms. Allen's body.

Approximately three days before the Evans' murder, the Cincinnati homicide detectives attempted to contact Mr. Evans by calling his sister Crystal Evans to obtain a DNA sample from him. Within three days of that phone call being made, Mr. Evans was murdered. There was extensive testimony by many witnesses, some voluntary and others involuntary, that Mr. McKelton murdered Germaine Lamar Evans to prevent him from being a witness against McKelton in the death of Margaret Allen.

The evidence at trial was that Mr. Evans' body was found in a park area along stairs in a remote, unlit part of the park. Evans was murdered by a shot to the back of his head by a 40mm firearm. The jury convicted Mr. McKelton of both the murder of Margaret Allen and the aggravated murder with specifications of Germaine Lamar Evans.

Prior to the sentencing hearing, the defendant through his attorneys, indicated to the Court that it would not present any of the mitigating factors listed in O.R.C. 2929.04(B). The attorneys indicated McKelton would only present mitigating factors under O.R.C. 2929.04(B)(7) which includes "any other factors

that are relevant to the issue of whether the defendant should be sentenced to death". At the sentencing hearing the defense presented the testimony of three witnesses and the unsworn statement of the defendant.

The first witness was Kayla McKelton, who is the 13-year-old daughter of the defendant. The second witness was Audrey McKelton, who is the mother of the defendant. The third mitigating witness was Crystal Evans. Ms Evans, whom the defendant has been in a romantic relationship with, is also the sister of the victim as well as the mother of one of the defendant's children. The defendant then presented an unsworn statement to the jury prior to the closing arguments during the sentencing trial.

There are mitigating factors which the Court finds exist. The defendant was raised in his early years by a single mother under very humble and chaotic circumstances. McKelton's father abandoned the children and seldom, if ever, provided any type of financial or emotional support to Mr. McKelton and his siblings. By the time Mr. McKelton was eight years old, his mother became heavily involved with crack cocaine. The mother suffered a long period of addiction. During defendant's youth and early adulthood his mother was convicted of a number of criminal offenses including multiple charges of solicitation and a felonious assault charge for which she served prison time. Mr. McKelton indicated that from age 14 years he was self-sufficient and provided support for himself and his family by engaging in trafficking in drugs and robbing other drug dealers.

Mr. McKelton's older brother, Montez, was murdered while Mr.

McKelton was incarcerated. During his periods of incarceration with both the Ohio Department of Youth Services and the Ohio Department of Corrections, the defendant obtained his GED. Mr. McKelton testified that while he was incarcerated he adjusted well to life within the prisons. Mr. McKelton indicated that upon his release from the penal institutions, he would return to the housing projects where he grew up and would live with various family members, including his grandmother and his aunts.

Mr. McKelton is the father of three children. His daughter, Kayla, described him as a 'great father.' During Mr. McKelton's unsworn statement, he indicated that it was his strongest desire to become a role model for his children and other family members. Mr. McKelton indicated that he had long provided for his family and had supported them through his criminal activities. Finally, Mr. McKelton indicated that he himself had been a victim of violent crime. He testified that he was shot once as a juvenile and several more times as an adult.

During both the trial and Mr. McKelton's statement to the Court at sentencing, Mr. McKelton adamantly maintained his innocence.

After consideration of the relevant evidence raised at trial, the testimony relevant to Specification 2 of Count 10 of the indictment, other evidence including the mitigating evidence, arguments of counsel and the unsworn statement of Mr. McKelton and his statement at sentencing, the Court believes by proof beyond a reasonable doubt that the aggravating circumstance the defendant was found guilty of committing outweigh any mitigating factors presented.

The Court certainly recognizes as mitigating evidence the humble and chaotic upbringing of Mr. McKelton. His father abandoned the family early on and his mother engaged in a long history of drug abuse and prostitution. The evidence was that Mr. McKelton from age 14 years was essentially on his own and supported himself, and those around him, by drug trafficking and robbery. Mr. McKelton was able to obtain a GED and adjusted well within the confines of the Ohio Department of Youth Services and the Ohio Department of Corrections. Further, based upon the testimony of his daughter, Mr. McKelton was a good father to not only her but her siblings. He made sure that these children and their mothers were supported, though that support came as a result of his criminal activities.

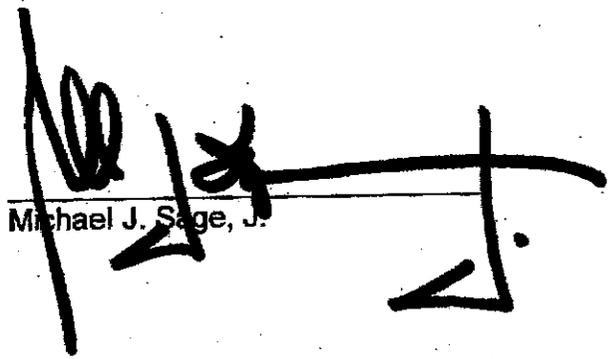
When the Court weighs these mitigating factors against the murder of Germaine Lamar Evans, the Court believes that though they are entitled to some weight, the aggravating circumstance of Mr. Evans' murder outweigh these mitigating factors. The murder of Germaine Lamar Evans was a calculated execution for the purposes of preventing him from testifying against Mr. McKelton concerning the murder of Fairfield Attorney Margaret Allen. The evidence at trial was that Mr. McKelton engaged in extensive prior planning in order to murder Mr. Evans and provide himself with an alibi.

The Court believes that the calculated execution of Germaine Lamar Evans for purposes of preventing him from testifying against Mr. McKelton for the murder of Margaret Allen outweigh any mitigating factors that were presented by

the defense.

Therefore, based upon the evidence and the law, the Court believes that the sentence of death was appropriate and the Court imposed a sentence of death as to Count 10, Specification 2 of the indictment.

So ordered,



Michael J. Sage, J.

Judge Michael J. Sage
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.

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.

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.

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

Go to the Ohio Code Archive Directory

ORC Ann. 2901.05 (2011)

§ 2901.05. Burden and degree of proof; presumption concerning self-defense or defense of another;
jury instructions concerning reasonable doubt

(A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

(B) (1) Subject to division (B)(2) of this section, a person is presumed to have acted in self defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.

(2) (a) The presumption set forth in division (B)(1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of, the residence or vehicle.

(b) The presumption set forth in division (B)(1) of this section does not apply if the person who uses the defensive force uses it while in a residence or vehicle and the person is unlawfully, and without privilege to be, in that residence or vehicle.

(3) The presumption set forth in division (B)(1) of this section is a rebuttable presumption and may be rebutted by a preponderance of the evidence.

(C) As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.

(D) As used in this section:

(1) An "affirmative defense" is either of the following:

(a) A defense expressly designated as affirmative;

(b) A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence.

(2) "Dwelling" means a building or conveyance of any kind that has a roof over it and that is designed to be occupied by people lodging in the building or conveyance at night, regardless of whether the building or conveyance is temporary or permanent or is mobile or immobile. As used in this division, a building or conveyance includes, but is not limited to, an attached porch, and a building or conveyance with a roof over it includes, but is not limited to, a tent.

(3) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as a guest.

(4) "Vehicle" means a conveyance of any kind, whether or not motorized, that is designed to transport people or property.

(E) "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs.

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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, trespass in a habitation when a person is present or likely to be present, 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*.

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

Go to the Ohio Code Archive Directory

ORC Ann. 2903.11 (2011)

§ 2903.11. Felonious assault

(A) No person shall knowingly do either of the following:

- (1) Cause serious physical harm to another or to another's unborn;
- (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

- (1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;
- (2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;
- (3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under *section 2907.02 of the Revised Code*.

(D) (1) (a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads guilty to a specification as described in *section 2941.1423 of the Revised Code* that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law, the court shall sentence the offender to a mandatory prison term as provided in division (B)(8) of *section 2929.14 of the Revised Code*. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of *section 2929.13 of the Revised Code*, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of *section 4510.02 of the Revised Code*.

(E) 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) "Motor vehicle" has the same meaning as in *section 4501.01 of the Revised Code*.

(3) "Peace officer" has the same meaning as in *section 2935.01 of the Revised Code*.

(4) "Sexual conduct" has the same meaning as in *section 2907.01 of the Revised Code*, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under *section 109.541 of the Revised Code*.

(6) "Investigator" has the same meaning as in *section 109.541 of the Revised Code*.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2909. ARSON AND RELATED OFFENSES

Go to the Ohio Code Archive Directory

ORC Ann. 2909.02 (2011)

§ 2909.02. Aggravated arson

(A) No person, by means of fire or explosion, shall knowingly do any of the following:

- (1) Create a substantial risk of serious physical harm to any person other than the offender;
- (2) Cause physical harm to any occupied structure;
- (3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of physical harm to any occupied structure.

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

- (2) A violation of division (A)(1) or (3) of this section is a felony of the first degree.
- (3) A violation of division (A)(2) of this section is a felony of the second degree.

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

Go to the Ohio Code Archive Directory

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.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2919. OFFENSES AGAINST THE FAMILY
DOMESTIC VIOLENCE

Go to the Ohio Code Archive Directory

ORC Ann. 2919.25 (2011)

§ 2919.25. Domestic violence

(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.

(B) No person shall recklessly cause serious physical harm to a family or household member.

(C) No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member.

(D) (1) Whoever violates this section is guilty of domestic violence, and the court shall sentence the offender as provided in divisions (D)(2) to (6) of this section.

(2) Except as otherwise provided in divisions (D)(3) to (5) of this section, a violation of division (C) of this section is a misdemeanor of the fourth degree, and a violation of division (A) or (B) of this section is a misdemeanor of the first degree.

(3) Except as otherwise provided in division (D)(4) of this section, if the offender previously has pleaded guilty to or been convicted of domestic violence, a violation of an existing or former municipal ordinance or law of this or any other state or the United States that is substantially similar to domestic violence, a violation of *section 2903.14, 2909.06, 2909.07, 2911.12, 2911.211 [2911.21.1], or 2919.22 of the Revised Code* if the victim of the violation was a family or household member at the time of the violation, a violation of an existing or former municipal ordinance or law of this or any other state or the United States that is substantially similar to any of those sections if the victim of the violation was a family or household member at the time of the commission of the violation, or any offense of violence if the victim of the offense was a family or household member at the time of the commission of the offense, a violation of division (A) or (B) of this section is a felony of the fourth degree, and, if the offender knew that the victim of the violation was pregnant at the time of the violation, the court shall impose a mandatory prison term on the offender pursuant

to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the second degree.

(4) If the offender previously has pleaded guilty to or been convicted of two or more offenses of domestic violence or two or more violations or offenses of the type described in division (D)(3) of this section involving a person who was a family or household member at the time of the violations or offenses, a violation of division (A) or (B) of this section is a felony of the third degree, and, if the offender knew that the victim of the violation was pregnant at the time of the violation, the court shall impose a mandatory prison term on the offender pursuant to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the first degree.

(5) Except as otherwise provided in division (D)(3) or (4) of this section, if the offender knew that the victim of the violation was pregnant at the time of the violation, a violation of division (A) or (B) of this section is a felony of the fifth degree, and the court shall impose a mandatory prison term on the offender pursuant to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the third degree.

(6) If division (D)(3), (4), or (5) of this section requires the court that sentences an offender for a violation of division (A) or (B) of this section to impose a mandatory prison term on the offender pursuant to this division, the court shall impose the mandatory prison term as follows:

(a) If the violation of division (A) or (B) of this section is a felony of the fourth or fifth degree, except as otherwise provided in division (D)(6)(b) or (c) of this section, the court shall impose a mandatory prison term on the offender of at least six months.

(b) If the violation of division (A) or (B) of this section is a felony of the fifth degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, the court shall impose a mandatory prison term on the offender of twelve months.

(c) If the violation of division (A) or (B) of this section is a felony of the fourth degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, the court shall impose a mandatory prison term on the offender of at least twelve months.

(d) If the violation of division (A) or (B) of this section is a felony of the third degree, except as otherwise provided in division (D)(6)(e) of this section and notwithstanding the range of prison terms prescribed in *section 2929.14 of the Revised Code* for a felony of the third degree, the court shall impose a mandatory prison term on the offender of either a definite term of six months or one of the prison terms prescribed in *section 2929.14 of the Revised Code* for felonies of the third degree.

(e) If the violation of division (A) or (B) of this section is a felony of the third degree and the offender, in committing the violation, caused serious physical harm to the pregnant woman's unborn or caused the termination of the pregnant woman's pregnancy, notwithstanding the range of prison terms prescribed in *section 2929.14 of the Revised Code* for a felony of the third degree, the court shall impose a mandatory prison term on the offender of either a definite term of one year or one of the prison terms prescribed in *section 2929.14 of the Revised Code* for felonies of the third degree.

(E) Notwithstanding any provision of law to the contrary, no court or unit of state or local government shall charge any fee, cost, deposit, or money in connection with the filing of charges against a person alleging that the person violated this section or a municipal ordinance substantially similar to this section or in connection with the prosecution of any charges so filed.

(F) As used in this section and *sections 2919.251 [2919.25.1] and 2919.26 of the Revised Code*:

(1) "Family or household member" means any of the following:

(a) Any of the following who is residing or has resided with the offender:

(i) A spouse, a person living as a spouse, or a former spouse of the offender;

(ii) A parent, a foster parent, or a child of the offender, or another person related by consanguinity or affinity to the offender;

(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender.

(b) The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent.

(2) "Person living as a spouse" means a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.

(3) "Pregnant woman's unborn" has the same meaning as "such other person's unborn," as set forth in *section 2903.09 of the Revised Code*, as it relates to the pregnant woman. Division (C) of that section applies regarding the use of the term in this section, except that the second and third sentences of division (C)(1) of that section shall be construed for purposes of this section as if they included a reference to this section in the listing of Revised Code sections they contain.

(4) "Termination of the pregnant woman's pregnancy" has the same meaning as "unlawful termination of another's pregnancy," as set forth in *section 2903.09 of the Revised Code*, as it relates to the pregnant woman. Division (C) of that section applies regarding the use of the term in this section, except that the second and third sentences of division (C)(1) of that section shall be construed for purposes of this section as if they included a reference to this section in the listing of Revised Code sections they contain.

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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.

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PERJURY

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ORC Ann. 2921.12 (2011)

§ 2921.12. Tampering with evidence

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

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

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

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

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2927. MISCELLANEOUS OFFENSES

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ORC Ann. 2927.01 (2011)

§ 2927.01. Abuse of a corpse

(A) No person, except as authorized by law, shall treat a human corpse in a way that the person knows would outrage reasonable family sensibilities.

(B) No person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities.

(C) Whoever violates division (A) of this section is guilty of abuse of a corpse, a misdemeanor of the second degree. Whoever violates division (B) of this section is guilty of gross abuse of a corpse, a felony of the fifth degree.

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 PENALTIES FOR MURDER

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ORC Ann. 2929.02 (2011)

§ 2929.02. Penalties for aggravated murder or murder

(A) Whoever is convicted of or pleads guilty to aggravated murder in violation of *section 2903.01 of the Revised Code* shall suffer death or be imprisoned for life, as determined pursuant to *sections 2929.022 [2929.02.2], 2929.03, and 2929.04 of the Revised Code*, except that no person who raises the matter of age pursuant to *section 2929.023 [2929.02.3] of the Revised Code* and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

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

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

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

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

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

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

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

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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.

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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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ORC Ann. 2929.04 (2011)

§ 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.

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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.

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ORC Ann. 2929.06 (2011)

§ 2929.06. Resentencing after sentence of death or life imprisonment without parole is set aside, nullified, or vacated

(A) If a sentence of death imposed upon an offender is set aside, nullified, or vacated because 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, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by *section 2929.05 of the Revised Code*, is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in *sections 2929.03 and 2929.04 of the Revised Code* is unconstitutional, is set aside, nullified, or vacated pursuant to division (C) of *section 2929.05 of the Revised Code*, or is set aside, nullified, or vacated because a court has determined that the offender is mentally retarded under standards set forth in decisions of the supreme court of this state or the United States supreme court, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall impose upon the offender a sentence of life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of *section 2929.03 of the Revised Code*, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of *section 2971.03 of the Revised Code* and served pursuant to that section, the court shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of *section 2929.03* or under *section 2909.24 of the Revised Code* at the time the offender committed the offense for which the sentence of death was imposed. Nothing in this division

regarding the resentencing of an offender shall affect the operation of *section 2971.03 of the Revised Code*.

(B) Whenever any court of this state or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because of error that occurred in the sentencing phase of the trial and if division (A) of this section does not apply, the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing. If the offender was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing. At the hearing, the court or panel shall follow the procedure set forth in division (D) of *section 2929.03 of the Revised Code* in determining whether to impose upon the offender a sentence of death, a sentence of life imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment. If, pursuant to that procedure, the court or panel determines that it will impose a sentence other than a sentence of death, the court or panel shall impose upon the offender one of the sentences of life imprisonment that could have been imposed at the time the offender committed the offense for which the sentence of death was imposed, determined as specified in this division, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of *section 2929.03 of the Revised Code*, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of *section 2971.03 of the Revised Code* and served pursuant to that section, the court or panel shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court or panel shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of *section 2929.03* or under *section 2909.24 of the Revised Code* at the time the offender committed the offense for which the sentence of death was imposed.

(C) If a sentence of life imprisonment without parole imposed upon an offender pursuant to *section 2929.021 [2929.02.1]* or *2929.03 of the Revised Code* is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of life imprisonment without parole that is set forth in *sections 2929.03 and 2929.04 of the Revised Code* is unconstitutional, the trial court that sentenced the offender shall conduct a hearing to resentence the offender to life imprisonment with parole eligibility after serving twenty-five full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(D) Nothing in this section limits or restricts the rights of the state to appeal any order setting aside, nullifying, or vacating a conviction or sentence of death, when an appeal of that nature otherwise would be available.

(E) This section, as amended by H.B. 184 of the 125th general assembly, shall apply to all offenders who have been sentenced to death for an aggravated murder that was committed on or after October 19, 1981, or for terrorism that was committed on or after May 15, 2002. This section, as amended by H.B. 184 of the 125th general assembly, shall apply equally to all such offenders sentenced to death prior to, on, or after March 23, 2005, including offenders who, on March 23, 2005, are challenging their sentence of death and offenders whose sentence of death has been set aside,

nullified, or vacated by any court of this state or any federal court but who, as of March 23, 2005, have not yet been resentenced.

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CHAPTER 2941. INDICTMENT
FORM AND SUFFICIENCY

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ORC Ann. 2941.145 (2011)

§ 2941.145. Specification that offender displayed, brandished, indicated possession of or used firearm

(A) Imposition of a three-year mandatory prison term upon an offender under division (B)(1)(a) of *section 2929.14 of the Revised Code* is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense)."

(B) Imposition of a three-year mandatory prison term upon an offender under division (B)(1)(a) of *section 2929.14 of the Revised Code* is precluded if a court imposes a one-year or six-year mandatory prison term on the offender under that division relative to the same felony.

(C) The specification described in division (A) of this section may be used in a delinquent child proceeding in the manner and for the purpose described in *section 2152.17 of the Revised Code*.

(D) As used in this section, "firearm" has the same meaning as in *section 2923.11 of the Revised Code*.

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CHAPTER 2945. TRIAL
JURY TRIAL

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ORC Ann. 2945.29 (2011)

§ 2945.29. Jurors becoming unable to perform duties

If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and has been discharged by the court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled.

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Ohio Rules Of Criminal Procedure

Ohio Crim. R. 8 (2011)

Review Court Orders which may amend this Rule.

Rule 8. Joinder of Offenses and Defendants

(A) Joinder of offenses.

Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.

(B) Joinder of defendants.

Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

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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.

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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. 31 (2011)

Review Court Orders which may amend this Rule.

Rule 31. Verdict

(A) Return.

The verdict shall be unanimous. It shall be in writing, signed by all jurors concurring therein, and returned by the jury to the judge in open court.

(B) Several defendants.

If there are two or more defendants the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(C) Conviction of lesser offense.

The defendant may be found not guilty of the offense charged but guilty of an attempt to commit it if such an attempt is an offense at law. When the indictment, information, or complaint charges an offense including degrees, or if lesser offenses are included within the offense charged, the defendant may be found not guilty of the degree charged but guilty of an inferior degree thereof, or of a lesser included offense.

(D) Poll of jury.

When a verdict is returned and before it is accepted the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged.

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Ohio Rules Of Evidence
Article IV Relevancy And Its Limits

Ohio Evid. R. 401 (2011)

Review Court Orders which may amend this Rule.

Rule 401. Definition of "Relevant Evidence"

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

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Ohio Rules Of Evidence
Article IV Relevancy And Its Limits

Ohio Evid. R. 402 (2011)

Review Court Orders which may amend this Rule.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

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

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Ohio Rules Of Evidence
Article IV Relevancy And Its Limits

Ohio Evid. R. 403 (2011)

Review Court Orders which may amend this Rule.

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

(A) Exclusion mandatory.

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

(B) Exclusion discretionary.

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

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Ohio Rules Of Evidence
Article IV Relevancy And Its Limits

Ohio Evid. R. 404 (2011)

Review Court Orders which may amend this Rule.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(A) Character evidence generally.

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

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

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

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

(B) Other crimes, wrongs or acts.

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

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Ohio Rules Of Evidence
Article IV Relevancy And Its Limits

Ohio Evid. R. 406 (2011)

Review Court Orders which may amend this Rule.

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

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Ohio Rules Of Evidence
Article VI Witnesses

Ohio Evid. R. 607 (2011)

Review Court Orders which may amend this Rule.

Rule 607. Impeachment

(A) Who May Impeach.

The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage. This exception does not apply to statements admitted pursuant to *Evid. R. 801(D)(1)(a)*, *801(D)(2)*, or *803*.

(B) Impeachment: reasonable basis.

A questioner must have a reasonable basis for asking any question pertaining to impeachment that implies the existence of an impeaching fact.

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Ohio Rules Of Evidence
Article VI Witnesses

Ohio Evid. R. 608 (2011)

Review Court Orders which may amend this Rule.

Rule 608. Evidence of Character and Conduct of Witness

(A) Opinion and reputation evidence of character.

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(B) Specific instances of conduct.

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's character for truthfulness, other than conviction of crime as provided in *Evid.R. 609*, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if clearly probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness's character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony by any witness, including an accused, does not operate as a waiver of the witness's privilege against self-incrimination when examined with respect to matters that relate only to the witness's character for truthfulness.

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Ohio Rules Of Evidence
Article VI Witnesses

Ohio Evid. R. 611 (2011)

Review Court Orders which may amend this Rule.

Rule 611. Mode and Order of Interrogation and Presentation

(A) Control by court.

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

(B) Scope of cross-examination.

Cross-examination shall be permitted on all relevant matters and matters affecting credibility.

(C) Leading questions.

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

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Ohio Rules Of Evidence
Article VI Witnesses

Ohio Evid. R. 612 (2011)

Review Court Orders which may amend this Rule.

Rule 612. Writing Used to Refresh Memory

If a witness uses a writing to refresh memory for the purpose of testifying, either: (1) while testifying; or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing. The adverse party is also entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

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Ohio Rules Of Evidence
Article VI Witnesses

Ohio Evid. R. 616 (2011)

Review Court Orders which may amend this Rule.

Rule 616. Methods of Impeachment

In addition to other methods, a witness may be impeached by any of the following methods:

(A) Bias.

Bias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence.

(B) Sensory or mental defect.

A defect of capacity, ability, or opportunity to observe, remember, or relate may be shown to impeach the witness either by examination of the witness or by extrinsic evidence.

(C) Specific contradiction.

Facts contradicting a witness's testimony may be shown for the purpose of impeaching the witness's testimony. If offered for the sole purpose of impeaching a witness's testimony, extrinsic evidence of contradiction is inadmissible unless the evidence is one of the following:

- (1) Permitted by *Evid. R. 608(A), 609, 613, 616(A), 616(B), or 706*;
- (2) Permitted by the common law of impeachment and not in conflict with the Rules of Evidence.

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Ohio Rules Of Evidence
Article VIII Hearsay

Ohio Evid. R. 801 (2011)

Review Court Orders which may amend this Rule.

Rule 801. Definitions

The following definitions apply under this article:

(A) Statement.

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(B) Declarant.

A "declarant" is a person who makes a statement.

(C) Hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(D) Statements which are not hearsay.

A statement is not hearsay if:

(1) Prior statement by witness.

The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with declarant's testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification.

(2) Admission by party-opponent.

The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

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Ohio Rules Of Evidence
Article VIII Hearsay

Ohio Evid. R. 802 (2011)

Review Court Orders which may amend this Rule.

Rule 802. Hearsay Rule

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

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Ohio Rules Of Evidence
Article VIII Hearsay

Ohio Evid. R. 803 (2011)

Review Court Orders which may amend this Rule.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression.

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(2) Excited utterance.

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing, mental, emotional, or physical condition.

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment.

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection.

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testi-

mony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity.

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in record kept in accordance with the provisions of paragraph (6).

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports.

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics.

Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirement of law.

(10) Absence of public record or entry.

To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 901(B)(10) or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations.

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates.

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person author-

ized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records.

Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property.

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property.

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents.

Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications.

Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises.

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history.

Reputation among members of the declarant's family by blood, adoption, or marriage or among the declarant's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of the declarant's personal or family history.

(20) Reputation concerning boundaries or general history.

Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character.

Reputation of a person's character among the person's associates or in the community.

(22) Judgment of previous conviction.

Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries.

Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

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OHIO RULES OF COURT SERVICE
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*** Rules current through rule amendments received through December 5, 2011 ***
*** Annotations current through August 29, 2011 ***

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) 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.

Certificate of Service

I hereby certify that a true copy of the foregoing Appenidx to Merit Brief of Appellant Calvin McKelton was forwarded by regular U.S. Mail to Michael Gmoser, Butler County Prosecutor, 315 High Street – 11th Floor, Hamilton, Ohio 45011, this 17th day of January, 2012.



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