ORIGINAL

In the Supreme Court of Ohio

STATE OF OHIO, Appellee -vs- BENNIE L. ADAMS, Appellant	Case Nº 2011-1978 On Appeal from the Mahoning County Court of Appeals, Seventh Appellate District Case No. 2008 MA 00246

APPELLANT BENNIE ADAMS' MERIT BRIEF
VOLUME TWO

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PROPOSITION OF LAW NO. 8

In a trial by jurors steeped in pretrial publicity, the failure to conduct meaningful and probing voir dire and the failure to file a non-spurious pretrial motion for change of venue or to develop a record to demonstrate accurately the effects of pretrial publicity, denies both trial by an impartial jury and the effective assistance of trial counsel, in contravention of the Sixth and Fourteenth Amendments to the U.S. Constitution and Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16.

I

In *State v. Williams*, 79 Ohio St.3d 1, 1997 Ohio 407, 679 N.E.2d 646, cert. denied, *Williams v. Ohio*, 522 U.S. 1053, 118 S.Ct. 703, 139 L.Ed.2d 646 (1998), the late Chief Justice Moyer and Justice Pfeifer of this Court argued that a Youngstown man, Willie J. Williams, should have been awarded a new trial. Williams was convicted of killing four (4) people execution-style. The Chief Justice wrote that he urged a new trial for Williams "acknowledging that the transcript in this case reveals a crime as heinous and calculated as any that come before us. This case represents a test for the criminal justice system because, if the right to an impartial jury is not protected for the worst among us, it is guaranteed to none of us." 79 Ohio St.3d, at 21. Chief Justice Moyer also wrote that "Protection of the integrity of the jury system requires our constant vigilance. Though perfect impartiality is neither a requirement nor an attainable goal, it must nevertheless remain the abiding objective of the justice system, and all reasonable measures must be taken by trial courts to protect the constitutional right of a criminal defendant to a fair and impartial jury." *Id.*

Writing for the United States Supreme Court in *Irvin v. Dowd* (1961), 366 U.S.

717, 81 S.Ct. 1639, 6 L.Ed.2d 751, Justice Tom Clark observed that England, from whom America has borrowed many concepts of individual liberty, bequeathed to us the most priceless of safeguards, trial by jury.

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver*, 333 U.S. 257; *Tumey v. Ohio*, 273 U.S. 510. "A fair trial in a fair tribunal is a basic requirement of due process. " *In re Murchison*, 349 U.S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. *Cf. Thompson v. City of Louisville*, 362 U.S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 *Burr's Trial* 416 (1807). 3 "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds v. United States*, 98 U.S. 145, 155.

366 U.S., at 721-722.

On the evening of February 16, 1961, police in Lake Charles, Louisiana, a medium-sized town some 40 or 50 miles west of Lafayette, with a city-suburban population at the time of around 150,000 residents, arrested Wilbert Rideau. He was charged with murder and other offenses. The next morning, a motion picture with a soundtrack was made of an interview in the jail between Rideau and the Sheriff of Calcasieu Parish. This 20 minute interview contained admissions by Rideau that he had perpetrated a bank robbery, and was guilty of kidnaping and murder.[31] Later the

[31] After several trials, the last only a few years ago, Rideau was found guilty of manslaughter, sentenced to 21 years, far more than he had served and was immediately released.

same day, the filmed interview was broadcast over a television station in Lake Charles, and where some 24,000 people in saw it on television. The film was again shown on television the next day to an estimated audience of 53,000 people. The following day the film was again broadcast by the same television station, and this time approximately 29,000 people saw and heard the interview.

Rideau's lawyers filed for a change of venue. After a hearing, the motion for change of venue was denied. Rideau was convicted and sentenced to death on the murder charge in the Calcasieu Parish trial court. Three members of the jury which convicted him had stated during voir dire that they had seen and heard Rideau's televised interview with the sheriff on at least one occasion. Two members of the jury were deputy sheriffs of Calcasieu Parish. Rideau had asked to have these jurors excused for cause, having exhausted all of their peremptory challenges, but the challenges for cause were denied by the trial judge. Rideau's conviction was affirmed by the Supreme Court of Louisiana.

The United States Supreme Court vacated the conviction in *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963). The Court held "that it was a denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged." 373 U.S., at 726. As Justice Potter Stewart put it:

> For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial -- at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.

373 U.S., at 726.

II

In this case, the news media, and to some extent, the government, played the Appellant's case like it was a Sunday night television movie: a young, beautiful college co-ed, raped and murdered, her body found in the river, finally gets the justice she deserves thanks to DNA, years after the case had gone "cold." To suggest that the news media does not have the right to report a case the way it sees fit would be absurd. Far less absurd would be to suggest that the *government* does not have the right to "poison the well." From the record, it appears that the Youngstown city prosecutor made public comments so inflammatory and improvident, and so far outside the parameters of the law, that Appellant's trial counsel was preparing to seek a "gag order." Appellant's counsel apparently abandoned that request when he became satisfied that government officers would no longer comment about the case improperly. This cases was, however, no run of the mill case.

Every time, it seems, that there is a case involving pretrial publicity, we read that judges should try first to select a jury in the county in which the offenses are alleged to have been committed. This Court has held time and again that "a careful and searching voir dire provides the best test of whether prejudicial pretrial publicity

has prevented obtaining a fair and impartial jury from the locality." *State v. Trimble*, 122 Ohio St.3d 297, 306, 2009 Ohio 2961, 911 N.E.2d 242, ¶58, certiorari denied, __ U.S.__, 130 S.Ct. 752, 175 L.Ed.2d 526 (2009), citing *State v. Bayless*, 48 Ohio St.2d 73, 98, 357 N.E.2d 1035 (1976). With due respect, that statement is a triumph of faith over experience. Particularly with the advent of the Internet, Google, Facebook, and all the rest, as well as the ubiquitous cell phone that can access the Internet from almost anywhere. To believe that jurors do not attempt to investigate high profile cases to which they are summoned is a whistle in the dark. There is no doubt that a jury can be seated in any county: to do so, we simply need to overlook the requirement to obtain "indifferent" jurors as they stand "unsworne." Asking the jurors to disregard what they have heard and read is described by the eminent jurist Learned Hand in a different context, and acknowledged by the United States Supreme Court in the seminal *Bruton* decision:

> Judge Hand addressed the subject several times. The limiting instruction, he said, is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else," *Nash v. United States*, 54 F.2d 1006, 1007; "Nobody can indeed fail to doubt whether the caution is effective, or whether usually the practical result is not to let in hearsay," *United States v. Gottfried*, 165 F.2d 360, 367; "it is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition," *Delli Paoli v. United States*, 229 F.2d 319, 321. Judge Hand referred to the instruction as a "placebo," medically defined as "a medicinal lie."

Bruton v. United States, 391 U.S. 123, 132, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), n. 8. No one, it seems, cites the pre-eminent case on the subject of pretrial publicity.

Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). If the case is cited, there is no meaningful discussion of its holdings. The Court's majority opinion was written by the late Justice Tom C. Clark. Like Justice Clark himself, the opinion is straightforward and plain-spoken. It contains none of the elegance of an opinion by Holmes, Brandeis, or Brennan. But the case's cure for conducting a criminal trial when there is widespread publicity is simple enough. Faced with the type of community publicity that by any objective view would threaten the fairness of a criminal trial, the trial judge should either change venue or order a continuance until the publicity abates or subsides.

> But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.

384 U.S., at 363. *Accord, Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

Sheppard remains the seminal statement of how liberties under the Constitution's Sixth and Fourteenth Amendments should be protected *vis-à-vis* pretrial publicity. The case has not been overruled, and while the states are free to afford citizens charged with criminal offenses more liberties than the federal Constitution

promises, *Michigan* v. *Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), the states are not free to ignore the requirements of the federal Constitution. The trial judge ignored the safeguards here. In doing so, he ignored the Fourteenth Amendment to the U.S. Constitution, which states are duty bound to apply.

The purpose of the voir dire proceedings is not to simply go through the motions and to proclaim, as the trial judge did at least once, how quickly it can be done. The trial court's attitude was, "let's see how quickly we can get through all of this jury selection stuff and get on with the trial," mere lip service to the idea of interrogating jurors in a meaningful fashion to determine if their exposure to pretrial publicity, or if their views about the death penalty, would prevent them from being fair and impartial jurors.

By allowing each side only four minutes per juror, the trial judge paid only lip service to the idea that the only constitutionally effective way to lay bare prejudice in the jurors—conscious or otherwise—is through the process of a careful, probing, meaningful voir dire. Instead of satisfying that constitutionally mandated—though, to be sure, often torturously monotonous—process of a meaningful voir dire, the trial judge forced counsel to ask questions under constraints that rendered jury selection a hollow formality. What we had here is a race to the finish line, nothing more.

As will be addressed elsewhere, the combination of the trial court's numbering system and the breakneck speed with which the trial judge attempted to obtain a

capital jury made for an abysmal—indeed, constitutionally insufficient—record for proper appellate review. For present purposes, it is enough to say that the method of capital voir dire enforced upon the parties by the trial court here denied the Appellant an impartial jury and resulted in a tribunal organized to sentence Appellant to death.

III

Ohio Constitution, Article I, Section 10 provides in pertinent part: "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; * * * and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed * * *." The Sixth Amendment to the U.S. Constitution provides in pertinent part: "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 * * *." R.C. 2901.12(K) provides: "Notwithstanding any other requirement for the place of trial, venue may be changed, upon motion of the prosecution, the defense, or the court, to any court having jurisdiction of the subject matter outside the county in which trial otherwise would be held, when it appears that a fair and impartial trial cannot be held in the jurisdiction in which trial otherwise would be held, or when it appears that trial should be held in another jurisdiction for the convenience of the parties and in the interests of justice." Crim. R. 18 provides in pertinent part:

> (A) General venue provision. The venue of a criminal case shall be as provided by law.
>
> (B) Change of venue; procedure upon change of venue. Upon the *motion of any party* or *upon its own motion* the court may transfer an action to any court having jurisdiction of the subject matter outside the county in which trial would otherwise be held, *when it appears that a fair and impartial trial cannot be held in the court in which the action is pending.*
>
> (1) Time of motion. A motion under this rule shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier, or at such reasonable time later as the court may permit.

(Emphasis added.) Trial counsel did not ask the trial court for a change of venue, did not file a timely motion for change of venue, and in fact trial counsel did not make a complete trial or appellate record by demonstrating the full extent of the pervasive nature of the publicity. The Appellant's trial counsel was ineffective for failing to do so. Based upon the provisions of the criminal rule, the case law, and the ABA standards quoted herein, there was an absolute duty of the part of counsel to seek a change of venue.[32]

There was substantial pretrial publicity in this case. We do not know that, of course, from any motion for change of venue filed by Appellant's trial counsel, with evidentiary exhibits attached—for none was filed. How, then, do we know from the record

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[32] Not all of the examples or effects of pretrial publicity can be detailed in this appellate brief. This is in no small measure because Appellant's trial counsel did not file a change of venue motion with exhibits attached. The government was ordered to duplicate its file, and yet ostensibly did so, scanning the file onto compact discs. Counsel's view indicates a national *Cosmopolitan* article in which Gina Tenney's case was described. While it certainly would not be proper to instruct the jurors about the article, it would be helpful to ask if anybody had read any magazine articles or any national news about the case. We know that the Court and counsel were aware of the *Cosmopolitan* article and a *Cleveland Plain Dealer* article. Defense counsel advised the trial court at the May 2, 2008 pretrial of the extensive publicity. Still, even with this knowledge, not a single question was asked of any of the prospective jurors about either article.

on direct appeal that there was substantial pretrial publicity? The answer is in the voir dire itself. The record shows a number of jurors who had knowledge of the case. Moreover, many of the jurors had substantial and detailed "knowledge" of the case.

The trial judge on his own concluded that jurors had heard about the case from the media:

> Okay. How many of you heard of this case? Okay. How many have heard of it prior to August 1st? Very few. Okay. *Mostly what you heard is from the media.* We will deal with that at another time. I just wanted an indication.

(Emphasis added.) (T.p. Voir Dire, Vol. I, p. 20.) The first group of jurors (1, 3, 218, 11, and 12) had knowledge about the case. (T.p. Voir Dire, Vol. I, p. 97.) Juror 1 heard about the case and repeated what the juror had heard in front of the other jurors. The juror heard on TV about the upcoming trial and that it was a rape. The trial judge offered to add to the juror's knowledge base: "THE COURT: Okay. You must have heard it was a murder." But the juror "didn't hear that part." Juror 1 claimed not to have formed any opinion in this case based on what was heard prior to coming to court.[33] Juror 226, heard about the case on TV and that Appellant was up for murder and rape charges.

All but one juror of the second group heard about the case. ("Now, is there anyone who heard this case prior to coming to court yesterday? Raise your hands. *All of you*, or except for the lady here in the middle.") Juror No. 17 saw the big headline that said jury

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[33] Jurors 3 and 218 sat on the panel that convicted Appellant and sentenced him to death.

orientation, so the juror read that article.[34] The Juror also knew that the case was from 1985. Juror No. 18 obtained information mainly from television, and saw a photo of the Appellant when he was younger. "They had the whole story on what had happened at that time. ... According to the news media, that he was released, there was not enough evidence. He got let go."

Juror 24 read an article in *The Vindicator,* a Mahoning County publication with widespread circulation throughout the County. There were a lot of details about it, about the lady that was murdered, and that she was a student at the University. The juror read that she was "harassed and stalked and et cetera." After this juror told the Court and the other assembled jurors more than they professed to know, the judge tried to downplay the information. "Now, I'm sure that you don't believe everything you read, do you?" "Especially what you read in the newspaper." Juror No. 24 equivocated about being able to afford Appellant a fair trial. When asked, "Can you give him a fair and impartial trial?" the juror said "I think so." But that was not good enough for the trial court.

> THE COURT: Okay. Now, remember I talked about commitment yesterday? It's not I think so or I believe I can. You must do it or you have to tell us you can't do it. Can you do it? You seem to hesitate.

This questioning was performed in front of other jurors, including jurors 17 and 228, both of whom were members of the panel that convicted Appellant and sentenced him to death. As to the third group of jurors the judge initially forgot to ask about

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[34] Juror 17 sat as a member of the panel that convicted Appellant and sentenced him to death.

publicity. When he did at the end (after twice being reminded by counsel) it was not the type of careful, probing voir dire that the Constitution demands.

> THE COURT: Okay. Thank you. Okay. You're going to go with my bailiff for a few minutes, and we're going to –
>
> MR. DeFABIO: Pretrial publicity, Your Honor.
>
> THE COURT: Oh, right. Did anybody hear about this case prior to you coming to court yesterday? Okay. Juror 44.
>
> JUROR NO. 44: My wife read an article in *The Vindicator* Sunday.
>
> THE COURT: And she told you about it?
>
> JUROR NO. 44: Yeah. She knew I was coming for jury duty, and she suggested it was those two cases.
>
> THE COURT: Did you know any of the facts of the case?
>
> JUROR NO. 44: No.
>
> THE COURT: Okay. Have you formed any opinion as to the guilt or innocence of Mr. Adams?
>
> JUROR NO. 44: No.[35]
>
> THE COURT: Okay. And nobody else knew anything about it till I read it to you in court?
>
> JUROR NO. 31: I saw it on TV.
>
> THE COURT: You saw it on TV?
>
> JUROR NO. 31: I saw it on the news.
>
> THE COURT: In the last few days?
>
> JUROR NO. 31: Yes.

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[35] Juror 44 sat as the sixth juror of the 12 jurors who convicted Appellant and sentenced him to death. (Footnote not in original.)

THE COURT: And they know we're going through this and they know about pretrial publicity and they do it anyway. Have you formed any opinion based on that pretrial publicity as to the guilt or innocence of Mr. Adams?

JUROR NO. 31: No.

THE COURT: Okay. If you'll go with my bailiff, please. That's all.

(T.p. Voir Dire Vol I, pp. 236-237.) The trial court was busy complaining about the fact that the news media did what the case law says the media has a right to do: cover news stories. The courts have repeatedly said that the First Amendment right of the media to cover stories can co-exist with the Sixth and Fourteenth Amendment rights to a fair trial. That is why change of venue provisions exist. *See*, *Sheppard v. Maxwell* and *Nebraska Press Ass'n*. Instead of complaining about the news media doing their job, the trial judge should have asked more detailed questions about the content of the story. To ask simply whether the juror could be fair and impartial based upon his wife telling him about the story ignores—indeed, none of the jurors on any of the panels were asked—if they had heard the case discussed in and around the courthouse, whether by other prospective jurors or other persons. None of the jurors were asked if they had heard any news coverage or discussion of the case after the first day of jury selection. To be sure, such questions may have yielded negative results. But the fact that they were not asked is indicative of the desire of the trial judge to assemble a jury quickly, the saturation of news coverage and its potential effect on the ability—as opposed to the desire—of the jurors to afford Appellant the presumption of innocence, their protestations of fairness

notwithstanding.

As to the fourth group of prospective jurors, at least two of them revealed in front of the other jurors what they had heard. Juror 55 read about the case in the paper. It said that "the YSU girl was murdered and that we're trying the fellow that was arrested for the crime." The judge did not get the answer that he wanted when he asked:

> THE COURT: Okay. Now, based upon what you have heard, have you formed any opinion as to the guilt or innocence of Mr. Adams?
>
> JUROR NO. 55: Well, it's hard to answer. I would say if you haven't found anybody in 22 years that committed the murder and his DNA matches –
>
> THE COURT: Who says his DNA matched?
>
> JUROR NO. 55: That's what the paper says.
>
> THE COURT: That's why I want to know what you heard in the paper. Do you believe everything you read?
>
> JUROR NO. 55: Sometimes.

(T.p. Voir Dire Vol. II, p. 243-244.) It is blinking reality to believe that, in this modern era of crime shows like *CSI* and *NCIS*, a DNA "match" that "solved" a "cold case" would not impermissibly undermine the presumption of innocence in the minds of some, if not all, prospective jurors. Furthermore, this questioning occurred in front of Jurors 48, 220, 60, and 233, as no doubt because individual questioning would have taken too long to satisfy the trial court. Juror 220 sat as the third juror on the panel of 12 that convicted Appellant and sentenced him to death. Rather than a probing voir dire designed to determine whether the jurors had been tainted by pretrial publicity, the trial judge engaged in a gargantuan effort here only toward "rehabilitation" so as to place as many of jurors on the

panel as possible. But the environment in which the jurors found themselves impermissibly undermined the constitutional presumption of innocence. See, *e.g.*, *State v. Lane*, 60 Ohio St.2d 112, 397 N.E.2d 1338 (1979).

> THE COURT: In this case, have you believed everything you've read?
>
> JUROR NO. 55: No.
>
> THE COURT: Now, again, can you -- have you formed an opinion?
>
> JUROR NO. 55: No, I haven't, *not yet.*

(T.p. Voir Dire, Vol. II, pp. 244.) (Emphasis added.) The trial court, after a long dissertation about the media, asked, "But what we want to know is can you give this gentleman a fair and impartial trial, ma'am?" The best the juror could muster was, " I think so," followed by, "Well, I need to hear the evidence, yes." As in other cases in the voir dire, the judge persisted until the juror relented.

> THE COURT: No. I just want to know if you'd be fair and impartial. I'm not asking you to –
>
> JUROR NO. 55: Yes.
>
> THE COURT: -- give me a verdict, just to be fair.
>
> JUROR NO. 55: Yes.

Juror 60 heard "Primarily what this woman [number 55] said, what I've read in the paper, and after all these years and the DNA, seemed like they had the guy to me." The judge's attempt to talk the juror out of his impression did not work, and in any event, an objective probing voir dire, not rehabilitation and intimidation by the trial judge in

front of other prospective jurors, were what the Constitution called for.

THE COURT: Okay. But that's the paper's version.

JUROR NO. 60: Yeah, true.

THE COURT: Okay. And we don't know if the paper's version is correct.

JUROR NO. 60: Not really, but I think it is.

THE COURT: Okay. *So you've already formed an opinion?*

JUROR NO. 60: *Yes, sir.*

THE COURT: Okay. *And what is your opinion?*

JUROR NO. 60: I say he did it.

THE COURT: Okay. Based on that one shred of evidence?

JUROR NO. 60: *Yes, sir. The DNA kind of convinced me. They're always turning people loose because of discovered DNA, and this got a guy caught because of DNA, so that's my opinion.*

THE COURT: That's your opinion. Okay. And I take it you cannot set that aside?

JUROR NO. 60: I could try, but, you know, it's always going to be there.

THE COURT: Um-hum. Okay. Has anyone else heard anything?

(Emphasis added.) (T.p Voir Dire, Vol II, pp. 247-248.) Instead of conducting individual sequestered voir dire, as had been ordered previously, and as ABA Guidelines suggest, the trial judge tried to minimize the impact on the other jurors who were listening.

THE COURT: Okay. Has anyone else been influenced by these two folks' comments concerning DNA? Ma'am. Juror 233?

JUROR NO. 233: Yes.

THE COURT: Have you been influenced by their comments about DNA?

JUROR NO. 233: It makes you wonder, but no, I believe I should hear all the evidence, no.

THE COURT: I'm sorry?

JUROR NO. 233: I believe I should hear all the evidence, so I'm not influenced by what --

After Juror 60 was excused for cause (Tp. *id.*, at 249), the judge asked:

THE COURT: Okay. Is there anyone here who cannot give this man a fair and impartial trial? Okay. No one's answering.

(T.p Voir Dire Vol II, pp. 248-249.) And that was the end of the publicity voir dire for that group of jurors. No careful probing voir dire. Counsel could, of course, supplement the court's "voir dire" with their own. Of course, to talk to a juror like juror 55 or juror 233 about the effects of pretrial publicity, about the effects of what they had heard about the defendant in the courtroom, and about their views of the death penalty, and to do so all in four minutes is itself "blinking reality." We can continue to uphold "limits" on voir dire imposed by the trial judges but we will continue to have convictions in which we cannot rest assured of juror impartiality.

Most of the information that Juror 99 furnished was in chambers. However, no one asked this juror whether the juror had a discussed the case in the courthouse, discussed the case with other jurors, or had heard others discussing the case. Experience teaches that jurors called to hear a case about which they have some prior knowledge and which has received media attention seldom can keep their information to themselves. Sometimes they can, but no one asked this juror any of those questions. The experience with Jurors

173, 175, and 176 indicates what is often the case. Despite the admonitions, jurors seldom come forward with information of jury misconduct. Many, if asked directly, are afraid to lie to the court *See, e.g. State v. Williams*, 79 Ohio St.3d, at 23 (Moyer, Ch. J., joined by Pfeifer, J., dissenting). But that's a different question entirely from whether they're asked in the first place.[36]

> JUROR NO. 99: I read all my information on line, *The Vindicator*, Vindy.com, and I'm a Youngstown State -- YSU alumni. It kind of piqued my interest when the story first started, and, you know, whenever it came up in *The Vindicator*, I'd always read about it, you know. I'm always interested in YSU happenings and things like that.
>
> THE COURT: But I need to know what facts of the case you know.
>
> JUROR NO. 99: Apparently, they found some DNA to link him to the crime, at least that's what I understand. She was afraid of him, she called her mother to come pick her up, then that following -- that day or the following day, she was -- you know, either disappeared or was murdered. They found her in the Mahoning River December 30th I believe, that Gina Tenney that we speak of.
>
> THE COURT: I understand.
>
> JUROR NO. 99: I guess that's kind of in a nutshell. I don't really know much else.
>
> THE COURT: Did you hear anything about the defendant or his background?
>
> JUROR NO. 99: He lived in the same building as her. He lived below her I believe in another apartment. They found his -- her ATM card on him -- or in his possession I believe. That's pretty much –

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[36] What Juror 99 candidly revealed in chambers was much more than the other jurors led the court to believe was in the *Vindicator* articles. We know from Juror 99 that the *Vindicator* article gave details about the entire case, not just DNA. None of the other jurors who were bold enough to admit that they had read the paper revealed such details. Neither the judge nor defense counsel made any effort to explore whether other jurors were aware of such details, and whether they had spoken about those details to others, including prospective jurors

THE COURT: Okay. Have you formed a conclusion or an opinion as to the guilt or innocence of the defendant?

JUROR NO. 99: I don't know. I don't know at this point to be honest with you. I can't say yes or no.

THE COURT: Okay. Well, can you put aside whatever you heard and base a decision solely on the evidence presented in the courtroom because that may not be the evidence?

JUROR NO. 99: I understand. I'm going to be completely honest, probably not.

THE COURT: Okay.

JUROR NO. 99: Okay. I'm just being honest.

(T.p. Voir Dire Vol. II, pp. 402-404.)

It is one thing if a juror may recall reading something in the paper about the defendant being arrested or indicted for a murder. Asking a juror if he or she could set that aside and decide the case based upon the evidence, and receiving an affirmative response, may be a realistic expectation. But it is quite another thing when jurors have heard that the Appellant had been in prison before; that the Appellant had been in prison for raping another woman and is charged with rape and murder here; that the case was a reopened "cold case," and that the government had DNA which pinpointed Appellant as the man who committed the crimes.

These jurors should have been properly excused for cause. Given the widespread publicity, even the publicity that we know about simply from the voir dire, believing that such jurors could impartially determine the case solely from the evidence is a triumph of faith over experience.

In this case, Appellant's trial counsel neither filed a motion for change of venue nor engaged in any meaningful voir dire on the subject. To be sure, it's impossible in four minutes in to do anything other than pay lip service to the idea that there was individual voir dire about publicity and the death penalty.[37] But neither did they object to the absurd limits placed upon voir dire

Even with the body of case law that has developed about attempting first to select a jury in the county in which the indictment was brought, when pretrial publicity is pervasive, a change of venue is proper—in fact, not only proper, but required. If, as the Ohio cases say, a careful and searching voir dire provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality, *State v. Davis*, 76 Ohio St.3d 107, 111, 1996 Ohio 414, 666 N.E.2d 1099, quoting *State v. Bayless*, 48 Ohio St.2d 73, 98, 357 N.E.2d 1035 (1976), then there should have been a careful and probing voir dire. Instead the trial judge started the case with an announcement to the jurors that a jury would be selected by Friday no matter what. "If you do not hear from us by Friday at noon, you're excused as jurors." (T.p Voir Dire Vol. I, p. 5). In this case, there was a

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[37] When the case was originally assigned to Judge R. Scott Krichbaum, he had granted a defense motion for individual sequestered voir dire on the subjects of the death penalty and publicity. (T.d. 33)." Why, when the case was transferred to Judge Franken, this order was ignored is not explained in the record. Nor does the record seem to contain an order countermanding Judge Krichbaum's original order. Unfortunately, however, the record does not contain any evidence that Appellant's trial counsel objected to the four minute voir dire procedure.

reasonable likelihood that pretrial publicity prevented a fair trial. The nature and the extent of the publicity regarding the "cold case," the DNA, and all the rest of it prevented Appellant from having a fair trial.

In *South Euclid v. Florian*, 95 Ohio Law Abs. 236, 192 N.E.2d 548 (M.C., 1963), the municipal court of South Euclid was faced with a defense motion for change of venue after the defendant had been previously convicted and the conviction was publicized within the jurisdiction of the court. The court said that the issue is:

> not what an appellate court would do if the judge in the exercise of his discretion overruled this motion, but rather, the issue is whether, this motion should be granted considering the publicity given the jury verdict, considering the general interest in the community (because of the unusual nature of the charge) and considering what transpired in the earlier trial of this case.

The *Florian* court relied upon the case of *State v. Williams*, 67 N.J. Super. 599, 171 A.2d 137 (1961). In *Williams*, the court was faced with a defense motion for change of venue after the defendant had entered a plea of *nonvult* (the equivalent of a plea of guilty). The *Williams* court held:

> It is to the credit of our system of justice that a prospective juror candidly admitted at the prior trial that he knew of the plea of *nonvult* to second degree murder. If such knowledge were not revealed in a subsequent trial, the defendant would be grossly prejudiced. In the interest of justice, it is the duty of this court not to expose this defendant to the risk contingent upon a trial in this county.

171 A.2d, at 139-140.

The American Bar Association has published standards that should have guided both the trial court and Appellant's trial counsel. American Bar Association, *ABA*

Standards for Criminal Justice: Fair Trial and Free Press, (3rd Ed. 1992).

Standard 8-3.3 Change of venue or continuance

The following standards govern the consideration and disposition of a motion in a criminal case for change of venue or continuance based on a claim of threatened interference with the right to a fair trial:

(a) Except as federal or state constitutional or statutory provisions otherwise require, a change of venue or continuance may be granted on motion of either the prosecution or the defense.

(b) *A motion for change of venue or continuance should be granted whenever it is determined that, because of the dissemination of potentially prejudicial material*, there is a *substantial likelihood* that, in the absence of such relief, a fair trial by an impartial jury cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. *A showing of actual prejudice shall not be required.*

(c) If a motion for change of venue or continuance is made prior to the impaneling of the jury, the court may defer ruling until the completion of voir dire. The fact that a jury satisfying prevailing standards of acceptability has been selected shall not be controlling if the record shows that the criterion for the granting of relief set forth in paragraph (b) has been met.

(d) It should not be a ground for denial of a change of venue that one such change has already been granted. The claim that the venue should have been changed or a continuance granted should not be considered to have been waived by the subsequent waiver of the right to trial by jury or by the failure to exercise all available peremptory challenges.

(Emphasis added.) Standard 8-3.5, entitled "Selecting the jury," provides:

The following standards govern the selection of a jury in those criminal cases in which questions of possible prejudice are raised:

(a) If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, *the examination of each juror with respect to exposure should take place outside the presence of other chosen and prospective jurors*. An accurate record of this examination should be kept by a court reporter or tape recording whenever possible. The questioning should be conducted *for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective juror that an inability to case aside any preconceptions would be a dereliction of duty.*

(b) Whenever prospective jurors have been exposed to potentially

> prejudicial material, the court should consider not only the jurors' subjective self-evaluation of their ability to remain impartial but also the objective nature of the material and the degree of exposure. *The court should exercise extreme caution in qualifying a prospective juror who has either been exposed to highly prejudicial material or retained a recollection of any prejudicial material.*
>
> (c) Whenever there is a substantial likelihood that, due to pretrial publicity, the regularly allotted number of peremptory challenges is inadequate, *the court should permit additional challenges* to the extent necessary for the impaneling of an impartial jury.
>
> (d) Whenever it is determined that potentially prejudicial news coverage of a criminal matter has been intense and has been concentrated in a given locality in a state (or federal district), the court should, in jurisdictions where permissible, consider drawing jurors from other localities in that state (or district).

(Emphasis added.) These provisions not only were not followed, but the record reveals every effort to flout the principles for which the guidelines stand. Moreover, counsel failed to follow the standards and failed to object to the trial court's flaunting of the standards. Counsel were not functioning as counsel in this regard. This deprived the Appellant not only of the impartial jury he deserved, but the assistance of counsel to which he was entitled, in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution, and in violation of the Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16.

Hoping for a trial with 12 impartial, "disinterested" jurors, the type of jury promised by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16, the Appellant was tried by jurors steeped in publicity. Even from this inadequate record, there can be no assurance that the Appellant received a trial by "indifferent" jurors. Whatever the trial judge's unexplained "experiment," it did not work. Both the Appellant and our system of justice were the victims.

> Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution -- of whatever race, creed or persuasion.

Chambers v. Florida, 309 U.S. 227, 241, 60 S.Ct. 472, 84 L.Ed. 716 (1940). The trial court afforded Appellant no such haven here. Appellant's conviction and death sentence are in violation of the aforementioned constitutional principles and must be vacated.

PROPOSITION OF LAW NO. 9

It is an abuse of discretion for a trial court to refuse to declare a mistrial to protect the freedoms guaranteed by the Fourteenth Amendment to the U.S. Constitution and Ohio Constitution, Article I, Sections 1, 2, and 16.

Prior to the commencement of trial, the trial court made several rulings regarding preclusion of testimony of prejudicial evidence. The rulings were circumvented during trial when Detective Blanchard provided testimony in contravention of the rulings. The trial court abused its discretion in denying Appellant's motion for a mistrial as a result of Detective Blanchard's comments and testimony. (T.p. Trial Vol. I, p. 230.)

The American criminal justice system is firmly grounded on the principle, imbedded in our Constitution, that every person accused of a crime is entitled to be tried by a fair and impartial jury of his peers and to be convicted, if at all, on the basis of evidence properly adduced at trial. Writing for the Court in *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955), Justice Hugo L. Black said: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. ... To perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States*, 348 U.S. 11, 14." Chief Justice William Howard Taft wrote in *Tumey* v. *Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927) that "the requirement

of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man ... to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

Trial courts always have an obligation to ensure that the proceedings are fair,[38] but that duty reaches a heightened level in death penalty cases because "death is different."[39] Here, the process was not fair, and was tainted by innuendo and

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[38] See, generally, *Chambers* v. *Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *State* v. *Lane*, 60 Ohio St.2d 112, 397 N.E.2d 1338 (1979), and the authorities cited therein.

[39] This famous phrase came not from the Supreme Court itself, but was a phrase employed by the estimable Professor Anthony Amsterdam. In the 1976 capital case arguments before the Supreme Court, Professor Amsterdam, when asked by the late Justice Potter Stewart if his argument did not "prove too much", responded:

> Our argument is essentially that death is different... .
>
> Now, why do we say death is different? Our legal system as a whole has always treated death differently. We allow more peremptory challenges; we allow automatic appeals; we have different rules of harmless error; we have indictment requirements; unanimous verdict requirements in some jurisdictions, because death is different.
>
> Death is factually different. Death is final. Death is irremediable. Death is unknowable; it goes beyond this world. It is a legislative decision to do something, and we know not what we do. Death is different because even if exactly the same discretionary procedures are used to decide issues of five years versus ten years, or life versus death, the result will be more arbitrary on the life or death choice.

Oral arguments held March 30-31, 1976. See, Peter Irons and Stephanie Guitton, ed., *May It Please the Court* (New York: The New Press, Copyright © 1993), 232-33.

interjection of improper evidence by Detective Blanchard.

The State filed a notice of intent to use other acts evidence and hearsay, intending to introduce testimony regarding Gina Tenney's fear of the Appellant. (T.d. 77.) The trial court ruled the State could introduce evidence of the victim's fear and/or apprehension of the Appellant, but could not present testimony about *why* she was afraid; nor was the State permitted to present testimony regarding the facts and circumstances of her fear.[40] (T.d.131; T.p. 09/19/2008 hearing pp. 66-67) In addition, the State filed a notice of intent to use other acts evidence regarding Appellant's 1986 conviction for rape, kidnapping and aggravated robbery. (T.d. 78.) The prior conviction involved an incident which occurred prior to the Tenney matter where the victim was Theresa Lattanzi. The trial court properly found that there were not sufficient similarities for purposes of identification, and further found the prejudicial effect of such testimony far outweighed any probative value. (T.d. 131.)

Despite these rulings, Detective Blanchard repeatedly and improperly referenced the Lattanzi case prompting a motion for mistrial which the trial court denied. Prior to commencing cross examination defense counsel specifically addressed the fact that there were issues in the file which addressed both cases; Tenney and Lattanzi. In fact, the State confirmed they had cautioned Detective Blanchard to not

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[40] As set forth in Proposition of Law No. 6, the trial court's ruling, given the fact that no witnesses could remember specific statements made by Tenney was improper as no testimony regarding fear should have been permitted.

bring up the Lattanzi matter:

> MR. DEFABIO: While we're here, during my cross- - and we have talked about this so that this doesn't come up, I would ask them on a break to remind their witness of this - - of course I'm going to question him regarding information in his detective notes. Within the confines of the detective notes is mention of other acts' testimony that you have already excluded, that being Lattanzi. They have indicated - - my concern is obviously just because for convenience he puts stuff in there about another case, it doesn't mean by questioning about the detective - -
>
> THE COURT: First of all you can't question him about his detective notes.
>
> MR. DEFABIO: If he says something differently.
>
> * * *
>
> MR DEFABIO: I agree with you. But in other words, state has agreed that in no way - - there are a number of documents in this case where there's like a cross-over.
>
> THE COURT: I understand.
>
> MR. DEFABIO: I just want that to be made part of the record that we have agreed - -
>
> THE COURT: We're stuck with - -
>
> MR. DEFABIO: I would like them to tell Blanchard.
>
> MS. CANTALAMESSA: I told him right before.
>
> MR. DEFABIO: Please tell him again because it is Blanchard.

(T.p. Trial Vol. I, p. 166-167.) Shortly thereafter, the defense began cross examining Detective Blanchard. He did not follow the trial court's rulings, and did not follow the prosecutor's directive.

Defense counsel was questioning Detective Blanchard regarding the pretrial

identification procedure involving John and Sandra Allie. According to the testimony, present at the line up were two attorneys, John Allie, Sandra Allie, Detective Landers and Detective Blanchard. Yet, when questioned about witnesses, Detective Blanchard interjected the Lattanzi matter:

> Q Can you read who the witnesses were, by the way, down below? I know Patrick V. Kerrigan.
>
> A You mean Theresa Lattanzi, the witnesses, Sandra Howard -
>
> MR. DEFABIO: Your Honor, once again
>
> THE COURT: I can't hear you.
>
> A You said witnesses, Counselor.
>
> Q Okay. You see Patrick V. Kerrigan?
>
> A I see Patrick V. Kerrigan.
>
> Q And underneath his name?
>
> A Is Sam Amendolara.
>
> Q That is cut off there; correct?
>
> A It is cut off, yeah, on this copy.
>
> MR. DEFABIO: We need to approach again.

(WHEREUPON, a discussion was had among Court and counsel out of the hearing of the jury as follows:)

> MR. DEFABIO: This is now the second or third time he's pulled this. Number one, in questioning him about the hearings in July and September, he specifically said, oh, at the suppression hearing? That wasn't the question I asked him. About 15 minutes ago -- I let it pass during one of my questions -- he said something about, this case? In other words, he was referring that there was another case out there.
>
> And now he's mentioned Theresa Lattanzi.

THE COURT: I was getting confused.

MR. DEFABIO: No, no, no, no. And then on this he indicated -- they indicated that he was going to not mention her name and not reference it and here he brings up Lattanzi. I move for a mistrial.

THE COURT: Overruled.

(T.p. Trial Vol. I, p. 230.) Appellant's counsel noted the Lattanzi comment was made *after* Detective Blanchard had already made a reference to "this" case, implying there had been another case. In addition, Detective Blanchard also provided testimony in violation of the trial court's order prohibiting testimony as to why Ms. Tenney was fearful or apprehensive of Appellant.

Q The prior break-in, the prior burglary, what led you to think that Bennie Adams was a suspect?

A From what the victim had told me that she was having problems -

MR. DEFABIO: Objection.

THE COURT: Stop.

MR. DEFABIO: Again, objection.

THE COURT: The objection is sustained.

BY MS. CANTALAMESSA:

Q So from what she had told you?

A Yes.

(T.p. Trial Vol. II, p. 244.) Detective Blanchard testified, implying there was another case, testified Lattanzi was a witness at the line up, testified Ms. Tenney was having problems with Appellant and also interjected testimony that there was a suppression

hearing. These were not isolated incidents, and inadvertence can only be carried so far, especially by a police officer who is also a trained lawyer.[41] The improper comments were dispersed throughout Detective Blanchard's testimony and no curative or cautionary instruction was ever provided. Given the numerous orders disregarded and the extent of the comments, a mistrial should have been granted.

Mistrials are necessary "only when the ends of justice so require and a fair trial is no longer possible." *State v. Garner*, 74 Ohio St.3d 49, 59, 1995 Ohio 168, 656 N.E.2d 623; *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991). The grant or denial of an order of mistrial lies within the sound discretion of the trial court. *State v. Glover*, 35 Ohio St.3d 18, 517 N.E.2d 900 (1988); *State v. Widner*, 68 Ohio St.2d 188, 190, 429 N.E.2d 1065 (1981). Generally, when improper prejudicial comments or testimony are presented, it is not an abuse of discretion to deny a mistrial when appropriate curative instructions are given to the jury. A jury is presumed to follow the instructions, including curative instructions, given it by a trial judge. *See, State v. Loza*, 71 Ohio St. 3d 61, 75, 641 N.E.2d 1082, 1100 (1994), quoting *State v. Henderson*, 39 Ohio St. 3d 24, 33, 528 N.E.2d 1237, 1246 (1988). No such curative instruction was given in this case. The jury heard the improper comments and no action was taken to correct the testimony.

In *State v. Garner*, 74 Ohio St.3d 49, 59, 1995 Ohio 168, 656 N.E.2d 623, an

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[41] The Ohio Supreme Court's website shows that Detective Blanchard has been admitted to the Ohio Bar since November 19, 1996.

officer improperly referenced the defendant's prior arrests while testifying. The Court found the comment "fleeting" and no mistrial required because the comment was promptly followed by a curative instruction. *Id.*, at 59. Likewise, in *State v. Castle*, 3rd Dist. No. 8-06-27, 2007 Ohio 3599, ¶31, the arresting officer improperly testified that the defendant, upon arrest, intended to confer with an attorney and did not give a statement. The Court of Appeals found the trial court did not act unreasonably, arbitrarily, or unconscionably when it denied Castle's motion for a mistrial because the officer "made a vague, isolated remark concerning Castle's decision to consult counsel. The trial court sustained defense counsel's objection and instructed the jury to disregard the remark."

When prejudicial, improper testimony is deliberately interjected during a trial, reversal of the conviction is required. See, *United States v. Blanton*, 520 F.2d 907 (6th Cir. 1975). In *Blanton*, the testifying officer indicated that the defendant was under investigation for another crime. Likewise in *United States v. Forrest*, 17 F.3d 916 (6th Cir. 1994), an officer while testifying referenced the defendant's criminal history. The court found no abuse of discretion because of the immediate limiting instruction but noted the prejudicial effect of officers blurting out inadmissable "convenient details" while testifying:

> In light of these circumstances, it is a close question as to whether the machinations of the agent-witness require a mistrial. On balance, we believe that the clear admonition by the judge and the ample other evidence of guilt determine that a mistrial is not mandated. Nevertheless, we caution both prosecutors and law enforcement witnesses that they

> needlessly jeopardize warranted convictions if they connive at "blurting out" inappropriate but conveniently useful details during testimony. As our cases indicate, where deliberately injected testimony concerning unrelated offenses prejudices the defendant, we will not hesitate to reverse verdicts that may have been reached because of the potential influence of such statements. See, e.g., *United States v. Blanton*, 520 F.2d 907, 909-10 (6th Cir. 1975); *United States v. Nemeth*, 430 F.2d 704, 706 (6th Cir. 1970). We remind all prosecutors that their "duty to the public and the defendant obliges [them] to seek justice rather than convictions." *United States v. Perry*, 512 F.2d 805, 807 (6th Cir. 1975).

Id., at 921. Here, Detective Blanchard took every opportunity to blurt out information which was inadmissible and prejudicial—and he knew it. Counsel noted Blanchard's inflection when asked a question, responding "this" case. Reference to the suppression hearing clearly conveyed to the jury that some evidence may have been excluded, or at least Appellant was attempting to keep evidence away from the jury. The Court of Appeals conclusion that most "murder cases involve suppression hearings" does little to address the point that information about the suppression hearing is not admissible and is prejudicial.

The trial court abused its discretion when it denied Appellant's motion for a mistrial. Detective Blanchard's deliberate tactics to interject prejudicial information cannot be tolerated in a death penalty case, where all precautions should be taken to insure the proceedings are fair and that any verdict be reliably obtained.

PROPOSITION OF LAW NO. 10

> Failure to give pertinent jury instructions that are a correct statement of law denies a capital defendant freedoms secured by Fourteenth Amendment to the U.S. Constitution and the Ohio Constitution, Article I, Sections 1, and 16.

Appellant was arrested on October 3, 2007 and charged with offenses which occurred in 1985. Appellant requested two jury instructions to properly reflect the law at the time of the offense and the evidence introduced at trial. The trial court denied both requests.

I

Count One of the indictment charged Appellant with aggravated murder pursuant to R.C 2903.01(B). Appellant requested the jury charge include an instruction on the lesser included offense of involuntary manslaughter pursuant to R.C. 2903.04. In 1985 the involuntary manslaughter statute provided the following:

> (A) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony.
> (B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor.
> (C) Whoever violates this section is guilty of involuntary manslaughter. Violation of division (A) of this section is a felony of the first degree. Violation of division (B) of this section is a felony of the third degree.

R.C §2903.04.[42] Because there was evidence from which the jury could find that Ms.

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[42] Though since amended, the involuntary manslaughter statute now is essentially the same, presently defining the offense as follows: "(A) No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony."

Tenney's death was the proximate result of Appellant committing or attempting to commit a felony, the involuntary manslaughter charge should have been given to the jury. In a criminal case, if a requested instruction is correct, pertinent and timely presented, it must be included, *at least in substance*, in the general charge. *State v. Barron*, 170 Ohio St. 267, 164 N.E.2d 409 (1960); *State v. Nelson*, 36 Ohio St.2d 79, 303 N.E.2d 865 (1973), syllabus at 1; *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1950). Moreover, a defendant is entitled to an instruction on a lesser-included offense if (1) the offense on which the instruction is requested is lesser than and included within the charged offense and 2) the jury could reasonably conclude that the evidence supports a finding of guilt on the lesser offense and not the greater offense. *State v. Thomas,* 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), *cert.* denied, *Thomas v. Ohio*, 493 U.S. 826, 110 S. Ct. 89, 107 L. Ed. 2d 54 (1989); *State v. Evans*, 122 Ohio St.3d 381, 2009 Ohio 2974, 911 N.E.2d 889, ¶13. Evans observed that the

> facts of a case are relevant in determining whether a court should instruct the jury on a lesser included offense. Specifically, we have stated that after the three parts of the *Deem* test are met, "[i]f the evidence is such that a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant of the lesser included offense, then the judge should instruct the jury on the lesser included offense." *Shaker Hts. v. Mosely* [113 Ohio St. 3d 329, 2007 Ohio 2072, 865 N.E.2d 859], at ¶11, citing *State v. Shane* (1992), 63 Ohio St.3d 630, 632-633, 590 N.E.2d 272. See, also, *State v. Thomas*, 40 Ohio St.3d at 216, 533 N.E.2d 286; *Kidder*, 32 Ohio St.3d at 282-283.

See, also, R.C 2945.74 and Crim.R. 31(C). This Court has consistently held that involuntary manslaughter is a lesser included offense of aggravated murder under

R.C. §2903.01(B), the purposeful killing of another while committing or attempting to commit the felonies listed therein. See, *State v. Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984); *State v. Scott*, 61 Ohio St.2d 155, 400 N.E.2d 375 (1980); *State v. Cooper*, 52 Ohio St.2d 163, 370 N.E.2d 725 (1977). As noted in *Jenkins*, the primary difference between aggravated murder and involuntary manslaughter is that aggravated murder requires purpose to kill, while involuntary manslaughter requires only a killing as a proximate result of committing or attempting to commit a felony. *State v. Jenkins*, 15 Ohio St.3d, at 218. ("The primary difference between involuntary manslaughter and aggravated murder is the offender's intent.")

In *State v. Johnson*, 6 Ohio St.3d 420, 453 N.E.2d 595 (1983), reversed and remanded on other grounds 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984), this Court observed, in determining that involuntary manslaughter was a lesser included offense of murder that "the common element shared by these two offenses is the causing of the death of another with the only distinguishing factor being the mental state involved in the act. * * * It is manifestly obvious that these two [mental] states are mutually exclusive and that in any given killing the offender may be possessed of only one." *State v Johnson*, 6 Ohio St.3d, at 424.

Jury instructions on lesser included offenses must be given when the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser included offense. *State v. Shane*, 63 Ohio St.3d 630, 590

N.E.2d 272 (1992); *State v. Fuller*, 2nd Dist. No. 20658, 2005 Ohio 3696, motion for delayed appeal denied, 111 Ohio St.3d 1408, 2006 Ohio 5083, 854 N.E.2d 1089. In other words, the trial court must instruct the jury on the lesser included offense if under any reasonable view of the evidence it would be possible for the jury to find defendant not guilty of the greater offense and guilty of the lesser offense.

When evidence presented is such that the jury reasonably is able to find a defendant lacked the purpose to kill necessary to sustain a conviction for aggravated murder, an involuntary manslaughter conviction should be given since the jury could conclude that the murder was nevertheless a "proximate result of committing or attempting to commit a felony. *State v. Scott*, 61 Ohio St. 2d 155, 400 N.E.2d 375 (1980). Reasonably means just that; it does not mean the evidence as the trial judge would like it to be found by the jury. Facts that support a conviction are to be found by a jury, not by a judge. This is a core Sixth Amendment right. See, *e.g.*, *Jones* v. *United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Ring* v. *Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)(capital case); *Blakely* v. *Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). These cases are premised upon the Sixth Amendment right to trial by jury and the Due Process precept that elements must be proved beyond a reasonable doubt to sustain a conviction. See, *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The jury was deprived

of the opportunity to make a finding by poof beyond a reasonable doubt (or refuse to make such a finding) that Appellant was guilty of the lesser and not the greater offense.

The Court of Appeals correctly noted that when deciding if a lesser included offense charge should be given, the trial court is required to view "the evidence in the light most favorable to the defendant." *State v. Adams* ¶332. The Court of Appeals then proceeded to do the exact opposite, construe the evidence is the light most unfavorable to Appellant. In *Scott* the trial court refused to give an involuntary manslaughter instruction. Scott was conviction of aggravated murder. Scott and two others were charged with kidnaping and aggravated murder of Scott's former employer for ransom. While Scott was initially involved in planning the kidnaping, there was conflicting evidence on whether Scott intended to kill the employer or let him go after receiving the money. The employer was found with six (6) gunshot wounds after Scott provided information as to where the body would be found. The Supreme Court reversed the court of appeal's decision and held the trial court erred in failing to give the involuntary manslaughter instruction.

> The Court of Appeals erred in sustaining the trial court's refusal to instruct the jury on involuntary manslaughter. Involuntary manslaughter would be an offense for which the jury could convict appellant if appellant convinced the jury that he lacked the purpose to kill required by the aggravated murder statute.
>
> R. C. 2903.04(A) defines involuntary manslaughter as follows:
>
> "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony."
>
> Appellant was convicted of kidnapping, a felony. If on remand, the

> jury were to find that appellant lacked the purpose to kill necessary to sustain a conviction for aiding and abetting the aggravated murder, an involuntary manslaughter conviction would be possible since the jury could conclude that the murder was nevertheless a "proximate result of [appellant's] committing * * * a felony." See State v. Nolton (1969), 19 Ohio St. 2d 133, 135; Cf. State v. Hill (1967), 12 Ohio St. 2d 88, 91-92, and paragraph four of the syllabus.

Like *Scott*, in this case there was evidence that Horace Landers was involved in Gina Tenney's death. The extent of Landers' involvement and Appellant's involvement was never proven at trial. While there was evidence from which a jury could conclude that Appellant was linked to the commission of other felonies; burglary and rape, there was no information as to the facts and circumstances of Ms. Tenney's death. Viewing the evidence in the light most favorable to Appellant, the jury could have determined that the death occurred while a felony was being committed, but that the State did not prove purpose to kill. While the autopsy indicated that the *cause* of death was asphyxiation, the actual *manner* of death was not proven. Dr. Germaniuk testified in response to direct examination questions from the prosecutor:

> So returning to your question, when I reviewed the autopsy report we have a couple of areas that, gosh, we have evidence of smothering. You can take a look at the contusion on the lips. *If you take a look at the marks about the chin, this is certainly consistent with a hand or an object placed over the face*. We certainly have what appears to be ligature strangulation with that 7-inch band by a quarter-inch band about the neck. With that we can exclude mechanical -- so usually if I have at least two things in here (indicating) then with these two things, *I would simply draw right back and go to asphyxia because I don't know how much of a role this played in her death (indicating), I don't know how much of a role that played in her death. I just don't know. And then I drop back to the broad category of asphyxia.*
>
> So the answer of your question is cause of death I put down asphyxia.

(T.p. Trial Vol. II, pp. 416-417.) (Emphasis added.) He reiterated the non-specific nature of the *manner* of death on cross examination:

> Q So, for example, you stated there's evidence of smothering?
>
> A Yes.
>
> Q But I believe you stated that you don't believe that it was significant enough that you could say that was the cause of death?
>
> A That's correct.
>
> Q And I believe you stated -- certainly you saw ligature marks around the neck?
>
> A Yes.
>
> Q I believe you stated the same thing, that you can't really say that that was the cause of death?
>
> A That's correct.

(T.p. Trial Vol. IV, p. 443-444.) It is possible that Ms. Tenney died from suffocation from being placed in the trunk of her car, or from having a hand placed over her mouth to prevent her from screaming, either during one of the claimed felonies or at another time. The coroner simply did not know; the police did not know; prosecutor did not know; and the jury had to come up with an answer. The trial judge did not give the jury the full complement of choices it should have had.

The State did not prove a purpose to cause death required for an aggravated murder conviction. The jury, if presented with an involuntary manslaughter charge could have found Appellant not guilty of aggravated murder and could have found that Ms. Tenney died during the commission of a felony. In *State v. Nolton*, 19 Ohio

St. 2d 133, 249 N.E.2d 797 (1969) the Court, in analyzing requests for a jury charge on a lesser included offense, held "if the trier could reasonably find against the state and for the accused upon one or more of the elements of the crime charged and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense, then a charge on the lesser included offense is both warranted and required, not only for the benefit of the state but for the benefit of the accused." *Id.,* at 135. As to the aggravated murder charge, the jury could have found the State failed to prove purpose to cause death and could have found the death was caused during the commission of a felony. Had the Court fo Appeals viewed the evidence in the light most favorable to Appellant it would have concluded that the trial court erred in refusing to give the involuntary manslaughter charge requested.

Between December, 30 1985 and Appellant's trial in 2008 the definition of circumstantial evidence was altered. Appellant requested the trial court instruct the jury regarding circumstantial evidence based upon the law at the time of the offense. (T.p. 09/05/2008 hearing p.22.) Appellant requested the trial court instruct the jury that when relying upon circumstantial evidence "all reasonable hypotheses of innocence must be excluded." In 1985 the law in Ohio required just that- "when a conviction is to be based upon inferences drawn from underlying facts (i.e., circumstantial evidence), the inferences which support guilt must be so strong that they

exclude the drawing from the same underlying facts of reasonable inferences which support innocence." *State v. Ebright*, 11 Ohio App. 3d 97, 101, 463 N.E.2d 400 (1983), citing *State v. Kulig*, 37 Ohio St.2d 157, 309 N.E.2d 897 (1974). In *Kulig* the defendant, executor of an estate, was charged with embezzlement. The Supreme Court noted that the State presented no evidence that Kulig intended to convert the property to his own use and that proof of such intent was required for a conviction. The State claimed there was circumstantial evidence that *Kulig* intended to keep the property for his own benefit. The Supreme Court concluded that it was just as likely that the circumstantial evidence proved he possessed the property in his lawful capacity as executor:

> It is settled that where circumstantial evidence alone is relied upon to prove an element essential to a finding of guilt, it must be consistent only with the theory of guilt and irreconcilable with any reasonable theory of innocence. *State v. Sheppard* (1955), 100 Ohio App. 345; *Carter v. State* (1915), 4 Ohio App. 193. If such evidence is as consistent with a theory of innocence as with a theory of guilt, the doubt must be resolved in favor of the theory of innocence. In this case, we find that the prosecutor failed to develop probative evidence of appellant's intent which was inconsistent with a reasonable theory of innocence. In the absence of evidence to prove an essential element of the crime, the trial court should have directed a verdict for appellant at the conclusion of the state's case. *State v. Channer* (1926), 115 Ohio St. 350.

Id., at 160. Here the State presented only circumstantial evidence that Appellant had anything to do with Ms. Tenney's death. The State presented evidence that Appellant had called Ms. Tenney in the months prior to her death, but presented no evidence that he threatened her in any way or intended to harm her. Likewise, the State presented evidence that Appellant had some of Ms. Tenney's possessions after her

death, but presented no evidence as to how he came to possess the items. The State presented testimony that Appellant's DNA was found on Ms. Tenney's underwear, but presented no evidence of the facts and circumstances of the encounter. There was no evidence that Appellant was seen with Ms. Tenney at any point the night she died. The State's case was entirely circumstantial and the requested instruction should have been given. The trial court refused to give the requested instruction, noting a change in the law and nothing required giving an "old instruction." (T.p. 09/05/2008 hearing p. 22.) Indeed, six years after Ms. Tenney's body was found, the Ohio Supreme Court overruled *Kulig* and held that "evidence, whether circumstantial or direct, is sufficient if a rational fact finder could find the crime's essential elements proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). The trial court should have instructed the jury as to the law in effect when Appellant was arrested in 1985, not the law in effect when the State finally obtained an indictment. Retroactive application of the circumstantial evidence law is a violation of the Ex Post Facto Clause of the Ohio and United States Constitutions.

Ohio Constitution, Article II, Section 28 provides:

> The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

Likewise U.S. Constitution, Article I, Sections 9 and 10 prohibit Ex Post Facto laws.

"An ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; *or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required. Cummings v. Missouri,* 71 U.S. 277, 18 L.Ed. 356 (1867)(Emphasis added.) See, also, *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798), which defined "ex post facto laws" to include "'[e]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." To be sure, the ex post facto prohibitions in both Constitutions directly place restrictions upon the legislative branch. *Frank v. Mangum,* 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915); *Collins v. Youngblood,* 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed. 2d 30 (1990); *State v. Webb,* 70 Ohio St.3d 325, 331, 1994 Ohio 425, 638 N.E.2d 1023. However, the Supreme Court noted that the principle on which the Clause is based "the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties - is fundamental to our concept of constitutional liberty. . ." and is therefore a right "protected against judicial action by the Due Process Clause of the Fifth Amendment." *Marks v. United States,* 430 U.S. 188, 191-192, 97 S.Ct. 990, 51 L.Ed. 2d 260 (1977).

Thus, if the *ex post facto* clause prohibits the legislature from retroactively altering the definition of circumstantial evidence, due process commands that the

judiciary be likewise barred from such retroactive application. The constitution is both a grant of power to the government, and a limitation upon the exercise of governmental power. The grant and the limitations apply, no matter what the branch. In our tripartite system of government, it is the duty of the courts to "say 'what the law is.'" *Boumediene v. Bush*, 553 U.S. 723, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008), quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). At the same time, "Congress and the President, *like the courts*, possess no power not derived from the Constitution." (Emphasis added.) See, *Ex Parte Quirin*, 317 U.S. 1, 25, 63 S.Ct. 2, 87 L.Ed. 3 (1942). The fundamental principle that "the required criminal law must have existed when the conduct in issue occurred," "must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." *Bouie v. Columbia*, 378 U.S. 347, 354, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). The Supreme Court in that case, in an opinion by Justice William Brennan, said that the "deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion" violates Due Process. *Pierce v. United States*, 314 U.S. 306, 311, 62 S.Ct. 237, 86 L.Ed.226 (1941), held that judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes

must be defined with appropriate definiteness. Judicial construction which adds a clarifying gloss, whether it expands or restricts a previous enactment, applied retroactively, operates precisely like an ex post facto law, which the Constitution forbids.

When the Ohio Supreme Court changed the basic concept of circumstantial evidence in *Jenks, supra*, the Court altered the legal rules of evidence, and indeed permitted the State to convict with less proof than was required at the time of the commission of the offence. One can read the *Jenks* opinion however one chooses to, or, as Justice Felix Frankfurter once said, where you come out of a case depends upon where yo go into it. That said, any judicial opinion which discards the premise that when circumstantial evidence is involved it must be irreconcilable with a reasonable theory of innocence before a conviction which comports with Due Process can occur, that decision lessens the government's practical burden of proof before a jury. That the judiciary altered the level of proof required, as opposed to the legislature is no less of an affront to basic due process requirements outlined above. The change in the circumstantial evidence was not a mere procedural change, but clearly affected "matters of substance," by depriving Appellant of "substantial protections" which existed at the time of the offense. See, *Duncan v. Missouri*, 152 U.S. 377, 382-383, 38 L.Ed. 485, 14 S.Ct. 570 (1894); *Collins v. Youngblood*, 497 U.S., at 45. The *Jenks* decision altered the required burden of proof by altering the degree of proof necessary

in relation to circumstantial evidence. Retroactive application of the altered circumstantial evidence is a violation of the ex post facto clause and due process.

In *State v. Webb*, the Ohio Supreme Court addressed retroactive application of the new circumstantial evidence requirement and concluded that *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990), and *Beazell v. Ohio*, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925), supported the conclusion that retroactive application of new evidentiary rules did not violate the ex post facto clause. Thus, the *Webb* decision concluded the new interpretation of circumstantial evidence announced in *Jenks* was merely a new rule of evidence and therefore could be applied retroactively. With due respect, the Court in *Webb* parsed the *Collins v. Youngblood* and *Beazel v. Ohio* decision to carve out what had long been included within the ex post facto prohibition, legal rules whether enacted by the legislature or mandated by judicial interpretation, which alter the nature of the crime or the amount or degree of proof essential for a conviction. *Collins v. Youngblood*, 497 U.S. at 43, footnote 3. The Court in *Webb* concluded that retroactive application of *Jenks* "does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed." Such reasoning is true, but incomplete, the Court ignored the prohibition which *Collins* acknowledged, that procedural changes which change the

nature of the crime and the amount or degree of proof essential to convict can not be applied retroactively.

Appellant should have asked for instructions on lesser included offenses of criminal trespass and theft. A trial judge is of course well within his purview not to instruct on lesser included offenses if there is no evidence to substantiate such a charge. *See, e.g.*, *State v. Watkins*, 2 Ohio App.3d 402, 442 N.E.2d 478 (1981); *State v. Lindner*, 76 Ohio St. 463, 81 N.E. 753 (1907). That is not the case here, however. The lesser included offenses may not have squared with the trial judge's own view of the evidence, but that is not the test, either.

> The persuasiveness of the evidence regarding the lesser included offense is irrelevant. If under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser offense must be given.

State v. Wilkins, 64 Ohio St.2d 382, 388, 415 N.E.2d 303 (1980); *State v. Nolton*, 19 Ohio St.2d 133, 249 N.E.2d 797 (1969).

There is no way to know if the jury's verdict, had it been given the opportunity to consider lesser offenses, would have been against the State on some elements and against the Appellant on others. Certainly, confidence in the outcome of this case is undermined. Had the jury been so instructed as requested by Appellant, and had the jury found Appellant guilty of the lesser offenses, no court would have overturned those verdicts as being against the manifest weight of the evidence or not supported by a sufficiency of the evidence.

III

When the trial court refused to instruct the jury that circumstantial evidence can be relied upon only if all reasonable hypotheses of innocence are excluded and instead instructed the jury that direct and circumstantial evidence are of equal weight and probative value the court altered the amount and degree of proof required. Appellant's conviction and death sentence are an affront to Due Process and the liberties secured by Ohio Constitution, Article I, Sections 1 and 16.

PROPOSITION OF LAW NO. 11

When a person asserts his right to silence during a custodial interrogation, thereby invoking his privilege against self-incrimination, but does not specifically ask for counsel, interrogation must stop and may not be commenced again unless the person initiates the communication. Fifth and Fourteenth Amendments to the U.S. Constitution, and Ohio Constitution, Article I, Sections 1, 2, 10, and 16 construed; *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and *Edwards* v. *Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), applied.

I

On June 17, 2008, Appellant filed a motion to suppress statements given to the Ohio Adult Parole Authority on or about December 30, 1985, and January 2, 1986. (T.d. 82.) The first page of the Appellant's memorandum (unnumbered) indicates that Appellant was arrested and that Youngstown police detectives attempted to question him regarding a receiving stolen property charge as well as any potential involvement in the death of Gina Tenney. The memorandum further states that Appellant "invoked his Fifth Amendment rights to counsel and silence." In reality, the government must establish waiver rather than Appellant establishing an invocation of his rights. As Appellant informed the trial court, the mere failure of a suspect to request the assistance of counsel does not constitute a waiver of the right to counsel. *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

The essence of the Appellant's claim before the trial court was that, once he did

not waive his privilege against self-incrimination, [43] "all conversations with the Defendant, *regardless of the law enforcement agency*, should have ceased. Instead, Mr. Soccorsy [from the Ohio Adult Parole Authority] continued to interrogate the defendant." Appellant's memorandum (T.d. 82), unnumbered, at 5. (Emphasis added.)

II

The burden to prove that a defendant committed a crime is always the government's. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This requirement is a natural corollary of, and is logically compelled by, a citizen's privilege not to incriminate himself. Undeniably, this is the hallmark of our accusatory system of criminal justice. A suspect in custody may offer a statement in response to interrogation, but only if it is shown that he understood what rights he is claimed to have relinquished or abandoned when he agreed to give the statement. The government must demonstrate that the privilege against self-incrimination was, in the classic locution, knowingly, voluntarily, and intelligently waived. Waiver "is ordinarily an intentional relinquishment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

The burden was, therefore, upon the government to establish that the Appellant knew or understood his constitutional rights; that relinquishment of the same was intentional; and that he acted knowingly, intelligently and voluntarily when doing so.

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[43] In fact in this case he invoked his right to silence

It is absurd to presume that a waiver of constitutional rights done outside of a courtroom may be done with any less assurance of the voluntary relinquishment than judges investigate during the course of a plea hearing. There is no reason to presume comprehension and waiver of constitutional rights in one setting but not another. Relinquishment of a right generally has the same effect whether done in a courthouse or a police station. The government did not establish a valid waiver in this case, nor did the government establish a reason why the *Edwards* rule, *post*, did not apply. Any statements made by the Appellant to law enforcement officers should have been suppressed, but were not.

Our "accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Chambers* v. *Florida*, 309 U.S. 227, 235, 60 S.Ct. 472, 84 L.Ed. 716 (1940). The privilege against self-incrimination is honored only when the citizen is guaranteed the ability "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *See, Malloy* v. *Hogan*, 378 U.S. 1, 8, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). The statements given to Mr. Soccorsy were not voluntarily obtained. The evidence clearly showed that the Appellant exercised his right to remain silent, but both the Youngstown Police and the Ohio Adult Parole Authority pressed him repeatedly until his will was overborne.

III

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), recognized that the atmosphere of compulsion bred by *incommunicado* custodial interrogation, coupled with modern police tactics which shy away from the rubber hose and bright light, and focus instead upon psychological compulsion, can overbear the will of a suspect to resist questioning and assert his rights.

To admit Appellant's statements to Officer Soccorsy in this case and still satisfy the requirements of the United States and Ohio Constitutions, the government was required to show that the Appellant's statements to Mr. Soccorsy were a choice "to speak in the unfettered exercise of his own will." *Malloy v. Hogan,* 378 U.S., at 8. The government was required to prove that the Appellant's statements were obtained in such a fashion as not to violate his right to the assistance of counsel. *See,* Fifth, Sixth, and Fourteenth Amendments to U.S. Constitution; Ohio Constitution Article I, Sections 1 and 10. Again, the government did not do so. Appellant asserted his rights and the government demonstrated that it did nothing besides impermissibly ignore the Appellant's requests not to speak. Detective Landers, while recalling no specifics of his interrogations of the Appellant, testified that during the first effort to question the Appellant, he chose not to waive his rights and chose not to give a statement. (T.p. Suppression Hearing, p. 28.) Despite this unequivocal lack of waiver and the affirmative assertion of the right to silence, over the next three days Detective Landers

attempted to question Appellant two, three, or potentially four times. (T.p. Suppression Hearing, p. 41.) Though the Appellant repeatedly advised Landers that he did not want to provide a statement, Soccorsy then made two efforts at interrogating the Appellant. On this final effort, on January 2, 1986, three days after being arrested and having been questioned as many as 6 times, the Appellant provided a statement. (T.p. Suppression Hearing, pp. 74, 84.)

There can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings. The privilege serves to protect persons in any setting in which their freedom of action is curtailed in any significant way from being compelled to speak to government agents, whether to incriminate themselves or exculpate themselves.[44] *Miranda* warnings are necessary to guard against the inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. *Miranda v. Arizona, supra*. Under *Malloy v. Hogan*, the privilege is fully assertable in state criminal proceedings such as these. And of course Ohio has separate constitutional provisions

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[44] *See*, *Miranda*, 384 U.S. at 476-477:

> Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.

which apply to the circumstances here, even if those provisions are not fully explained by the courts of this State. Ohio Constitution, Article I, Sections 1, 2, 10, and 16, are all reproduced in the Appendix. The voluntariness doctrine in the state cases, as *Malloy* indicates, encompasses *all* interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice.

A defendant's constitutional rights are violated if his conviction is based, in whole or in part, upon an involuntary statement, regardless of its truth or falsity. *Rogers* v. *Richmond*, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). This is true even if there is sufficient evidence aside from the improperly admitted confession to support the conviction. *See, e.g.*, *Bram* v. *United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897).

Though the procedure is crystal clear when Appellant advised Landers that he did not wish to speak, that crystal clear procedure was not followed here.

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates *in any manner*, *at any time* prior to or during questioning, that he *wishes to remain silent*, the *interrogation must cease*. At this point he has *shown that he intends to exercise his Fifth Amendment privilege*; any statement taken after the person invokes his privilege *cannot be other than the product of compulsion*, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been *once* invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, *they must respect his decision to remain silent*.

Miranda, 384 U.S., at 473-474. (Emphasis added.)

Here, the Appellant unquestionably asserted his rights and refused to give a statement. Retired Youngstown Police Department Detective Michael Landers testified at the suppression hearing that the Appellant was arrested, read his rights, and did *not* waive his privilege against self-incrimination.

> Q Detective, I want to take you back to 1985, December. At that time what position were you holding?
>
> A I was a detective.
>
> Q A detective? Did there come a time when you were called to interview [*sic*] the death of Gina Tenney?
>
> A Yes, sir.
>
> Q Do you recall the date?
>
> A I didn't until I refreshed my memory, but it was December 30th, I believe.
>
> Q On that day, did there come a time when you interviewed the defendant, Bennie Lee Adams?
>
> A Yes, sir.
>
> Q Where did this interview take place?
>
> A At the Detective Division in an interrogation room.
>
> Q At the Youngstown Police Department?
>
> A Yes, sir.
>
> * * *
>
> Q At that time, prior to interviewing the defendant, did you afford him his *Miranda* rights?
>
> A Yes, sir.
>
> Q Okay. *Did he waive those rights*?

A *I don't believe so, no, he did not.*

Q At that time did he request the assistance of an attorney?

A No, he did not.

Q No, he did not. Okay.

* * *

Q Okay. And what is State's Exhibit 1?

A It's a -- it's a form, it's a Youngstown Police Department -- it's a right sheet and a waiver form.

* * *

Q And did the defendant sign that?

A Yes, sir.

Q Okay. What is the date on that form?

A The 30th, 12/30/1985.

...

Q *... Now, you indicated that the defendant refused to give any statement at that time?*

A *Yes, sir.*

Q What did you do at that time after he refused to talk to you?

A I don't recall, but the interview would have been over. There would have been no use. Probably took him back upstairs.

Q So you ceased the interview?

A Yes, sir.

Q When was the -- did you ever attempt to speak to the defendant at another time?

A I probably spoke to him several times *or at least attempted to.*

Q Okay. Taking you to the next day, did there come a time when you were in contact with the defendant the following day?

A Yes, sir.

Q Okay. How did that come about?

A *Well, we brought him down, asked him some more questions, or some questions about this homicide.*

Q All right. Did you afford him his *Miranda* rights at that time?

A Yes, sir.

* * *

Q Detective, I'm handing you what's been previously marked as State's Exhibit 2. Do you recognize that?

A Yes, sir.

Q And what is State's Exhibit 2?

A Pardon me?

Q What is State's Exhibit 2?

A It's a copy of the Youngstown Police Department's -- it's a form containing his -- right sheets and a waiver form.

(WHEREUPON, State's Exhibit No. 2 was identified.)

Q And are both State's Exhibits 1 and 2 a fair and accurate depiction of the actual form itself just a copy?

A Yes, sir.

Q Now, what is the date on this form?

A 12/31 of '85.

Q And what time was this interview conducted?

A 1:43 p.m.

Q And you indicated the defendant signed his name that he waived his rights?

A Yes, sir.

Q Okay. *Did the defendant make a statement at that time?*

A *No, sir.*

Q At any time during either of these interviews, did the defendant request an attorney?

A No, sir.

Q To your knowledge was he represented by an attorney at this time?

A I don't know.

* * *

Q At any time during these two interviews, did the defendant ask any questions with reference to what his rights were?

A I don't believe so.

Q Did he ever give you any indication that he didn't understand his rights?

A No, sir.

MR. DESMOND: Okay. Thank you. No further questions.

(T.p. Suppression Hearing, pp. 25-29.) (Emphasis added.)Later in the suppression hearing Detective Landers further elucidated his opinion of Appellant's silence:

"He wanted to remain silent. He didn't want to talk to us." "He signed the right —he signed the waiver, but he chose not to talk to us. *That would say to me he's invoking his rights not to talk to us.*" (Emphasis added.) (T.p., Suppression hearing, p. 35.)

The prosecutor seemed to believe that it was incumbent upon Appellant to show that he asserted his rights by some affirmative act. This is precisely backward. It is incumbent upon the *government* to establish waiver. Appellant was not required to

assert his rights, and if the government could not demonstrate a valid waiver, there was no waiver. All the claims about not asserting rights do not substitute for a showing of waiver. In any event, the record is clear that Appellant asserted his right to remain silent. Whether he did or did not ask for a lawyer is immaterial.

The burden to prove that the waivers purportedly obtained and any statement made were done voluntarily is clearly upon the government. In *Tague v. Louisiana*, 444 U.S. 469, 100 S.Ct. 652, 62 L.Ed.2d 622 (1980), United States Supreme Court granted certiorari and then reversed the case without even the necessity of oral argument. At the suppression hearing in the trial court, the arresting officer:

> testified that he read Petitioner his *Miranda* rights from a card, that he could not presently remember what those rights were, that he could not recall whether he asked petitioner whether he understood the rights as read to him, and that he "couldn't say yes or no" whether he rendered any tests to determine whether petitioner was literate or otherwise capable of understanding his rights.

Id., 444 U.S. at 469. The Louisiana Supreme Court had held that the officer was not compelled to give an intelligence test to a person who has been advised of his rights to determine if he understands them. But one justice of the Louisiana Court wrote in dissent that the Court was reversing the *Miranda* standard, and creating a "presumption that the defendant understood his constitutional rights," thereby placing "the burden of proof upon the defendant, instead of the state, to demonstrate whether the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.,* 444 U.S. at 470; *State* v.

Tague, 372 So.2d 555, 558 (La. 1978).

Concerning the point made by the dissent, the United States Supreme Court, *per curiam,* said: "We agree. The [Louisiana Supreme Court] majority's error is readily apparent * * *. In this case, no evidence at all was introduced to prove that petitioner knowingly and intelligently waived his rights before making the inculpatory statement. The statement was therefore inadmissible." 444 U.S. at 470. *Tague* is no revelation. There isn't a common pleas court in this State that would permit a plea to a felony offense without a sufficient colloquy. No court would rely on the notion that since a defendant did not say that he did not understand his rights, and was pleading guilty, he *must* have understood them. Are the constitutional rights purportedly given up in a police confessional any less sacrosanct? The answer is obvious.

The testimony in this case was not all that far from that offered in *Tague*. It is understandable that memories fade after twenty years. But it was the State, as demonstrated elsewhere, that decided to wait all that time to prosecute the case—without good reason. But whether good reason or bad, the delay does not ameliorate the State's obligation to establish waiver. Officer Soccorsy's testimony failed to establish waiver:

> Q Okay. Prior to interviewing him, did you afford him his *Miranda* rights?
>
> A Yes, sir.
>
> Q Did he waive those rights?

A Yes, sir.

Q Did he do anything during the course of the administration of the *Miranda* rights and the waiver that led you to believe he didn't understand the rights?

A No, sir.

...

Q Okay. And in this instance do you recall him reading it or do you recall reading it to him?

A What I used to do, I'd let them read it. If they had problems reading it, then I would read it to them. Bennie Adams was capable of reading.

Q Do you specifically recall that happening in this case or you're just assuming, hey, this is the way I used to do it, so I assume that's the way it was done?

A No, I'm pretty positive he read it himself.

(T.p. Suppression Hearing, pp. 72-73) But there is no evidence, as there was none in *Tague*, to establish that there was a comprehension of his right to counsel or a valid waiver by the Appellant of his right to silence and right to counsel. Instead, the evidence supports the conclusion that the Appellant, having refused to waive his rights and to give a statement, was repeatedly questioned, while remaining in custody, over the course of the next three days, until at last he gave in.

Moreover, any suggestion by the State that the decision in *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) controlled is absurd. This case and that one could not have been further apart. In that case, the suspect was questioned about robberies, and said that he did not wish to give a statement. Later, at another police station, he was questioned about a different crime, a murder. The Supreme

Court said that his failure to waive his privilege against self-incrimination as to the robberies was "scrupulously honored."

> A review of the circumstances leading to Mosley's confession reveals that his "right to cut of questioning" was fully respected in this case. Before his initial interrogation, Mosley was carefully advised that he was under no obligation to answer any questions and could remain silent if he wished. He orally acknowledged that he understood the *Miranda* warnings and then signed a printed notification-of-rights form. When Mosley stated that he did not want to discuss the robberies, Detective Cowie immediately ceased the interrogation and did not try either to resume the questioning or in any way to persuade Mosley to reconsider his position. After an interval of more than two hours, Mosley was questioned by another police officer at another location about an unrelated holdup murder. ... Detective Hill did not resume the interrogation about the White Tower Restaurant robbery or inquire about the Blue Goose Bar robbery, but instead focused exclusively on the Leroy Williams homicide, *a crime different in nature and in time and place of occurrence from the robberies for which Mosley had been arrested and interrogated by Detective Cowie.*

Mosley, 423 U.S., at 96. (Emphasis added.) Here, there were no separate crimes. Everyone was asking about the same thing: Gina Tenney.

The simple fact is that the government is one entity which prosecuted the Appellant. It was the State of Ohio, not the Youngstown Police Department, the Adult Parole Authority, Bill Blanchard, or Bill Soccorsy. *See, Giglio* v. *United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Barbee* v. *Warden*, 331 F.2d 842 (4th Cir. 1964). Appellant twice told police that he did not want to make a statement. Nothing more is required under *Miranda*. In *Edwards* v. *Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, 49 (1981), the Supreme Court said:

> although we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to

> interrogation, see *North Carolina v. Butler, supra*, at 372-376, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police.*

451 U.S., at 484. (Emphasis added.) *Miranda* indicated that the assertion of the right was a significant event, and that once exercised by the accused, the interrogation must cease. *Miranda*, 384 U.S., at 474. Where a suspect in custody invokes his *Miranda* rights, the Court has said that there is an "undisputed right" *to remain silent and to be free of interrogation* until he had consulted with a lawyer. *Rhode Island v. Innis*, 446 U.S. 291, 298, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). *Edwards* lent substance to the idea and emphasized that "it is inconsistent with *Miranda* and its progeny for the *authorities, at their instance*, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Edwards*, 451 U.S., at 485. (Emphasis added.) *Edwards* held that "the fruits of the interrogation initiated by the police" could not be used against Edwards. The Court noted that it was not holding or implying

> that Edwards was powerless to countermand his election or that the authorities could in no event use any incriminating statements made by Edwards prior to his having access to counsel. Had Edwards initiated the meeting on January 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial. The Fifth Amendment right identified in *Miranda* is the right to have counsel

> present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver. *Rhode Island v. Innis, supra*, makes this sufficiently clear. 446 U.S., at 298, n. 2.

Edwards, 451 U.S., at 485-486. Here, the choice to countermand his previous election belonged to Bennie Adams alone. It did not belong to the police or the parole authority.

The Supreme Court recently revisited the *Miranda- Edwards* rule in *Maryland v. Shatzer*, __ U.S. __, 130 S.Ct. 1213, 175 L.Ed.2d 1045, 1056 (2010). The Court reaffirmed that once a defendant declines to speak, interrogation must cease and as long as the defendant remains in custody:

> It is easy to believe that a suspect may be coerced or badgered into abandoning his earlier refusal to be questioned without counsel in the paradigm *Edwards* case. That is a case in which the suspect has been arrested for a particular crime and is held in uninterrupted pretrial custody while that crime is being actively investigated. After the initial interrogation, and up to and including the second one, he remains cut off from his normal life and companions, "thrust into" and isolated in an "unfamiliar," "police-dominated atmosphere," *Miranda,* 384 U.S., at 456-457, 86 S. Ct. 1602, 16 L. Ed. 2d 694 , where his captors "appear to control [his] fate," *Illinois v. Perkins,* 496 U.S. 292, 297, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990).

Thus, the Court concluded that "The only logical endpoint of *Edwards* disability is termination of *Miranda* custody and any of its lingering effects." The Court found 14 days after release from custody to be sufficient before any effort to initiate interrogation.

The government here did nothing to scrupulously honor the Appellant's assertion of his constitutional rights. Appellant remained in custody asserted his right

not to speak, but repeated efforts were made to question him. No investigation was made to see if he had counsel. Although the probation officer was notified by the police department of Appellant's arrest, there was apparently no investigation or conversation about Appellant having asserted his right to silence with the police. The facts of this case in fact demonstrate the reverse of "scrupulously" honoring the assertion of the privilege against self-incrimination. Government agents continued to knock at the door until someone relented and granted them entrance. But *Edwards* stands for the proposition that the government may not in that way overcome the suspect's choice not to speak. The trial judge should have sustained the Appellant's motion to suppress. As noted above, whether there is independent evidence or not, Appellant's constitutional rights are violated when a conviction is based, in whole or in part, upon an improperly admitted statement, even if there is other evidence of guilt.

The Court of Appeals dealt with the issues in a ham-handed, if not disingenuous, fashion. After asserting that Appellant's arguments "inapplicable and incorrect respectively," *State v. Adams*, at ¶57, the Court of Appeals cites *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), for the proposition that "a suspect must invoke his right to counsel unambiguously." Indeed, so claims the Court of Appeals, "[i]f he does not do so at all or does so only ambiguously, then he has not invoked his right" *State v. Adams*, at ¶57. Because, concluded the appellate court,

"there is no indication at all that appellant referenced counsel after being advised of his rights, this argument is without merit." Alarmingly, the Court of Appeals missed a crucial distinction in *Davis*. Justice O'Connor's opinion for the Court in *Davis* pointed out that the "Petitioner waived his rights to remain silent and to counsel, both orally and in writing" and that "[a]bout an hour and a half into the interview, petitioner said, 'Maybe I should talk to a lawyer.'" 512 U.S., at 455. That is not even *close* to what occurred here. Appellant did not waive his rights, he chose not to speak and let the police know he did not want to speak. It did not stop the police from coming back a second, third and fourth time to question Appellant. The Court of Appeals crafted a fanciful if not entirely inaccurate legal ruling to overcome Appellant's arguments. The Court did exactly what *Tague* says cannot be done: turn the tables and place the burden of waiver on the suspect rather than the government.

The Court of Appeals next set out that Appellant argued that he invoked the right to remain silent by not providing a statement to the detective, and that Appellant "concludes that if he invoked his right to remain silent to the detective, then the probation officer was not permitted to seek a statement from him." *State v. Adams*, at ¶58. The Court of Appeals rejected Appellant's argument, finding that the "United States Supreme Court has even more recently held that a defendant does not invoke the right to remain silent by merely remaining silent. *Berghuis v. Thompkins* (2010), 130 S.Ct. 2250, 2260. Rather, the defendant must unambiguously express that he does

not want to make a statement. *Id.* Otherwise, the police can continue questioning the defendant." *State v. Adams*, at ¶ 59. This, once again, is not exactly the case. Justice Anthony Kennedy's opinion for the Court provides in part:

> Although *Miranda* imposes on the police a rule that is both formalistic and practical when it prevents them from interrogating suspects without first providing them with a *Miranda* warning, see *Burbine*, 475 U.S., at 427, it does not impose a formalistic waiver procedure that a suspect must follow to relinquish those rights. As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, *acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford. See, e.g., Butler, supra*, at 372-376; *Connelly, supra*, at 169-170 * * *. The Court's cases have recognized that a waiver of *Miranda* rights need only meet the standard of *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). *See Butler, supra*, at 374-375; *Miranda, supra*, at 475-476 (applying *Zerbst* standard of *intentional relinquishment of a known right*). * * * .

Once again, however, there is a crucial distinction that appears to have eluded the appellate court:

> The record in this case shows that Thompkins waived his right to remain silent. There is no basis in this case to conclude that he did not understand his rights; and on these facts it follows that he chose not to invoke or rely on those rights when he did speak.

When the officers read Thompkins his rights and began an interrogation, unlike the Appellant here, "[a]t no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney." 130 S.Ct., at 2256. Adams *did* indicate he did not want to talk. What happened in that case was factually and legally different. For this, we need not ask the Appellant; we can refer to the police officer who attempted to question the

Appellant—on multiple occasions. Detective Landers testified unequivocally on this point:

"He wanted to remain silent. He didn't want to talk to us." "He signed the right —he signed the waiver, but he chose not to talk to us. *That would say to me he's invoking his rights not to talk to us.*" (Emphasis added.) (T.p., Suppression hearing, p. 35.) The Court of Appeals is simply off the mark.

Accordingly, Appellant's conviction and death sentence should be vacated, and the case remanded for retrial without use of the statements.

denial of a proper motion for discharge based upon speedy trial in violation of liberties secured by U.S. CONST. amend. VI and XIV, OHIO CONST., art. I, §§1, 2, 10, and 16, and Enforced Through the Speedy Trial Act of 1974, Codified in R.C. §2945.71 *et seq*

What is often referred to as the "right" to a speedy trial is in reality an immunity secured by Sixth Amendment to the U.S. Constitution[45] and Ohio Constitution, Article I, Section 10 against government encroachment. So fundamental is this liberty that the United States Supreme Court has declared it to be an integral part of the most famous of American legal phraseology, "due process of law." See, *Klopfer v. North Carolina* (1967), 386 U.S. 213, 222-223, 87 S.Ct. 988, 18 L.Ed.2d 1.[46]

Neither the state nor the federal Constitutions delineate any specific time within which an accused must be brought to trial. States are free to prescribe a "reasonable" period of time to hold a trial. *See, Barker* v. *Wingo*, 407 U.S. 514, 523, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Apparently in reaction to *Barker* v. *Wingo*, the Ohio General Assembly enacted the Speedy Trial Act of 1974, codified in R.C.

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[45] The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

[46] *Klopfer* is one of the "incorporation" cases, meaning that the assurance of a speedy trial is so "implicit in the concept of ordered liberty" that a "fair and enlightened system of justice would be impossible without them." See, *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937), overruled by *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

§§2945.71 *et seq.*

In addition to the guarantee of a speedy trial secured by the Sixth Amendment, applicable to state prosecutions through the Fourteenth Amendment, the Defendant also has an independent state constitutional claim. See, Ohio Constitution, Article I, Sections1, 2, 10 and 16.[47] In *State v. Pachay*, 64 Ohio St.2d 218, 416 N.E.2d 589 (1980), this Court said that R.C. §§2945.71 *et seq.*, comprise a rational effort to enforce an accused's constitutional guarantee of a speedy trial. In *State v. Pudlock* (1975), 44 Ohio St.2d 104, 338 N.E.2d 524 (1975), the Court cautioned that it would not permit the government to engage in practices that undercut the speedy trial provisions of R.C. §2945.71 *et seq.* That is precisely what the government has done here. Appellant was not only a suspect in the murder, rape, robbery and kidnaping of Ms. Tenney in December, 1985, he was arrested and charged with an offense arising out of the incident. The government failed to bring Appellant to trial within the required 270

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[47] OHIO CONST., art. I, §1 provides: 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." OHIO CONST., art. I, §2 provides: "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." OHIO CONST., art. I, §10 provides in pertinent part: "In any trial, in any court, the party accused shall be allowed ... a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed ... ." OHIO CONST., art. I, §16 provides: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law."

days. The Court of Appeals conceded that "When new and additional charges arise from the same facts as did the original charge and the state knew of such facts at the time of the initial indictment, the time within which trial is to begin on the additional charge is subject to the same statutory limitations period that is applied to the original charge." *State v. Adams* ¶ 119. The record is clear. Appellant was arrested on December 30, 1985 and charged with receiving stolen property arising out of the Tenney murder. Detective Blanchard's testimony was quite clear; in 1986 there was sufficient evidence to prosecute Appellant for the murder of Ms. Tenney. When Appellant was indicted on October 11, 2007, the State had no new witnesses, no new evidence and no new information. By February, 1986 the State had the fingerprint analysis of the TV, the interviews of Ms. Tenney's friends, Ms. Tenney's property found in Appellant's apartment, the records regarding use of the ATM cards, a witness who placed Appellant with Ms. Tenney's car at the ATM machine on Belmont Avenue the night Ms. Tenney died, and blood serology results for the semen found on Ms. Tenney's underwear that could not exclude Appellant as the source. At the time Appellant was arrested on October 3, 2007 the only evidence the State had was that which was gathered in 1985 and 1986. (T.p. 07/17/2008 hearing, pp. 165-166, 181.) Somehow the court of appeals concluded "the murder indictment did not arise from the same facts as the receiving stolen property arrest." *State v. Adams* ¶125. The Court of Appeals simply rendered a conclusion inconsistent with the facts within the

records in order to exclude the time Appellant was held when first arrested. The charges in 2007 arose from same facts as did the original charge and the state knew of such facts at the time of the original charges.

Ohio's Speedy Trial Act designates specific time requirements for the government to bring an accused to trial. R.C. 2945.71(C)(2), provides that a "person against whom a charge of felony is pending ... [s]hall be brought to trial within two hundred seventy days after the person's arrest." The statute provides that for every day spent in jail, such day shall be counted as three days, provided that the defendant is being held in jail in lieu of bail solely on the pending charge. See, R.C. §2945.71(E); *State* v. *Ladd,* 56 Ohio St.2d 197, 383 N.E.2d 579 (1978), cert. denied 441 U.S. 926, 99 S.Ct. 2038, 60 L.Ed.2d 400. The three-for-one triple counting of speedy trial time does not apply when an accused is being held in jail on other charges that involve separate trials. See, *State* v. *Jones*, 2nd Dist. No. 20862, 2006 Ohio 2640, *State* v. *Coleman*, 45 Ohio St.3d 298, 304, 544 N.E.2d 622 (1989).

Although Appellant was not entitled to the triple count provision for all the pretrial time he was held after his arrest in 1985, as set forth below, even utilizing the one for one count for the majority of the time, the government clearly did not bring Appellant to trial within the required time. The Court in *State* v. *Jones, supra,* at ¶23, observed that the trial court had been correct that Jones had been "scheduled for trial within 90 days of initiation of the four (4) additional counts." But the appellate court

also noted that the trial court had missed the mark.

> The crucial issue, however, is whether those counts arose from the same facts and circumstances known to the prosecutor at the time of Jones' arrest on the original charge. If they did, Jones had to be brought to trial within ninety days of his April 22, 2004, arrest rather than within ninety days of his re-indictment. Jones filed his motion to dismiss the second indictment on speedy trial grounds on September 16, 2004, which was almost five months after his arrest. Moreover, as noted above, any time waiver on the first indictment did not apply to the subsequently filed second indictment. *Therefore, if the four counts in Jones' second indictment arose from the same facts and circumstances known to the prosecutor at the time of his arrest on the original charge, the second indictment should have been dismissed.*

(Emphasis added.) In *Jones*, the Court had to remand because the record was not clear. See, ¶31:

> Based on the record before us, we must reverse Jones' convictions and remand the cause to the trial court for a factual determination as to whether the additional charges in the second indictment arose from the same facts as the original charge and, if so, whether the State knew such facts at the time of the initial charge. We previously have taken this course of action when the correctness of a trial court's ruling on a potentially dispositive pretrial motion turns on an unresolved factual issue. *State* v. *Sanchez* (March 24, 1995), Montgomery App. No. 14904, 1995 Ohio App. LEXIS 1047. We have done so under other circumstances as well. *State* v. *Monroe* (July 26, 1995), Montgomery App. No. 14842, 1995 Ohio App. LEXIS 3106. Accordingly, we will sustain Jones' second assignment of error to the extent set forth in our analysis above. We hold that the trial court erred in overruling Jones' motion to dismiss without first determining whether the additional charges in the second indictment arose from the same facts as the original charge and, if so, whether the State knew such facts at the time of the initial charge.

(Footnotes omitted.) No such remand is necessary here.

Appellant was initially arrested on December 30, 1985 and was held solely on the charge until January 2, 1986, when he was served notice of the probation violation. Thus, Appellant was entitled to the triple count provision of Ohio law of 9

days. From January 2, 1986 until the case was no billed on September 12, 1986 Appellant remained incarcerated. As he was being held on other charges Appellant is not entitles to the triple count provision for this period and therefore an additional 253 days lapsed. As of 1986, 262 days lapsed. Appellant was rearrested on October 3, 2007 and was held solely on the pending charge. The first tolling event is when trial counsel filed a series of motions on October 29, 2007. For this period Appellant is entitled to the triple count provision and an additional 75 days. Thus, a total of 337 days lapsed before the first tolling event.

A *prima facie* showing of a Speedy Trial Act violation shifts the burden to the government. R.C. 2945.72 provides in pertinent part that the time within which an accused must be brought to trial, or, in the case of felony, to preliminary hearing and trial, may be extended only by certain factors. None apply here. R.C. §2945.73 provides in pertinent part that "[u]pon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if he is not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code." Once a defendant makes the claim of a speedy trial violation, the government must show that the case has been or will be tried within the required time. Here, Appellant raised the issue. The State did not come forward with proof that speedy trial had not already lapsed. Instead, there are vague references in the pleadings and oral arguments that there was no violation because Appellant's probation had been

revoked. There is nothing in the record as to when that occurred or where Appellant was[48] The State failed to carry its burden of proving no violation of speedy trial and the trial court merely overruled the motion for discharge without any factual findings at all. As noted above, once an accused demonstrates that more than two hundred seventy days have elapsed between his initial arrest and the date of his trial, the accused establishes a *prima facie* case for dismissal. The speedy trial period in this matter began to run on December 30, 1986. More than two hundred seventy days elapsed before he was brought to trial. Although the burden now shifted to the government to produce evidence demonstrating that Appellant was not entitled to be brought to trial within two hundred seventy days. See, *State v. Butcher*, 27 Ohio St.3d 28, 30-31, 500 N.E.2d 1368 (1986), the State failed to bring forth evidence to extend or toll the time. As such, discharge was required.

Finally, the Court of Appeals concluded that the time after May, 1986 no bill does not count towards speedy trial even though the no bill was not journalized until September. **State v. Adams** ¶ 117, citing *State v. Alexander*, 4th Dist. No. 08CA3221, 2009 Ohio 1401. *Alexander* is easily distinguished because the defendant was not incarcerated when the no bill was issued. Here, Appellant was held on the receiving

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[48] The Court of Appeals concluded that it was "established that he was being held on a probation violation in another case and on a separate multi-count indictment in yet another case." State v. Adams ¶ 117. The State presented no proof Appellant was incarcerated on the probation violation. The State had the burden and could have easily obtained certified copies of the records to verify actual dates when Appellant was tried and convicted on the other case and records regarding the probation violation.

stolen property charge and the State failed to present specific dates when or if the probation violation was disposed of and when Appellant was sent to prison.

R.C. §2945.72(E) is to be strictly construed in favor of the defendant. See, *State v. Singer*, 50 Ohio St.2d 103, 362 N.E.2d 1216 (1977). In *State v. Meeker*, 26 Ohio St.2d 9, 268 N.E.2d 589 (1971) the defendant committed acts at the same time and place which would have constituted four separate offenses. In June, 1963 the State chose to pursue only one of the offenses and obtained a conviction. In 1969 the conviction was overturned in post-conviction proceedings. The State then obtained an indictment charging the defendant with the three remaining offenses. This Court reversed Meeker's conviction on the second indictment based upon speedy trial violations:

> Considering the basic purposes of the constitutional right to a "speedy trial," we conclude that such constitutional guarantees are applicable to unjustifiable delays in commencing prosecution as well as to unjustifiable delays after indictment.
>
> Was the delay herein as to the new charges first made in 1969 legally justifiable? As noted before, there is no indication and no claim that the prosecuting authorities were not in full possession of all the facts relative thereto in 1963.
>
> Nor is such delay legally justified by the fact that defendant in 1969 secured a postconviction order voiding his 1963 guilty plea to a single crime.
>
> Where a defendant, at the same time and place in April 1963, commits acts which would constitute four separate crimes, and where the state with knowledge thereof elects in June 1963 to charge the defendant with but one of such crimes; those counts in an indictment returned in April 1969, charging the defendant with the other three crimes, are violative of the defendant's right to a speedy trial.

Id., at 16-17. For purposes of assessing speedy trial when there is a delay in

prosecution, the focus is upon what knowledge the state possesses when the initial charges are pursued. Here, the State had all the evidence it needed in 1985 and 1986 and waited until October 11, 2007 to present the case to the grand jury. When the case was presented, and the indictment obtained, there was no new DNA evidence. Moreover, according to the stipulation between the State and defense, there was "good scientific evidence" and BCI confirmed that "scientifically speaking" the State had a great case in 1986. (T.p. 07/17/2008 hearing, p. 217.) Thus, despite having all the evidence and despite arresting Appellant in December, 1985, the State delayed bringing Appellant to trial for 22 years. Appellant was not brought to trial within the time required under Ohio law and likewise, the delay was a violation of Appellant's Sixth Amendment right to a speedy trial. *See, also*, Ohio Constitution, Article I, §10.

The *Meeker* reasoning was affirmed in *State v. Selvage* 80 Ohio St.3d 465, 1997 Ohio 287, 687 N.E.2d 433. In *Selvage* the defendant was charged with selling drugs one year after the alleged sale to undercover agents. The sales occurred in March, 1994 and a complaint was filed against the defendant in June, 1994. However, the charges were not pursued because the police chose to keep the undercover agents identity secret. While indictments were obtained against other defendants in August and September, 1994, the State did not pursue the charges against Selvage until April, 1995. Employing the four part test in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) the Court affirmed the trial court's dismissal of the

indictment. *Barker* identified four factors which courts should assess in determining whether the right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. 407 U.S. at 530. Although *Barker* found no one factor controlling it noted that the length of the delay is a particularly important factor. The Court in *Selvage* rejected the State's argument that a one year delay to pursue the charges was not presumptively unreasonable. Indeed the Supreme Court found prejudice because Selvage could not remember events on the day the State claimed the drug sales were made:

> for purposes of the right to a speedy trial, "consideration of prejudice is not limited to the specifically demonstrable, and * * * affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Doggett*, 505 U.S. at 655, 112 S. Ct. at 2692, 120 L. Ed. 2d at 530. As the United States Supreme Court recognized in *Doggett,* "impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.' " Id. at 655, 112 S. Ct. at 2692-2693, 120 L. Ed. 2d at 530-531, quoting *Barker v. Wingo*, 407 U.S. at 532, 92 S. Ct. at 2193, 33 L. Ed. 2d at 118.
> * * *
> Therefore, we hold that the trial court did not abuse its discretion in determining that appellee was deprived of her Sixth Amendment right to a speedy trial. The trial court did not err in determining that the delay in commencing prosecution in this case, when considered in light of the appellant's reason for the delay, was constitutionally unreasonable.

Id., at 469, 470. Here the delay in commencing prosecution was 22 years. During the 22 years, memories faded, witnesses died, and records were lost or destroyed. The delay was not necessitated because the State needed to track down witnesses or obtain any additional evidence. The delay of 22 years between Appellant's initial

arrest and indictment was a violation of Appellant's Sixth Amendment right to a speedy trial as well as a violation of Ohio law requiring a defendant to be brought to trial with 270 days of arrest. At the conclusion of the hearing on Appellant's motion for discharge the trial court denied the motion without any factual findings regarding how many the days had in fact lapsed or why the court found no prejudice in the delay. The trial court abused its discretion in overruling the motion for discharge and in failing to make the requested factual findings.

When Appellant filed the pretrial motion for discharge premised upon speedy trial violations the motion specifically requested that the trial court "state its essential findings of fact relating to this motion. . ." (T.d. 80.) In ruling on the speedy trial portion of the motion the trial court simply concluded "The Court has reviewed the dockets in the 1985 case and in this one and finds the Defendant's speedy trial rights pursuant to Ohio law and the United States Constitution have not been violated." The trial court's failure to make essential findings of fact warrants reversal. "A trial court must, upon the defendant's request, state essential findings of fact in support of its denial of a motion to discharge for failure to comply with the speedy trial provisions of R.C. 2945.71." *Bryan v. Knapp*, 21 Ohio St.3d 64, 65, 488 N.E.2d 142 (1986). Failure to enter requested factual findings requires reversal. Id.,; *State v. Brown*, 64 Ohio St.3d 476, 481, 1992 Ohio 96, 597 N.E.2d 97; *State v. Benner*, 40 Ohio St.3d 301, 533 N.E.2d 701 (1988).

As set forth above, Appellant was entitled to discharge under Ohio's speedy trial provisions and the Sixth Amendment. The trial court's failure to grant the motion for discharge was error. Moreover, given the trial court's failure to enter factual findings renders appellate review impossible and requires reversal of Appellant's conviction.

PROPOSITION OF LAW NO 13

Prosecution for conduct barred by the applicable statute of limitations violates Due Process, Fourteenth Amendment to the U.S. Constitution, Ohio Constitution, Article I, Sections 1, 2, 10 and 16.

Appellant was charged with aggravated murder pursuant to R.C. §2903.1(B), which required the State to prove that the murder occurred while Appellant was committing or attempting to commit one of the enumerated felonies. The indictment also charged Appellant with aggravated robbery, aggravated burglary, rape and kidnaping. These were the felony offenses that the State relied upon to support the aggravated murder charge. The State did not allege aggravated murder by prior calculation and design.

Prior to trial, the court granted Appellant's motion to dismiss the underlying felonies on that the statute of limitations had long since passed. The October, 2007 indictment alleged that the offenses occurred on or about December 29, 1985. In 1985, the statute of limitations for the indicted felonies was six years. See, R.C. 2901.13. Although the counts within the indictment relating to these felonies were dismissed, the State was permitted to proceed on the felony-murder allegation and rely upon the time barred offenses as the predicate offenses. Permitting prosecution of felony-murder when the statute of limitations has lapsed for the predicate offenses violates due process.

The primary purpose of a criminal statute of limitations is to limit exposure to

prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. *Toussie v. United States*, 397 U.S. 112, 114, 90 S.Ct. 858, 25 L. Ed.2d 156 (1970). This "limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." *Id.,* at 115. Additionally, such a time limit has the salutary effect of encouraging law enforcement officials to investigate promptly suspected criminal activity. *Id.* Permitting Appellant to be prosecuted for felony murder when the statute of limitations has lapsed on the predicate felony offenses undermines the very purpose and intent of the statute of limitations.

Although the State did not proceed on the predicate felony counts, Appellant was forced to defend himself against charges involving circumstances that were 22 years old. Certainly when the state legislature enacted the six (6) year statute of limitations for felonies, the legislature intended to foreclose the ability to prosecute an individual for those incidents. By permitting the felony-murder to proceed, Appellant was forced to refute and defend allegations which had become obscured by the passage of time. As the testimony from several pretrial hearings confirmed, witnesses had died, the lead detective could remember little about specific interaction and questioning of Appellant, Appellant could not locate witnesses, and records and

documents were no longer available. Yet, Appellant was still placed in the position of defending against offenses for which the statute of limitations had clearly passed.

In *State v. Hensley*, 59 Ohio St.3d 136, 571 N.E.2d 711 (1991), the Court held that the intent of R.C. §2901.13 is to discourage inefficient or dilatory law enforcement, rather than to give offenders the chance to avoid criminal responsibility for their conduct." 'The rationale for limiting criminal prosecutions is that they should be based on reasonably fresh, and therefore more trustworthy evidence,' " quoting the Ohio Legislative Service Commission comment to R.C. §2901.13.

This Court has not directly addressed the issue of whether felony murder charges can be pursued when prosecution for the underlying felonies is barred by the statute of limitations. The Court's reasoning regarding application of the felony murder statute in *State v. Liberatore*, 4 Ohio St. 3d 13, 445 N.E.2d 1116 (1983), provides guidance. There the victim was killed by a bomb placed in the car next to his, which was detonated by remote control. The defendant was charged with aggravated arson and aggravated murder with the aggravated arson as the predicate felony. The jury acquitted the defendant of aggravated arson and was hung on the aggravated murder charge. The Court found that since aggravated arson was the predicate crime for the aggravated murder, a judgment of acquittal on the aggravated arson foreclosed retrial of the defendant on *aggravated* murder. *Id.*, at 15. The Court held that "By definition, felony murder requires proof of the underlying felony in order

to sustain a conviction under R.C. 2903.01(B)." The Court of Appeals concluded an acquittal is different than a procedural inability to proceed. *State v. Adams* at ¶143. As set forth in proposition of law number 2, there is no way to know if the jury found sufficient evidence of any one of the predicate felonies. No verdict as to the underlying felonies was rendered.

The Eighth District Court of Appeals reached a similar conclusion in *State v. Scott,* 8th Dist. 83477, 2004 Ohio 4631 discretionary appeal not allowed, 105 Ohio St. 3d 1407, 2005 Ohio 279, 821 N.E.2d 1027. In *Scott* the Court concluded that there was insufficient evidence to support a conviction of aggravated robbery and, as such, "a felony-murder conviction where the underlying offense is aggravated robbery similarly lacks sufficient evidence to support a conviction for that offense." Though not raised in the appeal, the Court conducted a plain error analysis and vacate the conviction, concluding that "the trial court committed plain error when it denied appellant's motion for acquittal for aggravated murder while in the course of committing, or attempting to commit, aggravated robbery as charged in Count Two of the indictment."

Other jurisdictions addressing the matter have concluded that expiration of the statute of limitations on the underlying felony does not preclude prosecution for felony murder. See, *State v. Dennison*, 115 Wash.2d 609, 801 P.2d 193 (1990); *State v. Lacy*, 187 Ariz 340, 929 P.2d 1288 (1996); *Commonwealth v. Munchinski*, 401 Pa Super 300;

585 A.2d 471 (1990); *Gebhardt v. O'Rourke*, 444 Mich. 535, 510 N.W.2d 900 (1994). The reasoning of these decisions focuses upon the fact that there is no statute of limitations for murder. Likewise, in *State v. Stansberry*, 8th Dist. No. 78195, 2001 Ohio App. LEXIS 3014, the Court concluded that because there is no statute of limitation for murder in Ohio, a felony murder prosecution is not barred because of the statute of limitations on the underlying felony. The reasoning of these cases ignores the fact that a defendant is then forced to respond to charges which have been barred by the statute of limitation. While not prosecuted as separate offenses, Appellant was nonetheless required to answer to the allegations of rape, aggravated robbery, aggravated burglary and kidnaping when the statute of limitations had long since past. Permitting prosecution of felony murder when the statute of limitations bars prosecution for the underlying felony defeats the very purpose of Ohio's six year statute of limitations.

PROPOSITION OF LAW NO. 14

> The provisions of the Sixth and Fourteenth Amendments to the U.S. Constitution and Ohio Constitution, Article I, Sections 5 and 10, which require a trial by a fair and impartial jury, require a trial court either to conduct an investigation or to permit an investigation to be conducted when there appears any indicia of juror misconduct.

The trial court, just before the general panel voir dire, was faced with a non-spurious suggestion of juror misconduct. The juror misconduct was a violation of the court's admonitions before jury selection began. Three prospective jurors were potentially guilty of this misconduct. The trial court dismissed one of the jurors, spoke to one other, and got the juror to agree that the misconduct "had no effect." In his desire to get on with it, the judge did not consider that the juror violated the admonitions and did not report the improper comments by the dismissed juror.

The trial judge early on gave the jurors admonitions telling the jurors "what you cannot do." The judge told the jurors that a violation of the admonitions order was contempt of court, punishable by jail and a fine. The pertinent portions of the trial court's admonitions follow:

> Do not discuss the case among yourselves or with anyone else, *do not permit anyone to discuss it with you or in your presence*, do not form or express any opinion on this case until it is finally submitted to you. * * * *It would be unfair to discuss the case amongst yourselves before you receive everything necessary to reach an informed verdict.* You should explain this rule prohibiting discussion of your case to your family and friends. It means you cannot discuss it with your wives, your husbands, your parents, anyone. * * * The court instructs you not to converse with the attorneys, parties, or witnesses during the trial. Likewise, the participants in the trial must not converse with you. *If anyone should attempt to discuss the case with you, report the incident to me or to the bailiff immediately.* * * *

> You are not to undertake any individual investigation of this matter. Do not attempt to visit the scene, do not perform any legal research, do not perform any experiments about this case, do not look up any legal issues, facts, or anything about this case in any book or on the Internet. In short, do nothing to find out anything about any aspect of this case. Everything you will need to decide this case will be presented in the courtroom. You are instructed not to read, view, or listen to any report in the newspaper, radio, television, or on the Internet on the subject of this trial. Do not permit anyone to read or comment upon the -- excuse me -- to read or comment upon them to you or in your presence. * * * *If you acquire any information from an outside source, you must report it immediately.*
>
> * * * Any violation of these orders may require a new trial, which is expensive for all concerned and may result in the prosecution of any person not following these orders.

(Tp. Voir Dire Vol. I, pp. 6, 7.) (Emphasis added.) It appears from the sparse record that one juror talked about the case, and two others failed to report the comments. Before the misconduct was discovered, the State moved to dismiss Juror No. 173 for cause, and Appellant's trial counsel did not object. (T.p. Voir Dire, Vol. III, p. 538.) The trial judge questioned Juror 175 alone in chambers, because he "heard three reports that [the juror] smelled of alcohol—or two reports—I'm sorry—that he had smelled of alcohol, I confronted him with that issue."[49]

The State's challenge for cause of Juror 173 was sustained. (*Id.*, p. 542). The trial judge released Jurors 175 and 176, and informed them that they would be required to return. Ironically, the judge repeated the admonitions. "Now, you cannot -- again, the admonitions that I read to you on Monday that you cannot discuss, you

[49] Once again, there appears to be no record of the reports to the Court, and no record of the chambers discussion.

cannot read or listen to the local news about any of this will be in effect as long as you're in jury service. Okay. Thank you. And I'll keep repeating them as long as you're on the jury." (T.p. Voir Dire Vol. III, p. 543.)

(WHEREUPON, the Court recessed at 4:02 p.m., Wednesday, October 8th, 2008 and reopened at 9:13 a.m., Thursday, October 9th, 2008 and the proceedings continued as follows:)

THE COURT: Hello, again. Okay. We're on the record. We have Juror 176 in court without the rest of the jurors. What happened is yesterday it came to my attention that when you, Juror 175, and Juror 173 were in the hallway, Juror 175 was talking about the victim or I can't forget the victim, that type of thing.

JUROR NO. 176: Um-hum.

THE COURT: Did that have -- I have to ask this and we have to ask it on the record, did that have an effect on you?

JUROR NO. 176: No.

THE COURT: Okay. You can still be a fair and impartial juror?

JUROR NO. 176: Yes.

THE COURT: *Basically, you didn't pay any attention to him?*

JUROR NO. 176: That's what he was talking about. It didn't affect me.

THE COURT: *He's been removed because of that because I gave the admonitions not to talk about the case.* That's all I had to ask you. We had to have it on the record. Does anyone wish to inquire?

MRS. CANTALAMESSA: No, Your Honor.

MR. DeFABIO: No, Your Honor.

THE COURT: Thank you. Allison will take you in the back. No reason to go back downstairs cause everybody will come back in a few minutes. We have to do some housekeeping.

(WHEREUPON, Juror No. 176 leaves the courtroom, after which the following proceedings were had:)

It is nowhere on the record where Juror 175 was excused. Nowhere on the record is any investigation into a non-frivolous situation of potential juror misconduct.

II

All juror misconduct is presumed to be prejudicial, and the burden is on the party who prevails to demonstrate that the juror misconduct is not prejudicial. *See, State v. King*, 10 Ohio App.3d 161, 460 N.E.2d 1383 (1st Dist. 1983). A conclusion that only jurors who actually sat on the jury must be addressed when investigating juror misconduct is wrong. That is what the trial judge did in *State v. Luoma*, discussed *post*. The Montgomery County Court of Appeals reversed the conviction.

The conclusions reached in a case should be generated only by evidence and argument in open court, and not by any outside influence. *Patterson v. Colorado* , 205 U.S. 454, 27 S.Ct. 556, 51 L. Ed. 879 (1907). The jury is obligated to decide a case solely on the evidence, and any communication or contact outside the courtroom or jury room about the matter at trial between a juror and another person, and any independent inquiry or experiment by a juror concerning the evidence or the law, constitutes juror misconduct. *State v. Taylor*, 73 Ohio App.3d 827, 831, 598 N.E.2d 818 (4th Dist. 1991). Further, when a juror refuses to consider the evidence or forms an opinion as to guilt or innocence before all the evidence is presented, such activity constitutes misconduct. *Id. See, also, Carr v. State*, 22 Ohio App. 78, 153 N.E. 233

(12th Dist. 1926), and *State v. Carter*, 11 Ohio Dec.Rep. 123, 1890 Ohio Misc. LEXIS 172 (C.P. 1890) (Where the juror's misconduct consists of declarations and utterances of opinions about matters on trial, made outside of court during the pendency of the trial, and where this action implies a strong disposition for or against one side or the other, be the evidence what it may; or where it indicates a state of mind or feeling as would cause him to give a deaf or unwilling ear to evidence or argument opposing his predilection, a verdict in accord with such prejudice will be set aside); and, *State v. McMillen*, 5th Dist. No. 2008-CA-0122, 2009 Ohio 210 at ¶122. (Though no misconduct was found, the trial court did hold a hearing on the motion.)

Here, there was clear evidence of misconduct by one juror. Whether it spread to other jurors, either as participants in the misconduct or as the "victims" of exposure to improper information, the trial court failed to conduct an investigation designed to find out who had heard information and what had been said. There was no way for defense counsel or the trial judge to determine which jurors, if any, had been affected by the misconduct. This problem was one of constitutional magnitude that the trial judge tried to dismiss quickly. When one or more jurors violate the admonitions or conceal information about a case, such a scenario requires the court to *presume* juror bias. *See*, *State v. Murphy*, 65 Ohio St.3d 554, 605 N.E.2d 884 (1992). It also requires the trial court to conduct an inquiry to assure Appellant a fair and impartial jury.

In *State v. Webb*, 70 Ohio St.3d 325, 1994 Ohio 425, 638 N.E.2d 1023 (1994),

a spectator reported that she had overheard jurors discussing the voir dire. Defense counsel requested that the juror be questioned. In *Webb*, the trial court did everything defense counsel asked before concluding no further investigation was warranted. In this case, the trial judge did very little. There is no record of excusing Juror 175, already a problem because of reports of drinking.

In her concurring opinion in *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982), Justice O'CONNOR wrote:

> Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in continuing his bias and partly because the juror may be unaware of it. The problem may be compounded when a charge of bias arises from juror misconduct, and not simply from attempts of third parties to influence a juror.

455 U.S., at 221. Justice O'CONNOR further stated that:

> In certain circumstances, a hearing may be inadequate for uncovering a juror's biases, in that there are extreme situations which would justify a finding of *implied* bias.

Id. [Emphasis added.] In *State v. Luoma*, 2nd Dist. No. 10719, 1990 Ohio App. LEXIS 5333 (1990), there was an allegation that one of the trial jurors had said to a non-juror that the defendant was a menace to society and that the defendant should be locked up and the key thrown away. The trial court held that the comment was not prejudicial, much as the trial court attempted to sidestep the issue here. The court of appeals reversed Luoma's conviction, and held that the juror had violated her oath not to express or form an opinion. The remark displayed an antipathy to the defendant and showed that the juror was not keeping an open mind, and both were violations

of the defendant's right to a fair trial by an impartial jury.

In *State v. King, supra,* the court held that all juror misconduct is *presumed to be prejudicial* and is a constitutional violation under both the U.S. Constitution, Amendment XIV and the Ohio Constitution, Article I, Section 10. The court said:

> All juror misconduct is *presumed* to be prejudicial, and the party prevailing at trial has the burden to demonstrate on appeal that the misconduct was not prejudicial under the circumstances.

[Emphasis added.] The court also held:

> Ohio prohibits outside influences, if they are demonstrated to be prejudicial. [Citations omitted.] Any communication or contact outside the courtroom or jury room about the matter at trial between a juror and another person, particularly if connected with one of the parties to the litigation, and an independent inquiry or experiment by a juror about the evidence or the law, violates the juror's duty to limit his considerations to the evidence, arguments and law presented in open court. Any such activity is jury misconduct, a constitutional violation whether viewed under the Fourteenth Amendment to the United States Constitution or Section 10, Article 1 of the Ohio Constitution.

Id., at 165. The United States Court of Appeals for the Sixth Circuit has addressed the issue of a juror who lies during voir dire examination. In *McCoy v. Goldston*, 652 F.2d 654 (6th Cir. 1981), the court held that the Constitution guarantees a trial by an impartial tribunal, free from bias, and that a showing of juror bias is the "touchstone" to determine whether to grant a new trial. The court also held that bias may be either actual or implied. A trial judge should *presume* bias and grant a new trial when a juror deliberately conceals information or when the juror gives a purposely incorrect answer. Here, the comments about the victim show a facial inability not to honor the

presumption of innocence. The record is abysmal. We cannot tell when the comment was made except that two or perhaps three jurors were there. All of them should have been questioned but were not.

THE U.S. Constitution, Amendment VI and XIV and the Ohio Constitution, Article I, Section 10 guarantee Appellant a fair trial before an impartial jury. When a juror is purposely misleading or deceitful in voir dire examination, bias must be presumed. If even one juror is tainted, the entire panel is tainted because Appellant was entitled to a trial by twelve fair and impartial jurors, not eleven, ten, or nine. *Parker v. Gladden*, 385 U.S. 363. 87 S.Ct. 468, 17 L.Ed.2d 420 (1966).[50] The trial court had the matter brought to its attention, but appeared not to want to bother to take the extra time to ensure that Appellant would be afforded a fair and impartial jury.

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[50] See, also, two Montana cases, the legal reasoning in which applies in this case. In *State v. Stafford*, 678 P.2d 644 (Mont. 1984), the Supreme Court of Montana considered the issue of jury partiality:

> The first three issues raise serious questions about the fundamental fairness afforded the defendant in his trial. Clearly, essential to due process in a criminal prosecution, is a fair and impartial judge and a jury made up *entirely* of fair and impartial jurors.

[*Emphasis added.*] *Id.*, at 647. See, also, *State v. Mott*, 29 Mont. 292, 297, 74 P. 728-730 (1903):

> If one of the jurors is incompetent because of actual bias entertained by him against the accused, and conceals such incompetency on his voir dire, this vitiates the jury as a whole. The accused being entitled to a jury of twelve impartial men, if he has but eleven, while the twelfth is hostile to him, he has not the impartial jury which the constitution and laws contemplate that he shall have.

A more recent California case is also succinctly set forth which should be the standard everywhere. See, *People v. Diaz*, 200 Cal. Rptr. 77 (1984), where the court held:

> A juror's concealment, regardless whether intentional, during voir dire examination of a state of mind which would prevent him from being impartial is misconduct for which a new trial should be granted.

In *State v. Rudge*, 89 Ohio App.3d 429, 624 N.E.2d 1069 (1993),[51] the Defendant was charged with capital murder. The trial court declared a mistrial after guilty verdicts in the first phase and the State appealed.[52] The court of appeals affirmed the trial judge's decision and emphasized the constitutional significance of juror misconduct as well as the trial judge's *obligation* to inquire into nonfrivolous allegations of juror misconduct. The court held:

> The trial judge, being confronted with a nonfrivolous suggestion of jury impartiality, was obligated to inquire into the possibility that fundamental notions of fairness had been infringed during appellant's trial, which resulted in the guilty verdict, and that a biased attitude within the jury might prevent a just determination of the penalty phase. The trial judge could best evaluate the deliberating and nondeliberating jurors' testimony, and possessed very broad discretion in conducting the inquiry and in making his determination. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 547-550, 96 S.Ct. 2791, 2797-2798, 49 L.Ed.2d 683, 690-692 (1976). The United States Sixth District Court of Appeals has stated:
>
> "The sixth amendment right to trial by jury is designed to ensure criminal defendants a fair trial by a 'panel of impartial, "indifferent" jurors.' *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 [755] (1961). When possible juror misconduct is brought to the trial judge's attention he has a duty to investigate and to determine whether there may have been a violation of the sixth amendment. *See, e.g., United States v. Griffith,* 756 F.2d 1244, 1252 (6th Cir. 1985); *United States v. Pennell*, 737 F.2d 521, 532-33 (6th Cir. 1984), *cert. denied*, [469] U.S. [1158], 105 S.Ct. 906, 83 L.Ed.2d 921 (1985); *United States v. Corbin*, 590 F.2d 398, 400 (1st Cir. 1979). Since the trial judge is in the best position to determine the nature and extent of alleged jury misconduct, his decision on the scope of proceedings necessary to discover misconduct is reviewed only for an abuse of discretion. *See, e.g., United States v. Soulard,* 730 F.2d 1292, 1305 (9th Cir. 1984); *United States v. Halbert*, 712 F.2d 388, 389 (9th Cir. 1983), *cert. denied*, 465 U.S. 1005, 104 S.Ct. 997, 79 L.Ed.2d 230

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[51] A motion by the State for leave to appeal to the Supreme Court of Ohio was overruled in, 67 Ohio St.3d 1502 (1993).

[52] The Defendant cross-appealed, but the issues raised in the cross-appeal are not material to the issues herein.

> (1984); *United States v. Chiantese*, 582 F.2d 974, 978-79 (5th Cir. 1978); *United States v. Hendrix*, 549 F.2d 1225, 1227-29 and n. 2 (9th Cir. 1977)." *United States v. Shackelford* (6th Cir. 1985), 777 F.2d 1141, 1145.

89 Ohio App.3d, at 441-442. The court also held at page 440:

> As a result, this court concludes that the trial court did not abuse its discretion in declaring a mistrial. The statement clearly evidences a juror who was not impartial, and instead predisposed to a guilty verdict and a death penalty. Commenting on a person's right to an impartial jury and the trial court's role in guaranteeing it, *United States v. Hendrix* (C.A.9, 1977), 549 F.2d 1225, 1227, states:
>
> "It cannot be gainsaid that a fair system for the administration of justice must include the guarantee of 'an impartial jury' for the criminally accused. U.S. Const. amend. VI. *See generally, Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.[2d] 600 (1966); *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Stone v. United States*, 113 F.2d 70, 77 (6th Cir.1940). If only one juror is unduly biased or prejudiced or improperly influenced, the criminal defendant is denied his Sixth Amendment right to an impartial panel. *E.g., Tillman v. United States*, 406 F.2d 930, 937 (5th Cir.) *vacated on other grounds*, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969); *Stone v. United States, supra*, 113 F.2d at 77. The *trial judge has both a great responsibility and a wide discretion to give meaning to this guarantee.* * * * .

(Emphasis added.)

In the case at bar, the trial court's failure to act demonstrated an unreasonable attitude in investigating possible jury misconduct and deprived Appellant of the fair trial demanded by U.S. Constitution, Amendments VI and XIV and Ohio Constitution, Article I, Sections10 and 16. The trial court's conduct amounted to donning blinders to avoid sight of Appellant's constitutional rights. The court's conduct can be deemed nothing less than an abuse of the discretion imparted to the judge, and an abdication of the obligation incumbent upon him. Appellant's convictions stand as a mockery of those constitutional provisions and must be vacated.

Proposition of Law No. 15

Application of the *Witt* standard for the excusal of prospective capital jurors is a denial of an impartial jury reflecting a that represented a fair cross-section of the community and violates Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16, and R.C. 2945.25(C)

I

The trial court employed an improper standard for excusal of jurors who expressed reservations about the death penalty. As a result, Appellant was convicted and sentenced to death by a jury that was pre-disposed to vote for death.

The standard for excusal is clear and is prescribed by R.C. 2945.25(C). The failure to employ the proper standard resulted in a violation of the freedoms protected by the cruel and unusual punishment clause, and a fair and impartial jury drawn from a cross section of the community. Ohio Constitution, Article I, Sections 1, 2, 5, 9, 10, and 16 are reproduced in the Appendix, *post*.

The genesis of Ohio's statutory standard, R.C. 2945.25(C), is *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). According to *Witherspoon*, jurors should be excused in capital cases only if they would either automatically vote against the imposition of capital punishment without regard to any evidence which might be developed at the trial; or, if their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. 391 U.S.,

at 522, fn. 21.[53] The constitutional basis for the holding was the Sixth Amendment's guarantee of a trial by an impartial jury, made applicable to the states through the Fourteenth Amendment to the U.S. Constitution.

The United States Supreme Court later modified the *Witherspoon* standard, and announced a new *federal* constitutional standard in *Wainwright* v. *Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).[54] After *Witherspoon* and before *Witt* was decided, the Ohio General Assembly in 1981 codified *Witherspoon* in R.C. 2945.25(C),[55] and thus established the appropriate standard for capital juror excusal *in Ohio*.

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[53] William Witherspoon was convicted of murder in Cook County, Illinois in 1960 and sentenced to death. Ill. Rev. Stat. c 38, §743 (1959) provided that jurors in murder trials could be excluded for cause if the juror had "conscientious scruples against capital punishment" or that the juror was "opposed" to capital punishment. The United States Supreme Court, in an opinion by Justice Potter Stewart, held that the Illinois jury was not one which complied with the requirements of the Sixth and Fourteenth Amendments to the U.S. Constitution because Witherspoon did not have a fair and impartial jury drawn from a true cross section of the community.

[54] The Court held that a juror may not be "challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 469 U.S., at 420. *Witt* "softened" the *Witherspoon* standard, and made it easier for the government to exclude jurors who expressed reservations (but not a flat refusal) about imposing death.

[55] The statute provides in pertinent part:

> A person called as a juror in a criminal case may be challenged for the following causes:
>
> ...
>
> (C) In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard.

II

The federal Constitution establishes a minimum level of protection of personal liberty, a floor, as it were, beneath which no government may sink when defining and enforcing constitutional rights. *Oregon* v. *Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975). States interpreting their own constitutions under what some call the "new federalism," are free to declare that their citizens enjoy greater freedoms and protections than those afforded by the federal Constitution. *See, Cooper* v. *California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967); *Michigan* v. *Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

III

Indeed, the following provision from the Ohio Constitution provide sufficient independent basis that the *Witherspoon* standard, codified by the General Assembly in 1981 in R.C. 2945.25(C) established the appropriate standard for capital juror excusal in Ohio which should have been used by the trial court. Ohio Constitution, Article I, Section 10 promises that, in pertinent part, "[i]n any trial, in any court, the party accused shall be allowed* * * a speedy public *trial by an impartial jury* of the county in which the offense is alleged to have been committed." (Emphasis added.) Ohio Constitution, Article I, Section 5 provides that the "right of trial by jury shall be inviolate." Ohio Constitution, Article I, Section 2 might surprise many today, for it says that "[a]ll political power is inherent in the people." It also says that "[g]overnment is

instituted for their equal protection and benefit." Just as important for present purposes, Section 2 promises the protection of the law, including these constitutional provisions, to all persons in this State. This Court said as much in *State* v. *Lane*, 60 Ohio St.2d 112, 122, 397 N.E.2d 1338 (1979). Ohio Constitution, Article I, Section 1 says that "[a]ll men * * * have certain inalienable rights, among which are those of enjoying and defending life and liberty." Ohio Constitution, Article I, Section 16 provides that "every person * * * shall have remedy by due course of law, and shall have justice administered without denial or delay."

Although *Witherspoon* and *Witt* were grounded on the Sixth Amendment, it is not to be forgotten here that this is a capital case, and that Ohio Constitution Article I, Section 9 ensures that "cruel and unusual punishments [shall not be] inflicted." Moreover, this Court has declared that the Ohio Constitution is a document of independent force. *Arnold* v. *Cleveland*, 67 Ohio St.3d 35, 41-42, 616 N.E.2d 163 (1993). Having declared that Ohio's Constitution is a document of independent force, one would think that the Ohio courts would jealously enforce enactments of the General Assembly. In the more than 25 years since *Witt* was decided, the statute has not been amended or repealed by the General Assembly. In relevant part it holds that a prospective juror shall be excused for cause only if:

> [i]n the trial of a capital offense, ... he *unequivocally* states that *under no circumstances* will he follow the instructions of a trial judge *and consider fairly the imposition of a sentence of death* in a particular case. A prospective juror's *conscientious or religious opposition* to the death penalty *in and*

> *of itself is not grounds for a challenge for cause*. All parties shall be given wide latitude in voir dire questioning in this regard.

(Emphasis added.) This was the question that the trial judge and counsel should have asked: whether a juror would under no circumstances follow the instructions of the trial judge and whether the juror will consider fairly the imposition of a sentence of death in a particular case. A juror does not have to say, as persons in this case were repeatedly asked, that he or she will sign a death verdict in this case.

Inexplicably, however, this Court has on several occasions held that the proper standard for excusal in Ohio is the *Witt* standard. *See, e.g., State* v. *Roe*, 41 Ohio St.3d 18, 535 N.E.2d 1351 (1989); *State v. Greer*, 39 Ohio St.3d 236, 530 N.E.2d 382 (1988); and, *State* v. *Beuke*, 38 Ohio St.3d 29, 526 N.E.2d 274 (1988). Those decisions claim that the proper standard in Ohio after *Witt* is R.C. 2945.25(O). But the cases fail to give effect to, and in fact ignore, the division of the statute which was crafted to apply *specifically* to capital murder prosecutions, R.C. 2945.25(C). R.C. 1.51 provides:

> If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

It is difficult to be more specific than R.C. 2945.25(C). It applies to only one type of case. But this Court has proceeded as if *Witt* had declared R.C. 2945.25(C) unconstitutional, or as if the General Assembly had repealed the statute. These decisions, again with respect, are inconsistent with principles of statutory construction this Court

extolled in a non-capital case. In *Cablevision of the Midwest, Inc. v. Gross*, 70 Ohio St.3d 541, 544, 1994 Ohio 505, 639 N.E.2d 1154, the Court said:

> It is the *responsibility* of courts to enforce the literal language of a statute whenever possible. *Pike-Delta-York Local School Dist. Bd. of Edn. v. Fulton Cty. Budget Comm.* (1975), 41 Ohio St.2d 147, 70 O.O.2d 300, 324 N.E.2d 566. A court's role is to interpret, not legislate. *Seeley v. Expert, Inc.* (1971), 26 Ohio St.2d 61, 55 O.O.2d 120, 269 N.E.2d 121. Absent ambiguity, the court must give effect to the plain meaning of a statute *even when a court believes that the statute results in an unfavorable outcome. Id.*; R.C. 1.49.[56]

(Emphasis added.) One would be hard-pressed to claim that it is not possible to "enforce the literal language of" R.C. 2945.25(C). The standard, to borrow Justice Antonin Scalia's phrase from another capital case, "could not be clearer." *Hitchcock* v. *Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

While the *Witt* standard may apply in jurisdictions which have not specifically addressed the issue under its state constitution or a state statute, Ohio is not one of those jurisdictions. Like it or not, *Witherspoon* is the Ohio *statutory* standard that enforces the right to an impartial jury under the Sixth Amendment to the United States Constitution and the Ohio Constitution Article I, Section 10. Failure to follow the statute not only violates federalism principles, but separation of powers principles as well. This is basic separation of powers theory. Unless the statute is unconstitutional—and no one has said it is in the last 25 years—the courts are bound to apply

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[56] There is no ambiguity in the Ohio statute, and the trial court was obliged to abide by the constitutional principle of separation of powers. The court thus was bound to apply the plain words of the statute at the trial level.

it, even when a court believes the statute results in an unfavorable outcome, to borrow the Court's phrase from the *Gross* case.

By failing to enforce a valid statute, the courts are exceeding their own powers, and at the same time usurping those of the legislature. This type of warring on the Constitution, *see, Cooper v. Aaron*, 358 U.S. 1, 18, 78 S.Ct. 1401, 3 L.Ed.2d 5, 3 L.Ed.2d 19 (1958), undermines the very fabric of our democracy. Whatever the rule in federal courts or in jurisdictions with no specific statutes, in Ohio, before a juror can be excused for cause, that juror must unequivocally state that under no circumstances could he follow the law as given by the Court and *consider fairly* the imposition of a sentence of death. A prospective juror's conscientious or religious opposition to the death penalty is not grounds for a challenge for cause in Ohio. The trial court's employment of the *Witt* standard deprived Appellant of his right to a jury composed of a fair cross section of the community, and deprived Appellant of the right to trial by an impartial jury, guaranteed by Ohio Constitution, Article I, Sections 5 and 10. Unless this Court finds R.C. 2945.25(C) unconstitutional, it is the standard that *must* be applied in Ohio. The Court cannot repeal R.C. 2945.25(C) *sub silentio*. *Witt* did not and cannot amend or repeal the portion of Ohio statute that specifically deals with capital cases. Unless that statute flatly violates the federal Constitution, to read it out of existence would violate the principle of federalism, "the respect that federal courts owe the States and the States' procedural rules * * * ." *Coleman* v. *Thompson*, 501

U.S., at 729. A court does not have to *like* the standard, but the separation of powers demands that it be honored.

In *State v. Beuke*, this Court acknowledged that R.C. 2945.25(C) embodies the *Witherspoon* standard. The Court mystically said that the United States Supreme Court had "clarified" the *Witherspoon* standard in *Witt*. Indeed, *Witt* "clarified" the *federal* law. *Witt* did not prevent states from establishing their own standard. The United States Supreme Court has no authority to make any pronouncements about state law, unless a state law violates the federal constitution. That, indeed, is one of the bedrock principles of federalism.[57]

Three years before *Beuke*, in *State v. Rogers*, 17 Ohio St.3d 174, 177-178, 478 N.E.2d 984 (1985), the Court handled the application of the federal *Witherspoon-Witt* standard in a left-handed fashion. The Court's treatment of the issue completely failed to take into consideration R.C. 2945.25(C). In *State v. Buell*, 22 Ohio St.3d 124, 138-139, 489 N.E.2d 795 (1986), the Court relied upon *State v. Jenkins*, *State v. Rogers*, and the federal cases to leap to the conclusion that death qualification challenges for cause suddenly were to be governed by R.C. 2945.25(O). This effectively repealed R.C. 2945.25(C) *sub silentio*. The federal cases obviously would fail to account for the

[57] In terms of having as large a pool of jurors passed for cause from a cross section of the community as possible, it is of course the *Witt* standard which "restricts" the number of potential capital jurors. The *Witherspoon* standard seeks to include as many potential jurors as possible in the pool passed for cause.

specific Ohio statute. This Court's post-*Witt* decisions treat the statute as though it does not exist. This Court has continued without further analysis to hold that the proper standard for excusal is R.C. 2945.25(O).

The Constitution of Ohio is a grant of limited powers from the people to the government. *See*, Ohio Constitution, Article I, Sections 2 and 20. Pursuant to that grant of power, the General Assembly of Ohio adopted R.C. 2945.25(C). Ohio Constitution, Article I, Section 10 guarantees a trial by an impartial jury. Liberty resides in part in the tension between federal and state power. Because the state standard does nothing to deprive a citizen of immunities guaranteed by the federal constitution as interpreted by *Witt,* R.C. 2945.25(C) is a proper exercise of state power. R.C. 2945.25(C) does not offend the constitutional guarantee of an inviolate right to a trial by an impartial jury, and in fact *enforces* those provisions. See, the Sixth and Fourteenth Amendments to the U.S. Constitution, and Ohio Constitution, Article I, Sections 5 and 10. So long as R.C. 2945.25(C) is valid, constitutional exercise of the legislative power—and there has been no holding that R.C. 2945.25(C) is an improper exercise of the legislative power—courts are duty-bound to apply legislative enactments as written. To do otherwise violates the constitutional doctrine of separation of powers.

IV

The trial court ignored the statute. It was error to excuse Jurors 55 and 233 on

the death penalty issue. (T.p. Voir Dire, Vol. II, p. 300.) Juror 233 said that in certain circumstances "maybe" the death penalty might be appropriate and the juror would be willing to consider the death penalty. (T.p. Voir Dire, Vol. II, p. 284.) More importantly, these jurors were never asked the proper questions. The most that can be demanded of a venireman is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If veniremen were excluded on any broader basis than this, the death sentence cannot be carried out. In fact, unless a venireman states *unambiguously* that he would *automatically* vote against the imposition of capital punishment *no matter what the trial might reveal*, it simply cannot be assumed that is his position. *See*, *Witherspoon*, 391 U.S., at 516, n. 9. Jurors who oppose the death penalty, like jurors who favor the death penalty, can set aside their personal beliefs and follow the court's instructions to consider whether death is an appropriate penalty. Trial courts must distinguish between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial. *Witt*, 469 U.S., at 421 and 422, n. 4; *Adams v. Texas*, 448 U.S. 38, 44-45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). This the trial court made no effort to do, perhaps because it would take too

much time.

V

On this record, it cannot be said with any assurance that the two jurors mentioned were properly excluded.

> THE COURT: All right. Now, is there anyone -- oh, and I want you to consider any of these penalties that if that is the verdict that is returned ultimately, either death, life without parole or the other two life options, that is exactly what the defendant's going to get, okay? So the jury has to understand that that's their responsibility. So are any of you religiously, morally, or otherwise against the imposition of the death penalty? Yes, ma'am. And you're juror?
>
> JUROR NO. 233: 233.
>
> THE COURT: 233. And on what basis are you against the imposition of the death penalty?
>
> JUROR NO. 233: Probably because of my religious beliefs. This has just happened recently. I used to think they should, if they were guilty, get the death penalty, depending on the crime, but as I got older and read that people that were put in jail forever, got the death penalty, and then years later, they found out that they were not guilty, and you can't take back a life, so I guess I have to say I'm against the death penalty *just for that reason.*
>
> THE COURT: Okay. Even though you have a -- an objection to the death penalty, if you were selected as a juror in this case, would you nevertheless follow my instructions and fairly consider the imposition of the death penalty?
>
> JUROR NO. 233: Yes.
>
> THE COURT: You would?
>
> JUROR NO. 233: (Nods head.)
>
> THE COURT: Could you actually sign the death verdict?
>
> JUROR NO. 233: It would be hard, but if you said, yes.
>
> THE COURT: Okay. I don't tell anybody what to sign.

JUROR NO. 233: Okay.

THE COURT: But I will give instructions of the law that could lead you to that. For instance, my instruction will be in the sentencing phase, if you find the aggravating circumstances outweigh the mitigating factors by beyond a reasonable doubt, then you are to find the death penalty.

JUROR NO. 233: I have a real hard time with it.

THE COURT: I'm sorry?

JUROR NO. 233: I have a real hard time with it, though.

THE COURT: Okay. Well, see, *we talked about commitment yesterday*. That's one of the things. I know this is difficult, and I'm certainly not trying to put you on the spot, but we need to know if you can or you can't.

JUROR NO. 233: I can't.

THE COURT: I'm sorry?

JUROR NO. 233: I can't.

THE COURT: Okay. And before someone else asks, is this in all cases?

PROSPECTIVE JUROR: *No.*

THE COURT: Okay. What would be the case?

JUROR NO. 233: *I guess if it was such a terrible crime and premeditated and just so cruel.*

THE COURT: Yeah, I understand. People talk about premeditation. Understand something, no one gets charged with murder, let alone aggravated murder with capital specifications, unless they intended to kill the person. You understand?

JUROR NO. 233: Yes.

THE COURT: *You must have intent to be charged with murder* and any of the other varieties of murder, okay? So here you have, as what I read to you, defendant purposely, that means intentionally, caused the death of Gina Tenney. So is this one of those cases?

JUROR NO. 233: I don't know until I heard everything, so

(T.p. Voir Dire Vol. II, pp. 252-256.) But the trial judge, aside from instructing the juror that you have to have an intent to kill to be *charged* with capital murder (as opposed to being *convicted* of aggravated murder) also asked the wrong question. If that were not bad enough, the trial court confused the juror by equating premeditation and intent. This was continued by the prosecutor:

> MR. DESMOND: I'm not going to get up here and try to change your point of view, I'm not going to try to twist my words or confuse you to say the right answer. I'll leave it at that. You're opposed to the death penalty. Okay. Your opposition to the death penalty, would it affect your ability to find the defendant guilty in this phase?
>
> JUROR NO. 233: No.
>
> MR. DESMOND: Okay. Second part, you already said you couldn't sign your name to the death verdict?
>
> JUROR NO. 233: Yes.
>
> MR. DESMOND: Okay. *I know it can sometimes be a little intimidating when a judge is questioning you and he says you can't follow the law*. Could you? I mean, it's -- and there's no wrong answer here. If you say no, you couldn't, that's fine.
>
> JUROR NO. 233: No, I couldn't.

(T.p. Voir Dire Vol. II, pp. 263-264.) (Emphasis added.) No one at this point has explained that under the law, she need only be willing to consider fairly the death penalty. The trial judge and the prosecutors were so busy telling pro-death jurors that they only had to say that they were willing to *consider* mitigation, but that whatever weight they assigned, even if it was zero, was up to them. Yet, the judge did not

explain to jurors with death scruples that they need only be willing to *consider* capital punishment fairly as an option. In point of fact, the juror *was* willing to consider capital punishment, and did not say that *under no circumstances* would she ever refuse to vote for death, even if the evidence and law told her otherwise.

> MR. MERANTO: Okay. Now, No. 233, you kind of got stuck, it seemed to me, with both the prosecutor and the judge about this whole signing on the verdict. All right. I believe you said that, for example, premeditated and cruel, you know, you think maybe the death penalty's appropriate.
>
> JUROR NO. 233: Maybe.
>
> MR. MERANTO: Okay. Maybe. Well, you could consider it under those circumstances; right?
>
> JUROR NO. 233: Yes.
>
> MR. MERANTO: And once again, you said maybe and then you said, yes, under the right circumstances, right facts, I could vote for death, the death penalty is appropriate. I think you said that; right?
>
> JUROR NO. 233: You know, I think I did, but I just don't think I could do it. I said it, but –
>
> MR. MERANTO: Well, could you participate in an open discussion and vote your conscience?
>
> JUROR NO. 233: Yes.
>
> MR. MERANTO: And if your conscience was, man, this really shocks my -- this shocks me, this act, the way this went down, the premeditation, whatever, and I'm voting for it, *you could do that, once again, if the judge instructed you on the law and you had to, not that you had to vote, but that you had to follow the law?*
>
> JUROR NO. 233: *Yes.*
>
> MR. MERANTO: Okay. So you could take an oath and you could vote to do it, and once again, just the matter of signing to what you participated in, would that be -- I mean, *could you do it if you had to do it; I mean, if you felt that way strongly enough?*

JUROR NO. 233: *Yes.*

(T.p. Voir Dire, Vol. II, pp. 284-286.) (Emphasis added.) The trial court early on told jurors that he would not dawdle or coddle their human feelings of ambivalence about the most serious penalty in the world.

> THE COURT: Okay. This is for everybody. Everybody wants to say, well, I think I won't or I think I will or I don't believe. We actually need commitment. This is one of those places you got to commit because, you know, we go through two weeks of this and find out at the end, whoops, I guess I can't, we can't do that. You have to tell us you can't.

(T.p. Voir Dire, Vol. I, p. 20.) The judge became frustrated that jurors were expressing views reflecting hesitation with making a decision about imposing a death sentence:

> THE COURT: ... Let me address something here cause I keep seeing more and more of this, that I'm for the death vote -- penalty, I think it's appropriate, I think it's necessary, whatever, but I want someone else to do it. *This is a civic responsibility*. I mean, that's not a moral issue. *That's not I want the other guy to do it issue.* And, you know, if everybody feels that way, we might as well just all pack up and go home, you know. We have a duty to our community, and one of those duties is to be jurors. You have a duty to follow the law, and the law's going to put you to that point, and what are you going to do -- ? -- say I'm not going to follow the law, I'm going to engage in juror misconduct? And from what I hear, it's not for a religious reason, it's not for a moral reason, it's for a squeamish reason or I don't want to be responsible reason, I don't want to accept the responsibility of this job.

(T.p. Voir Dire, Vol. II, p 368.) There was room on this jury only for those who could sentence Appellant to death, not for those who were not sure, even if they were willing to consider a death sentence. The judge started early in the case, like a schoolmaster, telling his "children" how they *must* feel and think, and leaving no room for their actual views. This would reach the point where both sides would acknowledge that the judge was bullying jurors. For example, here was an exchange between the Court and

Juror No. 24.

> THE COURT: Okay. Based on anything for that matter. Can you give him a fair and impartial trial?
>
> JUROR NO. 24: I think so.
>
> THE COURT: Okay. Now, remember I talked about commitment yesterday? *It's not I think so or I believe I can.* You must do it or you have to tell us you can't do it. Can you do it? You seem to hesitate. What's the reason for the hesitation?
>
> JUROR NO. 24: The reason for the hesitation was the question about capital punishment.

(T.p. Voir Dire, Vol. I, p. 141.) (Emphasis added.) The trial judge appears to have mistakenly believed that every trial juror had to promise an absolute ability to sign a verdict for death.

> THE COURT: * * * Okay. I want you all to take a deep breath, okay? We're just here to get your opinions. There's no right or wrong answers, okay? So a couple of you have kind of gone back and forth, so I'm not sure, but I would like to be cause I have to be. Let's go with Juror 55. As I said at the beginning, if found guilty of the aggravated murder and the capital specification, we get to the sentencing phase. The aggravating circumstance, they're correct, is already there. It would be the capital specification. That's the aggravating circumstance. *Then the burden is on the defense* to give you mitigating factors *to persuade you to believe that death is not the appropriate penalty, okay?*[58] And you're required by law, anyone who sits on this jury, to consider those mitigating factors. How you weigh them is totally up to you. So I wasn't sure. Can you consider them?
>
> JUROR NO. 55: Yes.
>
> THE COURT: Okay. Now, this is -- all comes – cause I think you said this when Mr. Desmond was talking to you, that happens when the jury signs a verdict form. You sign a verdict form and you come into court and it's read in open court. *Could you sign that form?*

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[58] This is *not* the standard in Ohio. (Footnote not in original.)

JUROR NO. 55: No.

THE COURT: Okay. Why is that?

JUROR NO. 55: I just couldn't. It would make me a nervous wreck. I can't do it.

THE COURT: I'm sorry?

JUROR NO. 55: I just can't do it.

THE COURT: *Why? I'm curious as to why. Actually, I have to know why.*[59]

JUROR NO. 55: I couldn't sentence him to death myself. I just could not.

THE COURT: All right. That's what I need to know. Thank you.
Okay. Juror 233, same thing, you're sitting in there, and if you believe that the aggravating circumstance outweighs the mitigating factors beyond a reasonable doubt, you have to sign a verdict form for death. Can you sign that?

JUROR NO. 233: No.

THE COURT: Okay. Thank you both.

(T.p. Voir Dire, Vol. II, pp. 293-295.) (Emphasis added.) The trial judge, *before* hearing the arguments of counsel, had concluded that Jurors 55 and 233 were going to be excused. Though he told counsel that they could "put whatever you want on the record," those arguments would be meaningless to the trial judge, who had already made up his mind. These jurors were going to be excused, no matter what anyone said..

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[59] Actually, the judge does not have to know why. But this is further evidence that he was attempting to craft jurors into his own mind set, even, as shown in Proposition of Law No. 1, accusing "non-conforming" jurors of having something wrong with them. (Footnote not in original.)

THE COURT: Okay. *I'm going to make this simple* and you can put whatever you want on the record. I'm excusing Juror 55. *Basically, she can't sign a verdict form. She's no good to us.* I'm excusing Juror 233 for the same reason, *can't sign a verdict form, you're no good to us*, and if you want to put your objections on the record, feel free.

MR. MERANTO: I would object to 233. You know, once again, I think in the simple context you asked her at the end without – you know, it's like looking at that one question in a vacuum. I mean, when you talked to her about her duty and her oath and everything, she understood, and she understood that part of that may be signing a verdict form, and she said she'd sign it.

THE COURT: She just said she couldn't. She's all over the place, but she can't do it. *So you want me to keep them both?*

MR. MERANTO: No. But with all due respect –

Apparently uninterested in hearing legal argument, the trial judge opted for the type of judicial bullying that pervades this trial record.

THE COURT: You want me to keep them both?

MR. MERANTO: If you would have asked her first before 55, and that's -- once again, I'll be brief, but if those four people were not sitting together, it might have been a different result. 55 seemed much stronger with regard to the way she said I'll never sign a verdict, even though her issues were –

THE COURT: Then you agree with me that 233 is weak and she'll go whatever way the last person talked to her said?

MR. MERANTO: No, I don't agree with that.

THE COURT: As to the others, 48 and 60.

MR. MERANTO: Pass for cause.

MRS. CANTALAMESSA: 220.

THE COURT: I'm sorry?

MR. DESMOND: Forty-eight and 220.

THE COURT: I'm sorry. Sixty's gone.

MR. DeFABIO: Sixty brings up our next point. We do not pass for –

THE COURT: Let's do these two. Forty-eight and 220.

MR. DeFABIO: We do not pass for cause on the grounds of 60's answer regarding pretrial publicity along with 55's injection of DNA, injection of the thoughts that after 20 years, DNA included these people. Again, I don't want to echo Mr. Meranto, and I certainly don't mean this as an attack against the court, but the problem you have when you discuss pretrial publicity in an open setting like this, once it's out, it has tainted the other people. They've now heard these issues, they've now heard these opinions, which was strong enough to let No. 60 set off, so we would make a general excusal for that entire panel, or what's left of them at this point.

(T.p. Voir Dire, Vol. II, pp. 295-298.) (Emphasis added.)

In *State* v. *Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984), *cert. denied, Jenkins v. Ohio*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985), one of the last cases in Ohio to interpret the specific part of the statute in issue here, this Court held that in order to uphold a conviction and death sentence, a reviewing court must be able to conclude safely from the record that excluded jurors would have been unwilling to *consider* all of the penalties provided by state law, and that each excused juror was irrevocably committed, before the trial has begun, to vote against the death penalty, regardless of the facts and circumstances that might emerge in the course of the proceedings. *See, also, State v. Anderson*, 30 Ohio St.2d 66, 70, 282 N.E.2d 568 (1972); *State v. Watson*, 28 Ohio St.2d 15, 275 N.E.2d 153 (1971), syllabus at 3: "In

selecting the members of a jury, unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, *it cannot be assumed that this is his position.*" (Emphasis added.)

The trial court made the assumption here that *Anderson* prohibits. The trial court exhibited no interest in "wasting time" on careful probing questions or legal arguments. That is a constitutional violation. A necessary corollary to the above rule is there be sufficient latitude in the voir dire of prospective jurors to establish whether because of their scruples regarding capital punishment they would automatically vote against the imposition of a sentence of death no matter what the trial might reveal. *State v. Anderson*, at syl. 1. That did not occur here.

Appellant was denied an impartial jury, and was convicted and sentenced by a tribunal organized to return a death sentence. The State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. *See, Morgan v. Illinois*, 504 U.S. 719, 732, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), quoting *Witherspoon*. Appellant's conviction and sentence of death are in violation of the aforementioned constitutional provisions and must be vacated.

PROPOSITION OF LAW NO. 16

Failure to File a Motion to Suppress Evidence When There is a Colorable Basis to Exclude, Prior to Trial, Eyewitness Testimony Violates the Essential Duties of Counsel Under the Sixth and Fourteenth Amendments to the U.S. Constitution, and Ohio Constitution, Article I, Sections 1, 10 and 16.

The United States Supreme Court recently reaffirmed that it is a due process violation to permit admission of unreliable pretrial eyewitness identification "procured under unnecessarily suggestive circumstances arranged by law enforcement." *Perry v. New Hampshire*, __ U.S. __, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012). Here, the police conducted a pretrial identification line up with multiple witnesses viewing the line-up at the same time. The line up contained two suspects, Horace Landers and Appellant. The police did nothing to ensure that the witnesses were separated or that their identification was based upon their independent observations. Mrs. Allie testified that her husband was giving her signals during the line-up. (T.p. Trial Vol. II p. 325.) After John and Sandra Allie left without selecting Appellant, they discussed the line-up. John Allie claims to have called the detective then to say inform him that the man at the ATM number three, The Appellant. (T.p. Trial Vol. II, 317.) Sandra Allie never spoke to the detective; her husband conveyed her "selection" of number three (T.p. Trial Vol. II p. 338.) The purported pretrial identification was the result of "unnecessarily suggestive circumstances arranged by law enforcement." There are inherent problems with line-ups where several witnesses are asked to view a line-up

simultaneously, which "increase the risk of misidentification." *See, State v. Norman*, 137 Ohio App.3d 184, 201, 738 N.E.2d 403 (1st Dist. 1999.) In *Norman,* several witnesses viewed the line up together and conferred with each other before providing their selection to the police. The Court in *Norman* found the identification sufficiently reliable, given the witnesses' opportunity to observe the perpetrator and the description given prior to the line-up, to permit admission at trial. The same can not be said of this identification.

Appellant's trial counsel was aware that John Allie had selected no one from the line-up and then called the detective the next day to say it was number three: the Appellant. Sandra Allie selected number 5 at the line-up, the omnipresent Horace Landers. According to John and Sandra Allie, the individual at the ATM had a hood covering part of his face, had a scarf wrapped around his neck, chin, and mouth. All that was visible was his nose and eyes. ("He turns toward my direction and looks at me. And of course there was nothing to focus on but his eyes,") according to Sandra Allie. T.p. Trial Vol. II p. 333.) Moreover, Sandra Allie, 5'4" to 5'5" testified the individual was a little taller than she was. (T.p. Trial vol. I, p. 328, 331.) She selected number five, Horace Landers who was 5'8", not the Appellant, who was 6'2". (T.p. Trial Vol. IV, p. 610.) In view of the inability to select Appellant, the limited observation of only the eyes and the nose, and the taint in identification based upon the Allies signaling each other and then conferring with each other before selecting

the Appellant, it was a denial of the effective assistance of counsel when no pretrial motion to suppress was filed. *See*, the Sixth and Fourteenth Amendments to the U.S. Constitution and by Ohio Constitution, Article I, Section 10.

The Court of Appeals dismissed this issue by concluding that "Appellant makes absolutely no argument that there were unduly suggestive police procedures implemented here or that something was inherently wrong with the line-up itself, and nothing in the record indicates that such an argument could be made here." *State v. Adams*, at ¶24. In so concluding, the Court of Appeals ignored Appellant's argument that the identification process was tainted as a result of procedures implemented by the police. The police cannot and should not permit multiple witnesses to view a line-up and further permit one of the witnesses to sway the identification process, as was done here. Under such circumstances, a motion to suppress should have been filed by trial counsel.

If a criminal defendant is denied the effective assistance of counsel, he is also deprived of a fair trial and the constitutional promise that any guilty verdict is reliably achieved. The United States Supreme Court has long recognized that the effective assistance of counsel is a fundamental right. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 177 L.Ed. 158 (1932); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 7929 L.Ed.2d 799 (1963). As early as 1932, the Court recognized in *Powell* that a defendant "requires the guiding hand of counsel at every step in the proceedings against him."

U.S. Constitution, Amendment 6 secures not only the assistance of counsel but the *effective* assistance of counsel. The Supreme Court has said that "of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other right he may have." *See, United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

Ohio Constitution, Article I, Section16 secures for all person the ability to have a remedy in the courts by due course of law. Ohio Constitution, Article. I, Section 1 evinces the "natural law" concept embodied in the Declaration of Independence and protects against encroachment by the government the ability to defend life and liberty. Just as the federal and state constitutional guarantees of counsel mean the effective assistance of counsel, so, too, the guarantee of the ability to defend life and liberty must be the guarantee to defend life and liberty *effectively* . Ohio Constitution, Article I, Section 2 promises that all citizens will have these liberties enforced equally. *See, also, State v. Lane*, 60 Ohio St.2d 112, 397 N.E.2d 1338 (1979). Those rights were denied Appellant here because his trial counsel violated an essential duty to Appellant when they failed to file a pretrial challenge to identification testimony offered at trial through the Allies.

When a criminal defendant does not have the effective assistance of counsel, the results of the trial are not reliably obtained, and the entire adversarial process and confidence in the outcome of the trial are undermined. *See, Strickland v.*

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Supreme Court in *Strickland* set guidelines for determining ineffectiveness.

> First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S., at 687. Any claim for ineffective assistance of counsel must also "identify the acts or omissions of counsel" and show that the acts are not "the result of reasonable, professional judgment." *Id.*, at 680. The objective standards against which performance should be measured in this case is the failure to file a motion to suppress the pretrial and in-court identification of Appellant as being at the ATM machine on December 29, 1985, ostensibly using Ms. Tenney's car and attempting to use her ATM card. John and Sandra Allie were present for a line-up on January 8, 1986. (T.p. Trial Vol. I p. 222.) Appellant was in the third position. (T.p. Trial Vol. I p. 224.) Counsel failed to file a motion to suppress the pretrial identification procedures which were tainted and unreliable and as a result, necessarily tainted the in court identifications. There must also be a showing that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the

outcome." *Strickland*, 466 U.S., at 694.[60]

In this case, though counsel did a fine job of cross examining the Allies at trial regarding the identification of Appellant, counsel's failure to file a pretrial motion to suppress the identifications resulted in the jury hearing evidence that was unreliable and certainly prejudicial. Those failures deprived Appellant the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and by Ohio Constitution, Article I, Sections 1, 2, 10 and 16.

As to the *Strickland* performance prong, there are legally objective criteria for challenging the admission of pretrial and in-court identifications. There is more to effective representation than doing a good job in the trial in front of the jury. In *State v. Garrett*, 76 Ohio App.3d 57, 600 N.E.2d 1130(11th Dist. 1983), the court found that trial counsel's failure to move to suppress evidence amounted to ineffective assistance of counsel. The court held:

> In the present case, it was the obligation of the trial court to determine whether exigent circumstances existed so as to negate the need for a warrant to enter the house. Only then could the trial court determine if there was an illegal arrest. . . .
>
> The trial court *was denied the opportunity to determine* whether exigent circumstances existed *because of appellant's trial counsel's failure to file a motion to suppress.* Although it is not clear whether such a motion would be granted, the possibility that it would have been warranted its filing by appellant's counsel.
>
> By not filing a suppression motion, appellant's trial counsel

[60] Ohio adopted the *Strickland* test in *State v. Thompson*, 33 Ohio St.3d 1, 514 N.E.2d 407, (1987), and *State v. Post*, 32 Ohio St.3d 380, 513 N.E.2d 754, (1987) cert denied, *Post v. Ohio*, 484 U.S. 1079, 98 L.Ed.2d 1023, 108 S.Ct. 1061, (1988).

> substantially violated an essential duty owed to appellant. The legality of the arrest was critical to appellant's defense.
>
> For the foregoing reasons, appellant was denied effective assistance of counsel.

76 Ohio App.3d., at 62-63. (Emphasis added.)

The prejudice prong of *Strickland* is apparent here. John and Sandra Allie provided testimony placing Appellant on Belmont Avenue using Ms. Tenney's ATM card on December 29, 1985. There was ample evidence the the identification process was tainted as a result of the procedure employed by the police. There was further evidence that selection of Appellant from the line up was not the result of the witnesses independent observation and recollection. The trial court was denied the opportunity to determine whether the line-up was unfairly conducted.

The Due Process Clause of the U.S. Constitution, Amendment 14 has been interpreted to mean that a citizen charged with a crime has a fair opportunity to defend against the charges. *Chambers* v. *Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). There can be no fair opportunity to defend against the charges when counsel has failed to challenge the identification by John Allie and Sandra Allie. Even though neither of them made appropriate or legally sufficient pretrial identifications of Appellant, the State was permitted to elicit testimony from each of the Allies as if a proper pretrial identification had been made. Moreover, the facts and circumstances surrounding the pretrial identification were clearly tainted and suggestive, leading to the likelihood of irreparable misidentification.

The United States Court of Appeals for the Sixth Circuit has recognized the import of challenging pretrial and in court identifications "because of all the evidence that may be presented to a jury, a witness' in-court statement that "he is the one"' is probably the most dramatic and persuasive. Eisenberg & Fenstel, *supra*, E. Borchard, Convicting the Innocent (1932);" *See*, *United States v. Russell*, 532 F.2d 1063, 1067 (6th Cir. 1976). A review of the facts surrounding the purported pretrial identification as well as the witnesses' actual testimony reveals a strong likelihood that the identification was tainted and would have been suppressed as unreliable. Failure to move to suppress unduly suggestive identifications can form the basis of an ineffective assistance claim. *Williams v. Lavigne*, 209 Fed. Appx. 506, 511 (6th Cir. 2006).

The totality of the circumstances is the general standard applied in reviewing pretrial identifications. The totality of the circumstances surrounding the identification process support the conclusion that the police did not employ practices designed to elicit reliable identification. Experience has proven that, when a purported eyewitness identifies someone as the perpetrator, the jury is thereafter inclined to convict the defendant almost as a matter of course. The paradox is that eyewitness testimony, among the most unreliable forms of evidence employed in a criminal trial, is perhaps the testimony that is given the greatest weight by a jury. The United States Court of Appeals for the Second Circuit has captured the essence of this paradox:

> There can be no reasonable doubt that inaccurate eyewitness testimony may be one of the most prejudicial features of a criminal trial. . . . [W]hile

> juries may be led by their experience to believe their eyes, and, by inference, what they hear from those who have seen, that eyewitness testimony may sometimes be the least trustworthy means to identify the guilty.

See, Kampshoff v. Smith, 698 F.2d 581, 585 (2nd Cir. 1983). The Supreme Court also recognized the problem for a defendant at trial once the witness has made an identification:

> It is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence), for all practical purposes be determined there and then, before the trial.

United States v. Wade, 388 U.S. 218, 229, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

The United States Supreme Court has recognized the dangers of impermissible and unduly suggestive confrontations, as well as the ramifications of such suggestive confrontations. The Court has held that the:

> confrontation compelled by the State between the accused and the victim or witness to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. . . . Suggestions can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

See, United States v. Wade, 388 U.S., at 228-229. Thus, the Due Process Clause protects against conviction when the identification testimony is truly unreliable. A review of the procedures utilized in this case confirms the very concerns emphasized in *Wade*. Here, whether intentional or not, identification of Appellant was made only

after the two witnesses left and conferred with each other. Such identification is a violation of due process and strikes to the very heart of the government's ability to obtain a reliable verdict by proof beyond a reasonable doubt. The Fourteenth Amendment to the U.S. Constitution provides in pertinent part that: "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *"[61] Every citizen is guaranteed that the government's processes—here, a trial—will be "due process", *i.e.*, a procedure where the process is fair so that there can be confidence in the outcome. *See, generally, In re Winship, ante*; *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). As Justice Harry A. Blackmun put it, the *Due* Process Clause is not the *Some* Process Clause, *See, Medina v. California*, 505 U.S. 437, 463, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992). (BLACKMUN, J. , joined by STEVENS, J., dissenting). The United States Court of Appeals for the Third Circuit has provided a useful due process analysis when analyzing potentially suggestive identifications:

> The first question is whether the initial identification procedure was unnecessarily or impermissibly suggestive. This inquiry actually contains two component parts: that concerning the suggestiveness of the identification, and that concerning whether there was some good reason for the failure to resort to less suggestive procedures. . . . If a procedure if found to have been unnecessarily suggestive, the next question is whether the procedure was so conducive to mistaken identification or gave rise to such a substantial likelihood of misidentification that admitting the identification would be a denial of due process.

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[61] Ohio Constitution, Article I, Sections 1, 10, and 16 are reproduced in the Appendix, *post*.

United States v. Stevens, 935 F.2d 1380, 1389 (3rd Cir. 1991). In identification cases, the Due Process Clause protects against evidence which has as its genesis an unnecessarily suggestive procedure.

As important, if not more important, in this case as the suggestive and tainted nature of the identification procedure itself is the fact that there was good reason to believe that the opportunity to observe the person using the ATM card was so insubstantial as to lead to the likelihood of misidentification.

In *Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the Supreme Court established a two prong test to determine whether an identification is reliable. The first prong focuses upon whether the identification procedure was unnecessarily suggestive. The second prong is whether the suggestive procedure created a substantial likelihood of misidentification. Recognizing the need to protect individuals from government misconduct in pretrial identification, this Court emphasized that due process mandates suppression of improperly suggestive pretrial identifications:

> The rationale for excluding a tainted pretrial identification is to protect the defendant from misconduct by the state. *State v. Brown* (1988), 38 Ohio St.3d 305, 310, 528 N.E.2d 523. Thus, "'[w]hen a witness has been confronted with a suspect before trial, due process requires a court to suppress her identification of the suspect if the confrontation was unnecessarily suggestive of the suspect's guilt and the identification was unreliable under all the circumstances.' (Emphasis added.)" *State v. Murphy* (2001), 91 Ohio St.3d 516, 534, 747 N.E.2d 765, quoting *State v. Waddy*, (1992), 63 Ohio St.3d 424, 438, 588 N.E.2d 819. We have previously recounted those factors to be considered: "(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness'

> degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation." *State v. Broom* (1988), 40 Ohio St.3d 277, 284, 533 N.E.2d 682, citing *Manson v. Brathwaite* (1977), 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140.

State v. Gross, 97 Ohio St.3d 121, 127, 2002 Ohio 5524, at ¶19.

In this case, the initial identification was not reliable. No description of the individual at the ATM machine was given. (T.p. Trial Vol. I, p. 216.) The Allies could only observe the eyes and nose of the individual, and, when presented with a line-up, did not select the Appellant. Only after conferring with each other after leaving the police station did John Allie call and select the Appellant. The procedures utilized were so conducive to mistaken identification that admitting the identification testimony was a denial of due process. Of course, one cannot blame the trial court for admission of this evidence, for the evidence to demonstrate misidentification was not brought to the trial court's attention prior to trial. The testimony concerning the pretrial identifications should have been suppressed and any in-court identifications prohibited, and had counsel filed a pretrial motion to suppress evidence this likely would have been the result.

In *Neil v. Biggers*, the Supreme Court held that it is the "likelihood of misidentification" which violates due process and requires exclusion of the unreliable identification testimony. Likewise, in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), the Court said that due process obligates a court to exclude

identification testimony that results from unnecessarily suggestive procedures which may lead to an irreparably mistaken identification. The likelihood of misidentification violates the due process precept that convictions in criminal cases shall be reliably determined. *See, Neil v. Biggers,* 409 U.S., at198; and, *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In *Manson v. Brathwaite,* 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), an undercover police officer purchased drugs from a seller and shortly thereafter described him to a second police officer. After hearing the description, the second officer suspected Brathwaite and left a picture of him, which had been pulled from police files, in the undercover officer's office. The undercover officer later identified Brathwaite from the single photograph. The Court held the identification admissible because the undercover officer had had an adequate opportunity to view the suspect, was a trained observer, gave a detailed and accurate description of the suspect, was certain about the identification, and identified Brathwaite from the photograph only two days after the incident. *See, Id.*, at 114-16.

The Court has focused its inquiry on the *reliability* of the identification testimony. Accordingly, while it is not always necessary to exclude an identification derived from unnecessarily suggestive procedures, the identification evidence may be admitted only if the totality of the circumstances indicates that the identification is *reliable*. The law employs a two-step analysis to determine the admissibility of

identification testimony. To exclude such evidence, first, the defendant must establish that the identification procedure was "impermissibly suggestive." Second, the court must determine whether the testimony was nonetheless reliable using the five factors enumerated in *Biggers*. These factors are: (1) the witness' opportunity to view the perpetrator at the time of the crime; (2) the witness' degree of attention at the time of the crime; (3) the accuracy of the witness' description of the perpetrator prior to the identification; (4) the witness' level of certainty when identifying the defendant at the confrontation; and (5) the length of time elapsed between the crime and the confrontation.

When the testimony has been found admissible, it has been because the identification was reliable based on the *Biggers* factors. *See, e.g.*, *Brathwaite*, 432 U.S., at 114-16 (adopting the factors enumerated in *Biggers* as the test for reliability of identification testimony) Conversely, however, where the *Biggers* factors demonstrate a lack of reliability, then the testimony must be suppressed. *See, e.g.*, *United States v. Eltayib*, 88 F.3d 157, 167 (2nd Cir. 1996); *Thigpen v. Cory*, 804 F.2d 893, 896-97 (6th Cir. 1986) (identification held unreliable because the victim only briefly viewed the suspect once during robbery).

It is not the suggestive identification of a suspect *per se* which violates due process. A constitutional violation occurs when *testimony* regarding a suggestive pretrial identification (or and in-court identification based upon it) is introduced at

trial.

> A conviction based on identification testimony that follows a pretrial identification violates the defendant's constitutional right to due process whenever the pretrial identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification * * * It is the likelihood of misidentification that violates the defendant's due process right * * * The due process concern is heightened when that misidentification is possible because the witness is called upon to identify a stranger whom she has observed only briefly, under poor conditions, and at a time of extreme emotional stress and excitement.

See, *Ledbetter v. Edwards*, 35 F.3d 1062, 1070 (6th Cir. 1994). It is the government's employment of unreliable *testimony* as part of an effort to convict which constitutes the due process violation.

With regard to the prejudice prong, one need only look at the first question asked by the jury during deliberation. The jury requested Sandra Allie's testimony. (T.p. Trial Vol. IV, p. 786.) No other evidence or testimony connected Appellant to the use of the ATM card. Given that the jury was charged in a manner which included all four felony specifications (rape, aggravated robbery, aggravated burglary, kidnaping) as one, it is impossible to know whether the jury found sufficient evidence of aggravated robbery to support the aggravated murder conviction. The ATM card was a pivotal piece of evidence and the testimony surrounding use of the ATM card and identification of Appellant should have been challenged. They were not, and the failure to do so was a clear denial of the right to effective counsel. Appellant's conviction and death sentence must be vacated and the case remanded so that trial

counsel may file a pretrial motion to suppress evidence.

PROPOSITION OF LAW NO. 17

> Racially discriminatory challenges made by the state and approved by the trial court deny a defendant a Jury Composed of a fair cross-section of the community, a fair and impartial jury, and Equal Protection of the Laws When His Due to in Violation of the Sixth and Fourteenth Amendments to the U.S. Constitution, and Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16.

The record in this case confirms that the State sought to exclude minority jurors who could follow the law and leave non minority jurors on the panel who openly admitted they could not be fair and impartial. Apparently the prosecutor was not interested in insuring a fair process, just one with jurors inclined to impose the death penalty.

The first attempt to exclude a black juror was a purported challenge for cause of Juror 301 in the seventh group of five jurors.

> MRS. CANTALAMESSA: Your Honor, we would challenge No. 301 for cause. She—in her initial questionnaire, she said she was against capital punishment, she said she could not sign a death verdict, she said her feelings were mixed, she—even when she said yes, that she would sign it, at the end, I mean, she was still hesitant, still talking about she didn't know if she could do it since—if she had been sitting in the same room with him all week during the trial, it was very hard for her to do that.
>
> THE COURT: Isn't it supposed to be hard?
>
> MRS. CANTALAMESSA: She promised that she would, but she—she still seemed very hesitant, and she—she just kept stressing the fact that it would be very hard for her to do that.

(T.p. Voir Dire, Vol. II, p. 442.) The trial court responded that the reason articulated by the State pushed it past a *Batson* challenge, but was not sufficient for a challenge

for cause and declined to dismiss the Juror 301.[62] In fact the Court, having listened to Juror 301's responses and witnessed her demeanor proceeded to find that Juror 301 would be "a good juror. She's going to put it aside. It's going to be difficult. She's a thinker." (T.p. Voir Dire Vol. II, p. 443.)

That the State's challenge was racially motivated is further supported by what the State *did not do* after concluding questioning of the seventh group. Two jurors in the seventh group questioned along with Juror 301 candidly responded that they could not be fair and impartial. Juror 110 had a brother who was killed. He stated several times that because of his brother's case he did not think he could be fair and impartial. (T.p. Voir Dire Vol. II, pp. 418, 419, 427.) After the State's challenge of Juror 301, the Court inquired, "Do you have anyone else?" The State responded, "No we pass everyone else." (T.p. Voir Dire, Vol. II, p.443.) The trial court incredulously asked: "What about the one that can't be fair and impartial? You don't care about that?" (T.p. Voir Dire, Vol. II, p. 443.) Apparently not interested in ensuring the jury was composed of those who could be fair and impartial, and only seeking jurors who would side with the State, the prosecutor saw no problem with Juror 110, believing Juror 110 would not cause a problem for the State. (T.p. Voir Dire, Vol. II p. 444.) That the State would

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[62] Because of the way the juror questionnaires were designed, there simply was no way, for purposes of appellate review, to determine the race of the jurors. Had the trial court not referenced the *Batson* issue, there would be nothing in the record to reflect the race of Juror 301, or any other juror for that matter. *Compare, Miller-El* v. *Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).

leave a juror on the panel who readily admitted he could not be fair and impartial but moved to exclude Juror 301 who said she could follow the law, who would take being a juror seriously and could sign a verdict of death because "right is right" underscores the State's motive in challenging Juror 301.

The fair cross-section requirement of the Sixth Amendment and Equal Protection Clause of the Fourteenth Amendment preclude a prosecutor from exercising peremptory challenges in a racially discriminatory manner. *See, Batson v. Kentucky*, 476 U.S. 79, 86, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). A trial court employs a three-step analysis when evaluating claims of racial discrimination in the exercise of peremptory challenges: (1) the opponent of the strike must make a *prima facie* showing of discrimination; (2) the proponent of the strike must give a racially neutral explanation; and (3) the trial court must determine whether the opponent has proven that the strike was racially motivated. *Id.* at 96-98; *Purkett v. Elem*, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). A violation of the Sixth and Fourteenth Amendments and Ohio Constitution, Article I, Sections 2, 5, 10, and 16 exists if the prosecutor strikes even one prospective juror in a racially discriminatory manner. *State v. White*, 85 Ohio St.3d 433, 436, 1999 Ohio 281, 709 N.E.2d 140. To prove a racially discriminatory challenge has occurred, a defendant need not show that the prosecution engaged in a pattern of discriminatory strikes. *Id.*; *State v. Tuck*, 80 Ohio App.3d 721, 724, 610 N.E.2d 591 (10th Dist. 1992).

If the Sixth Amendment fair cross-section and the Fourteenth Amendment due process and equal protection clauses and Ohio Constitution, Article I, Sections 5, 10, and 16 are to have any meaning, trial courts must zealously guard against discriminatory based challenges. The fair cross-section requirement is not some laudatory goal simply to ensure that all members of the community participate in the judicial process; it serves the purpose of protecting the citizens against overzealous government action and protects all other rights attendant in the jury process:

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. *Duncan v. Louisiana*, 391 U.S., at 155-156.This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . [The] broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly [*531] because sharing in the administration of justice is a phase of civic responsibility." *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946) (FRANKFURTER, J., dissenting).

Taylor v. Louisiana, 419 U.S. 522, 530-531, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). Thus, no court should tolerate actions by the government that are designed to undercut the fair cross section requirement. Here, the State made several challenges

to jurors who were black.

The State continued to practice racially motivated strikes. The State challenged Juror 11 after the general voir dire was complete. (T.p. Voir Dire, Vol. IV, p. 759.) In response to the *Batson* challenge, the State offered the following:

> MRS. CANTALAMESSA: Your Honor, throughout the entire interview, I don't feel that Juror No. 11 liked what I had to say. She wasn't listening to certain portions of me. She liked court shows, she mentioned hearing both sides of the story during one portion, and when I explained to her that it was just our burden, she agreed with that, but, however, she always talked about motive, and she seemed very disappointed to us that we didn't have to prove why someone did something.

(T.p. Voir Dire Vol. IV, pp. 758-759.) The trial court made no findings and simply overruled the *Batson* challenge, concluding the State set forth a race neutral reason for the challenge. But the State and the trial court were required to do more. A prosecutor must offer more than a "gut reaction" to justify his strike. *See*, *State v. Hairston*, 67 Ohio App.3d 341, 345, 586 N.E.2d 1200 (8th Dist. 1999). Likewise, a prosecutor may not rely upon generalizations to prevail. *See*, *State v. Bryant*, 104 Ohio App.3d 512, 518-19, 662 N.E.2d 846 (6th Dist. 1995). Similarly, the fact that other minority jurors remain on the jury is irrelevant. *State v. Bryant*, 104 Ohio App.3d, at 518-19. Moreover, when the State offers reasons which address a juror's demeanor, as with Juror 11, the trial court must make its own findings pertaining to a juror's demeanor. *McCurdy v. Montgomery County*, 240 F.3d 512, 522 (6th Cir. 2001), overruled in part on other grounds, *Barnes v. Wright*, 449 F.3d 709 (6th Cir. 2006). A trial judge cannot simply accept the prosecution's explanation on its face. Rather, the

trial judge has "a duty" to assess "the plausibility of the prosecution's proffered explanation in light of all evidence with a bearing on it." *United States v. Torres-Ramos*, 536 F.3d 542, 559 (6th Cir. 2006) quoting *Miller-El v. Dretke*, 545 U.S. 231, 251-52, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).

Had the trial court fulfilled its duty, the challenge to Juror 11 would not have passed muster. First, the State said Juror 11 "liked court shows." This concerned the prosecutor so much that she did not ask Juror 11 one question about court shows. Moreover, a review of the jury questionnaires reveals that well over half the jurors liked court shows. Juror 11 responded positively to the State when asked if she understood that she could place whatever weight she wanted to on mitigation offered by the defense. (T.p. Voir Dire Vol. I, p. 103.) She again answered affirmatively when the State asked if she understood that she had to return a verdict of death if the aggravating circumstance outweighed the mitigation. (T.p. Voir Dire Vol. I, p. 105.) While the State attempted to characterize Juror 11's answers regarding motive as improper, the record reveals that the issue of "motive" was a response not to motive, but to the mental state of the defendant when considering the penalty. Juror 11 expressed no hesitation when the State indicated it did not have to prove motive:

> MRS. CANTALAMESSA: And Juror No. 11, you talk about the mental state of the convicted. What did you mean by that?
>
> JUROR NO. 11: Okay. You know, some people, like they're kind of slow or they had a problem ever since they were born, or maybe they might have snapped. It all depends on what the circumstances was to do the murder -- do you know what I'm saying -- ? -- but it might be

self-defense also, you know what I'm saying? You might have seen somebody doing something to your child and you all of a sudden snapped and shot them. Your mind wasn't thinking right at the time.

MRS. CANTALAMESSA: So you think the motive of a person convicted has a lot to do with it, what was in their mind?

JUROR NO. 11: The state of mind that they were in at the time; you know, you have a doctor examine them and tell them exactly what state of mind they were in at that time.

MRS. CANTALAMESSA: Okay. Do you realize as the state of Ohio we don't have to prove the defendant's motive?

JUROR NO. 11: Right.

MRS. CANTALAMESSA: We don't have to prove why he did it or anything like that.

JUROR NO. 11: Right.

MRS. CANTALAMESSA: But you promise you will take into consideration all the facts and evidence when determining the aggravating circumstances?

JUROR NO. 11: Exactly.

(T.p. Voir Dire, Vol. I, p. 108.) Juror 11 actually displayed a willingness to consider appropriate statutory mitigating factors, if offered by the defense, which the prosecutor somehow argued was inappropriate. This may have been due to the fact that it was the prosecutor who was being obtuse, not the juror. Only one of the parties to the colloquy appeared to appreciate the difference between a murderer's state of mind, the circumstances of the killing, and motive—and it was not the prosecutor. The prosecutor kept repeating motive, both in the voir dire colloquy and during the challenge. The juror never once said anything about motive. The juror was interested in hearing, if appropriate, the statutory mitigating factors of "the nature and

circumstances of the offense," and the "history, character, and background of the offender." These are mitigating factors, if they are raised by the defense. *See*, R.C. 2929.04(B). Juror 11 never indicated that she thought the State should prove motive. Finally, Juror 11 was questioned by the defense regarding life in prison, or 30 years in prison being a long sentence. When questioned by the defense regarding being on a death penalty case Juror 11 indicated she would pay attention to what was going on and "listen to both sides and weigh both options." (T.p. Voir Dire Vol. I, p. 124.)

During questioning on the general voir dire, Juror 11 positively answered all questions posed by the State, indicating that she understood the concepts and could follow them. Again, had the trial court performed its duty, Juror 11 would have been shown to be conscientious, willing to follow the law and willing to do that which is required if a sentencing phase occurs; weigh mitigation offered by the defense and consider both sides. Indeed, when the defense asked the jurors what they thought about the appeal process, Juror 11 again indicated a willingness to see both sides fairly. She indicated appeals are necessary because sometimes the wrong person is convicted, but sometime appeals last too long. (T.p. Voir Dire, Vol. I, p. 130.) Juror 11's only "failure" in the State's eyes was that she was black, just like the Appellant. The trial court did not challenge the State's assertions and the record reflects the pretextual nature of the State's proffered reasons. Here, the trial court simply accepted the State's response as race neutral, even though a review of the record reveals it was

not plausible.

The State's next racially motivated challenge was to juror 31. In response to the *Batson* challenge the State offered the following:

> MRS. CANTALAMESSA: Your Honor, I've stated numerous reasons in both my causes, and I would reiterate those, and those being that she was confused and she's also had a nephew killed and they're still under investigation.
>
> MR. MERANTO: Judge, just to point out, there were originally three African-American people on the jury, we're now down to one based on --
>
> THE COURT: The ones in the box. There are others in the panel at large.
>
> MR. MERANTO: Yes, yes.
>
> THE COURT: You're right. But it's a racially-neutral reason. There were complaints about her from the beginning by the state, so I assumed the state was going to do that.

(T.p. Voir Dire Vol. IV, pp. 762-763.) The trial court again relinquished its duty to undertake a review of the State's reasons and failed to make its own findings pertaining to Juror 31's demeanor, instead adopting the view, if you complain enough there must be some merit to the complaints. Juror 31 indicated she had mixed feelings about the death penalty, but believed there were cases were she could be for the death penalty such as when someone murders without a cause. (T.p. Voir Dire Vol. I, pp. 191-192, 196.) Many jurors had mixed views and many responded in contradictory ways. As argued elsewhere, there was no time to sort them out. However, when specifically asked if she could impose a death sentence if the aggravating circumstance

outweighed the mitigating factors, she said she could. (T.p. Voir Dire Vol. I, p. 197.) When questioned by the trial court, Juror 31 responded that she could follow the instructions and follow the law.

> THE COURT: Okay. Juror No. 31, I need to know because you kind of answered this question both ways, can you -- is there any case in which you can sign a verdict for the death penalty; in other words, ordering someone to receive the death penalty?
>
> JUROR NO. 31: Could be, yeah.
>
> THE COURT: I'm sorry?
>
> JUROR NO. 31: Could be.
>
> THE COURT: Could be. I've got to know. I mean, in an appropriate case, can you find -- order someone to receive the death penalty?
>
> JUROR NO. 31: What you mean? They committed a crime --
>
> THE COURT: Right. In this. Committed a crime, found guilty of the specification, we go to the second phase where you have the aggravating circumstance and the defense puts on mitigation, but you don't think a whole lot of it, so you decide that the aggravating circumstance outweighs the mitigation beyond a reasonable doubt, what are you going to do?
>
> JUROR NO. 31: Yes.
>
> THE COURT: What's yes mean?
>
> JUROR NO. 31: I would sign.
>
> THE COURT: A death verdict?
>
> JUROR NO. 31: Yes.

(T.p. Voir Dire, Vol. I, 232-233.) Once again, a fair reading of the record does not support the prosecutor's position. Yet, once again, the trial court failed to make any

findings.

"[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *See*, *United States v. Lane*, 866 F.2d 103, 105 (4th Cir. 1989); *United States v. Clemons*, 843 F.2d 741, 747 (3rd Cir. 1988); *United States v. Battle*, 836 F.2d 1084, 1086 (8th Cir. 1987); *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986)." *Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008). Moreover, "all of the circumstances that bear upon the issue of racial animosity must be consulted" *Id.*, at 478. When, as here, the trial court makes no findings, a reviewing court cannot presume that a juror's demeanor was a credible justification. *Id* When, as was the case with Jurors 301 and 11, the record clearly does not support the prosecutor's proffered reason, an inference of discriminatory intent is presumed. *Id.*, at 485. While not required, here a pattern was shown and the justifications by the State were not supported by the record.

This Court must vacate the Appellant's conviction and sentence of death and remand the matter for a new trial. This jury, with jurors excluded based upon racial discrimination in the jury selection process, is an affront to the Sixth and Fourteenth Amendments to the U.S. Constitution and Ohio Constitution, Article I, Sections 1, 2, 5, 10, and 16.

PROPOSITION OF LAW NO. 18

> Failure to make an adequate and accurate record of all proceedings in a capital murder case denies effective appellate review and deprives the capital defendant of due process of law, the ability to effectively defend life, and meaningful access to the courts. Fourteenth Amendment to the U.S. Constitution, and Ohio Constitution, Article I, Sections 1 and 16, construed.

A lethal combination of the trial judge's venturesome system of using juror numbers, coupled with a confusing and woefully inadequate appellate record, deprived Appellant of a fair trial and, more importantly, a fair opportunity to have meaningful appellate review of his capital trial. These evils violate the Fourteenth Amendment to the U.S. Constitution and Ohio Constitution, Article I, Sections 1 and 16.

There was a time when the question of whether the accused was guilty of a capital offense and whether the accused should receive the death penalty or a lesser sentence was decided in the solitary proceeding. *See*, *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). Our legal system has since determined that a bifurcated preceding is required to answer the separate questions of guilt and penalty. *See*, *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), decided just a year after *McGautha*.

While our legal system is steeped in tradition, innovation is not to be scoffed at. But innovation simply for the sake of innovation does not secure the ends of justice. Here, the trial judge insisted upon a system where no juror names were to be used, simply juror numbers. He gave no reason for employing the system. Lawyers on both

sides of the case found it difficult to use, so much so that they commented to the jurors during voir dire. At one point, the trial judge considered the lawyers' comments so seditious that he openly expressed his ire, calling the lawyers defective.

Capital cases are not the place for innovation by a trial court simply for the sake of innovation. This is particularly true when the innovation denies, as it denied here, the ability for any effective appellate review. The first goal is to afford a fair trial and insure there is an adequate record of the trial. The unique nature of the death penalty not only demands additional protections during pretrial, guilt, and sentencing phases, but also intensifies the importance of the appellate process. *See*, *Murray v. Giarratano*, 492 U.S. 1, 22, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989). "[M]eaningful appellate review" in capital cases "serves as a check against the random or arbitrary imposition of the death penalty." *See*, *Gregg v. Georgia*, 428 U.S. 153, 195, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (opinion of STEWART, POWELL, and STEVENS, JJ). Meaningful appellate review is an integral component of a State's "constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *See*, *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

The Rules of Criminal Procedure provide that "[i]n serious offense cases, all proceedings shall be recorded." *See*, Crim.R. 22. The Rules of Appellate Procedure, specifically, App.R. 9(A) says that "In all capital cases the trial proceedings shall

include a written transcript of the record made during the trial by stenographic means." This Court recently held that when considered together, "the Rules of Criminal Procedure and the Rules of Appellate Procedure clearly require that a complete *and accurate* record be created in capital cases. The reason for this is simple: the unique nature of capital cases demand a heightened level of care in constructing the record *to guarantee regularity* of the proceedings and *assist in appellate review*." (Emphasis added.) *See, State v. Clinkscale,* 122 Ohio St.3d 351, 2009 Ohio 2746, 911 N.E.2d 862, at ¶12. The case involved a second capital trial for Clinkscale, where this Court vacated and remanded this case to the trial court because a deliberating juror was replaced with an alternate juror in violation of former Crim.R. 24(G)(2), and because the trial court failed to make a record of the proceedings that resulted in the deliberating juror's dismissal and replacement.[63]

This Court has said that gaps may occur, and that "[t]he requirement of a complete, full, and unabridged transcript in capital trials does not mean that the trial record must be perfect for purposes of appellate review." *See, State v. Palmer*, 80 Ohio St.3d 543, 1997 Ohio 312, 687 N.E.2d 685, syl. *Palmer* held that the failure to record a jury view and conferences in the judge's chambers or at the bench did not warrant

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[63] In this case, the trial judge, without the record explaining how it came to his attention, removed juror 175 for cause for being out in the hallway talking about the case with at least two other jurors, 173 and 176. Not only did the trial court fail to investigate a non-spurious suggestion (we do not know *whose* suggestion) of juror misconduct, but the trial court failed to make an adequate record of the removal of the juror.

reversal when the appellant had not requested that the view or the conferences be recorded and did not demonstrate that any prejudice arose from the failure to record those proceedings. 80 Ohio St.3d, at 560. *Palmer* also held that the:

> reversal of convictions and sentences on grounds of some unrecorded bench and chambers conferences, off-the-record discussions, or other unrecorded proceedings will not occur in situations where the defendant failed to demonstrate that (1) a request was made at trial that the conferences be recorded or that objections were made to the failures to record, (2) an effort was made on appeal to comply with App.R. 9 and to reconstruct what occurred or to establish its importance, and (3) material prejudice resulted from the failure to record the proceedings at issue.

80 Ohio St.3d, at 554. In *Clinkscale,* 122 Ohio St.3d 351, at ¶14, this Court noted that while there were legitimate competing arguments as to whether the application of the test outlined in *Palmer* to Clinkscale's case would warrant reversal, the important distinction is that *Palmer* addressed the failure to record relatively unimportant portions of a trial. Most of the conferences at the bench and in chambers were recorded and that "all crucial aspects" of Palmer's case were recorded. 80 Ohio St.3d, at 555. None of the unrecorded conferences concerned a matter as important as the dismissal of a deliberating juror, as was the case in *Clinkscale*. *Clinkscale* held that recording the proceedings related to the dismissal and replacement of a deliberating juror is of critical importance to protecting a defendant's constitutional rights. *Clinkscale* cited *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955) and quoted its language: "A fair trial in a fair tribunal is a basic requirement of due process * * *

[O]ur system of law has always endeavored to prevent even the probability of unfairness."

The composition of the jury in a capital case implicates important constitutional rights. It was upon that premise that this Court declined to extend the holding of *Palmer* to encompass a trial court's failure to record proceedings relating to the dismissal of a juror in a capital case after the jury has begun its deliberations. *Clinkscale* suffered material prejudice from the trial court's failure to make a record, held the Supreme Court.

> We cannot determine whether the trial court obtained a waiver or consent from either party before dismissing the juror. We are also left to speculate about the reason the juror asked to be removed, the true severity of the juror's health problem, whether the trial could have been continued, or whether any alternative measures may have been taken to address the situation. Most significant, perhaps, is that we are unable to determine whether the substitute judge's action affected any of Clinkscale's constitutional rights, because we are unable to discern whether the juror was, as argued, a lone dissenting juror who wished to be dismissed for this reason.

This Court in *Clinkscale* cited the rule that "[w]hen portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *See*, *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980). However, said the Court, "the important constitutional rights at issue here demand that we not apply that presumption in this case." *Clinkscale*, at ¶19. This Court found that the failure to record the proceedings violated appellant's due process right to a fair

trial, and reversed. *Id.*, at ¶20.

Clinkscale also held that capital cases are distinct from noncapital cases in the nature of the statutory requirements and penalties, and accordingly trial courts "must conduct proceedings in capital cases with a *strict level of care* that comports with their unique status." *Clinkscale*, at ¶23. (Emphasis added.) While finding it to be "less than desirable to have Clinkscale tried for the third time in 12 years," this Court nonetheless said that "all essential phases of a capital trial must be conducted on the record and in full accordance with the Rules of Criminal Procedure. Therefore, we hold that the proceedings in which a juror is dismissed in a capital case, and an alternate juror is seated, must be recorded."

Additionally, in capital cases, R.C. 2929.03(G) requires that "the entire record" be transmitted for appellate review. This Court long ago recognized the importance of a complete record in a capital case. *See, State, ex rel. Spirko, v. Court of Appeals*, 27 Ohio St.3d 13, 501 N.E.2d 625 (1986) (*per curiam*). The court of appeals in that case concluded that Spirko had "made an insufficient showing of the pertinency" of some of the requested transcripts. But this Court flatly rejected placing that burden upon an accused. "We believe that placing such a burden on a defendant-appellant places unnecessary obstacles in the path to effective appellate scrutiny and that it further is contrary to established precedent in this state." 27 Ohio St.3d, at 16.

Spirko cited Ohio Constitution, Article I, Section 16 and *Thomas v. Mills*, 117

Ohio St. 114, 157 N.E. 488 (1927), an opinion written by Ohio's first female justice, Florence Allen.

> Section 16, Article I of the Ohio Constitution provides:
>
> "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."
>
> In *Thomas v. Mills*, 117 Ohio St. 114 (1927), this court had occasion to interpret and apply the foregoing constitutional provision. In that dispute, the warden of the Ohio Penitentiary had refused to allow an attorney to enter the prison for the purpose of conferring with his client. The prisoner was appealing a conviction of first-degree murder. The court found from the record that the attorney had applied for entry only at reasonable times.
>
> Judge Florence E. Allen, author of this court's opinion, framed the issue at 120 with these observations:
>
> "Was Article I, Section 16 of the Constitution of Ohio, violated by the warden's refusal? That section provides that every person shall have justice administered without denial or delay. Surely the right to be represented by counsel in every stage of a criminal proceeding is a right inherent in justice itself, and any person who is denied the right is denied justice."
>
> We think these basic principles also apply in the present case. Just as the right to confer with an attorney "is a right inherent in justice itself," so too is the right to an unabridged transcript. If consultation with one's lawyer is essential to prepare a case for the appellate courts, we believe the availability of a trial record is indispensable for that very same purpose. Without a transcript, a capital defendant is precluded from obtaining a complete and meaningful appellate review of his case as provided by statute and by Section 16, Article I of the Ohio Constitution. In brief, with respect to the right to a comprehensive transcript, "any person who is denied the right is denied justice."
>
> Judge Allen, in *Mills, supra*, at 125, approvingly quoted language from an Oklahoma case, *State, ex rel. Tucker, v. Davis*, 9 Okla. Crim. 94, 97, 130 P. 962, 963 (1913), which we find appropriate here:
>
> "'It would be a cheap subterfuge of and shameless mockery upon justice for the state to put a man on trial in its courts, charged with an offense which involved his life, liberty, or character, and then place him in such a position that he could not prepare to make his defense. It would be just as reasonable to place shackles upon a man's limbs, and then tell him that it is his right and duty to defend himself against an impending physical assault. If the right of defense exists, it includes and carries with it the right of such freedom of action as is essential and necessary to make such defense complete. In fact, there can be no such thing as a legal trial, unless both parties are allowed a reasonable opportunity to prepare to

> vindicate their rights. * * *"
>
> Because of the foregoing considerations, we cannot countenance a situation where a person engaged in a contest with the state for his life should be placed in the untenable position of having to present his case before an appellate court without a comprehensive record to assist him. Furthermore, we cannot allow the grave responsibility to review capital cases, placed by law upon the court of appeals and this court, to be crippled simply because a full record is unavailable. We therefore hold that Section 16, Article I of the Ohio Constitution requires that a defendant in a capital case be afforded a complete, full, and unabridged transcript of all proceedings against him so that he may prosecute an effective appeal.

Interestingly, this Court decided the case under the Ohio Constitution, and did not decide whether the federal Constitution would demand the same conclusion. The Court did note in passing that the United States Supreme Court has repeatedly emphasized, in the context of federal constitutional provisions, the right to effective appellate review, and cited cases ranging from *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), to *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). But the *Clinkscale* case makes clear that an inadequate record is also a violation of due process under The Fourteenth Amendment to the U.S. Constitution.

In this case, there are numerous deficiencies within the record, largely (though not entirely) attributable to the trial court's unique voir dire experiment. It is virtually impossible to determine which jurors are the original "twelve in the box" after the completion of the group-of-five voir dire concerning the death penalty and publicity. Whatever the method suggested by the trial judge for the exercise of peremptory challenges, the peremptory challenges were not limited to those who were seated in the jury box or their replacements if they were challenged. For example, the state's

first peremptory challenge was juror 72, who, according to the record, "is not in the jury box." (T.p. Voir Dire Vol. IV, p. 757.) On the other hand, it appears that juror 48 was in the original jury box, and when peremptorily challenged by the state (its fourth challenge, T.p., Voir Dire, Vol. IV, p. 761), juror 77 replaced the removed juror.

More importantly, the record is unclear in terms of what jurors were being questioned. While the trial court delineated which jurors, by number, were to be in each group of ten, (T.p. Voir Dire, Vol. I, p. 94) there appears to be several instances where the five originally identified are not the jurors being questioned. Equally important, when the groups of five are ushered into the room, the trial judge made no effort, in order to keep this confusing process somewhat organized, to confirm on the record who the five jurors are.

For instance in the seventh group of jurors, the record discloses that no less than seven jurors were questioned during that session. According to the court, when the group in identified originally, juror 249, 99, 110, 112 and 121 are to appear. (T.p. Voir Dire Vol. I, p. 94.) The transcript reflect the following jurors being questioned; 249, 99, 110, 112, 121, and 301. Jurors 121 and 301 ultimately sat as alternate jurors. (See, T.p. Voir Dire Vol. II, pp. 410, 411, 412, 414, 415, 423, 430, 436, 437, 442.) As if the inclusion of an apparent sixth juror in the seventh group were not confusing enough, the record discloses another juror being questioned during this session, juror 262 (See, T.p. Voir Dire Vol. II, pp. 419-421, 429, 430, 434.) The Court of Appeals

brushed this off, noting that Appellant did not object to more than 5 jurors being questioned.

In the eighth group, once again, there is no effort to clarify for the record who is being brought in for questioning. (T.p. Voir Dire, Vol. III, p. 446.) The best that Appellant can tell from the record, jurors 155, 157 (who sat as an alternate), 159, 253 (who sat as an alternate), and 167 should have been in the panel. The Alice in Wonderland nature of the record becomes more evident—or curiouser and curiouser. "We are missing 273," says one of the lawyer, but juror 273 was not supposed to be in that group. (T.p. Voir Dire Vol. I, p. 94; T.p. Voir Dire Vol. III, p. 446). Nor is juror 290, who comes in late (T.p. Voir Dire Vol. I, p. 94; T.p. Voir Dire Vol. III, p. 462), after the questioning about pretrial publicity and after the chambers hearing with another juror (juror 167). Later, juror 290 says that he or she believes in "an eye for an eye" (T.p. Voir Dire Vol. III, p. 469), but professed an ability, after being asked leading questions by the trial judge, to "follow the law." (T.p. Voir Dire Vol. III, p. 492.) Because juror 290 was late, that juror missed many of the instruction and preliminary questions and was left "trying to catch up." (T.p. Voir Dire Vol. III p. 465.)

The ninth group of what was supposed to be five jurors again is plagued with uncertainty about just how many jurors were actually in the courtroom. The five initially identified were supposed to be jurors 254, 172, 173, 175 and 176. (T.p. Voir Dire Vol. I, p. 94.) Juror 172 is never questioned, but Jurors 278 and 273 are. When

initial questions regarding pretrial publicity are explored in chambers, three jurors are excused; Jurors 254, 273, 278. (T.p. Voir Dire, Vol. II p. 498, 499, 503.) When the voir dire resumes in open court, three jurors remain for questioning; Jurors 173, 175 and 176.

The same problem occurs with the tenth group of five. Jurors 203, 204, 206, 256 and 216 were originally identified as the last panel to be questioned. (T.p. Voir Dire, Vol. I, p. 94.) The record reflects all of those jurors being questioned, plus Juror 298 (T.p. Voir Dire Vol. IV, pp. 547, 568, 577, 578, 579, 589, 590); Juror 303 (T.p. Voir Dire, Vol IV, pp. 547, 572, 577, 579, 580, 581, 587); and Juror 300 (T.p. Voir Dire Vol. IV, pp. 567, 591, 592.)

Without identifying which jurors were entering the courtroom for each panel, it is impossible to tell which jurors were actually questioned. There could have been typographical errors by the stenographors, but more likely not. As a result, it is impossible to review the record for errors such as improper *Witherspoon* or *Morgan* challenges, whether appropriate challenges were made and whether they were appropriately ruled upon. Never does the trial court indicate for the record that more than five jurors were ever brought into court. Yet the record reflects numerous panels that seemingly have more than five jurors. There is no way to know who of the five is actually providing the responses that were recorded. No doubt in some of the instances this has occurred because the numbers within given panels were so close

and may have been confused during transcription. Whatever the cause, as the record stands, there is no way to conduct a complete and accurate appellate review of the voir dire proceedings.

Finally, the record is incomplete because the trial court failed to insure that critical events were recorded. Specifically, in the ninth group of five jurors, and issue arose regarding Juror 175 smelling of alcohol.

> THE COURT: Juror 175, by myself in chambers, because I heard three reports that he smelled of alcohol -- or two reports – I'm sorry -- that he had smelled of alcohol, I confronted him with that issue. He said he had nothing to drink today, but he had had some drinks last night. I advised him that even -- number one, you can't drink if you're a juror, but number two is you cannot come to court hung over either because you have a job to do. He assured me that that would not become a problem, so I sent him out here to be questioned with the rest of the panel.

(T.p. Voir Dire Vol. III, pp. 538-539.). The record is devoid of when the trial court inquired, who raised the issue or how it was raised, what the inquiry was or if the parties waived their presence during the inquiry. At the conclusion of the panel 9 voir dire, the Appellant moved to dismiss Juror 175 based upon his "eye for eye" view regarding the death penalty and the fact that at 3:20 in the afternoon, he still had a strong odor of alcohol from the night before. After a lengthy discussion about the heightened due process requirements and the jurors expressed views, and apparent intoxication, the trial court denied Appellant's challenge for cause. (T.p. Voir Dire Vol. III pp. 541-542.) The problems with the record with regard to Juror 175 did not end there. The next day an issue arose regarding Juror 175 talking about the case and

about the victim with three other jurors. The trial court apparently *sua sponte* dismissed Juror 175.

> THE COURT: Hello, again. Okay. We're on the record. We have Juror 176 in court without the rest of the jurors. What happened is yesterday it came to my attention that when you, Juror 175, and Juror 173 were in the hallway, Juror 175 was talking about the victim or I can't forget the victim, that type of thing.
>
> JUROR NO. 176: Um-hum.
> * * *
> THE COURT: He's been removed because of that because I gave the admonitions not to talk about the case. That's all I had to ask you. We had to have it on the record. Does anyone wish to inquire?

(T.p. Voir Dire Vol. III p. 600.) The record is devoid of how the issue was brought to the trial court's attention, what was said to Juror 175 when he was excused, or if the parties were present or waived their appearance. As argued more fully in Proposition of Law No. 14, the issue of juror misconduct is a significant issue which directly implicates constitutional rights. Thus, the failure to make record regarding Juror 175 is not some minor conference or sidebar ruling. Appellant's counsel should have objected or tried to supplement the record. But the primary responsibility for an accurate historical record rests with the trial judge.

At least since *Gregg v. Georgia, supra,* the necessity of an adequate appellate review has been an ingredient to any death penalty scheme in order for that scheme to pass constitutional muster. The Court will recall, as described elsewhere herein, that four years after *Gregg*, the United States Supreme Court invalidated a provision of the Georgia death penalty statute, specifically because it found that the Georgia

appellate courts were not adequately policing the imposition of death under that specific division of the statute. *See*, *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

What does all of this mean? What it means is that without adequate appellate review, the death penalty is unconstitutional, whether that be an entire statutory scheme, or simply a portion of the scheme as was the case in *Godfrey*. There cannot be adequate appellate review unless there is an adequate record for this Court to review. Why? Although the answers are obvious to appellate practitioners and appellate judges, perhaps they bear repeating just one more time. Without an adequate record, this Court cannot determine what truly occurred in the trial court. We can make assumptions and excuses like the Court of Appeals did. But we can never know exactly what happened. Without an adequate record, the Appellant cannot properly assign errors and point to places in the record that substantiate the assigned errors. Ordinarily, this might be more of a problem for the Appellant than for this Court. But, because this is a death penalty case, the case is "different," and this is not a difference without a distinction. This Court is required to review the entire record and decide, independent of the jury and the actions of the trial judge, whether the aggravating circumstance outweighs the mitigating factors by proof beyond a reasonable doubt, and whether death is the appropriate sentence in this case. This the Court cannot do without an adequate and accurate record.

How do we know that the record is inaccurate? We know that Juror 18, having been excused for cause, somehow ended up back on the panel. Using numbers instead of names complicates this procedure.

A capital defendant is entitled to a complete and unabridged record of the proceedings that occurred in the trial court. The trial court is required to record all proceedings in serious cases, and there is no more serious case than one like this. Yet, aside from the confusion that the numbering system engendered, one juror was spoken to in chambers by the trial judge about allegations that he had been drinking or coming to Court drunk. That colloquy appears nowhere on the record, and it's in fact a fair reading of the record to say that, had Appellant's counsel had not registered a complaint about that juror, the trial judge likely would never have revealed to anyone that he had had that conversation. It was discovered the next day the same juror violated the court's instructions and expressed views about the victim to at least two other jurors. As a result, the juror was removed, *again*, without any record of the removal being made and without further investigation by the trial judge. Can anyone really be confident that a juror who came to court smelling of alcohol only expressed his views to two other jurors?

At least one other juror engaged in jury misconduct, violating the admonitions of the trial court. These violations directly challenge Appellant's right to be tried by impartial jurors. Though the trial court at the beginning of the trial sternly warned

the jurors that violation of the admonitions could be treated as contempt of court, the judge took no such action. Appellant does not criticize the judge for not punishing the offending juror for contempt, but Appellant does criticize the trial judge for failing to make a record about what was said, in front of whom, and what impact, if any it had upon the hearers. Upon learning of jury misconduct, the trial court, instead of making an adequate record to show that an investigation had been done and that the misconduct was limited to that one juror, did nothing to inquire of other jurors. There is no way to know if the judge did an adequate job or not.

This was consistent with the trial judge's apparent effort to get on with this case as quickly as possible. The inquiries about pretrial publicity—in a case where a motion for change of venue had an arguable, if not meritorious, basis—were entirely insufficient to give one comfort and if these jurors were not steeped in pretrial publicity and could not set aside the impression that such publicity had left upon them.

Justice Thurgood Marshall began is dissent in *Ross v. Oklahoma*, 487 U.S. 81, 91, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), by saying that a man's life is at stake. We should not be playing games.

And so it is here. Bennie Adams' life is at stake. We should not be playing games. Asking the trial court to make an adequate record was not too much. It was his job. Throughout the record, the judge commented about being paid to make sure

that everybody understood the law, and about the number of capital trials that he had handled. It's unacceptable in *any* capital case to have an inadequate record.

A man's life *is* at stake. We should not be playing games. We should be using juror names and not juror numbers. We should be conducting patient, individual voir dire, not paying lip service to the idea voir dire by affording a lawyer four minutes to ask the juror virtually anything the lawyer wanted to know about pretrial publicity and the views of the juror about the death penalty—so long as it was done in four minutes. We should not be excusing jurors for cause without conducting an investigation and making a record of that investigation. We should not report juror misconduct as a causal afterthought placed on the record, with no investigation, despite the fact that all jury misconduct is *presumed* to be prejudicial.

A man's life is at stake and we should not be playing games. Whether this court regards the behavior of the trial court as playing the type of games that Justice Marshall referred to, or whether the Court disagrees with that assertion, it does not matter. The fact of the matter is that this was a death penalty case and in fact Appellant was sentenced to death. To have a record of that capital trial that is as poor, as incomplete, and as unintelligible as this record is, is not only inexcusable—it is constitutionally unacceptable.

This Court cannot affirm the conviction and sentence and death on this record, and Appellant's conviction and death sentence must be vacated and the matter

and to make a complete verbatim record of that trial.

PROPOSITION OF LAW NO. 19

Due process and the ability to remain free from cruel and unusual punishment requires a "mercy" instruction when requested. See, the Eighth and Fourteenth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section, 2, 9, and 16.

As part of the charge in the penalty, or sentencing, phase, Appellant requested a "mercy" instruction. The trial court refused this, and it was clear error for the reasons which follow.

The cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. See, *Tuilaepa v. California*, 512 U.S. 967, 971, 129 L.Ed.2d 750, 114 S.Ct. 2630 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. *Id.*, at 971. In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant. *Id.*, at 972. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. *Coker v. Georgia*, 433 U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (1977). To render a defendant death eligible, the trier of fact must convict the defendant of murder and find at least one aggravating circumstance (or its equivalent) at either the guilt or penalty phase. *See, e.g.*, *Lowenfield v. Phelps*, 484 U.S. 231, 244-246, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); *Zant v. Stephens*, 462 U.S. 862, 878, 103 S.Ct. 2733, 77

L.Ed.2d 235 (1983). The aggravating circumstance may be contained in the definition of the crime, in a separate sentencing factor, or in both. An aggravating circumstance must meet two requirements. First, it may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. See, *Arave v. Creech*, 507 U.S. 463, 474, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993) ("If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm.") Second, the aggravating circumstance may not be unconstitutionally vague. See, *Godfrey v. Georgia*, 446 U.S. 420, 428, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980).

As to mitigation, the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. See, *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct.1669, 90 L.Ed.2d 1 (1986); *Eddings* v. *Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L. Ed.2d 1 (1982); *Lockett* v. *Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978) (plurality opinion).

There are not many things which are unwavering in the law today, especially in capital litigation. One thing that is unwavering, however, is a virtually unbroken line of cases that say that the Constitution does not permit limitations on mitigation. Ohio learned this lesson the hard way in its post-*Gregg* statutory scheme, see, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), a scheme that was struck down by the Court in *Lockett* v. *Ohio, supra*. The infirmity with the law was

that it listed only three statutory mitigators. If the defendant was found guilty of capital murder and at least one aggravator, but did not satisfy one of the three statutory mitigating circumstances, then the death penalty was the result. The Court struck that down, holding that the Constitution does not permit such limitations on mitigation. *Lockett* said that, given that the imposition of death by a public authority is so profoundly different from all other penalties, an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases, where a variety of flexible techniques, such as probation, parole, and furloughs may be available to modify an initial sentence of confinement. *Lockett* said that the nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

The epitome of this principle is the Court's decision in *Hitchcock* v. *Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). In that case, Hitchcock's lawyer referred to various considerations, some of which were the subject of factual dispute, that would make a death sentence inappropriate. Hitchcock's youth (20 at the time of the murder), his lack of significant prior criminal activity or violent behavior, the difficult circumstances of his upbringing, his potential for rehabilitation, and his voluntary surrender to authorities. Although counsel stressed the first two consider-

ations, which related to mitigating circumstances specifically enumerated in the statute, he told the jury that in reaching its sentencing decision, it was to "look at the overall picture ... consider everything together ... consider the whole picture, the whole ball of wax." In contrast, the prosecutor told the jury that it was "to consider the mitigating circumstances and consider those by number," and then went down the statutory list, item by item, arguing that only one (Hitchcock's youth) was applicable. The trial judge instructed the jurors "on the factors in aggravation and mitigation that you may consider under our law." He then instructed them that "the mitigating circumstances which you may consider shall be the following" and then the judge listed the *statutory* mitigating circumstances.

A unanimous Supreme Court reversed the limitations placed by the trial judge, and the Court's opinion, written by Justice Antonin Scalia, who fancies himself a constitutional "originalist," held that Hitchcock's right to relief under the Constitution "could not be clearer."

> We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion). Respondent has made no attempt to argue that this, or that it had no effect on the jury or the sentencing judge. In the absence of a showing that the error was harmless, the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid.

Hitchcock v. Dugger, 481 U.S., at 398-399.

The law has a history of jurors having an option to find the defendant guilty of capital murder, but nonetheless recommending mercy. In fact, Ohio's pre-*Furman* statute provided that the penalty is death unless the jury recommends "mercy" or "life imprisonment" in which case the punishment shall be life imprisonment. The statute had been construed as providing for alternative punishment in the discretion of the jury. *See*, *Howell v. State*, 102 Ohio St. 411, 131 N.E. 706 (1921).

This Court's decision in *State* v. *Lorraine*, 66 Ohio St.3d 414, 613 N.E.2d 212 (1993), virtually ended mercy instructions because mercy is not one of the mitigating factors set forth in R.C. §2929.04(B). Prior to *Lorraine*, this Court paid lip service to the mercy option by holding that an Ohio jury *is not precluded* from extending mercy to a defendant. *See, State v. Zuern*, 32 Ohio St.3d 56, 512 N.E.2d 585 (1987), cert. denied, *Zuern v. Ohio*, 484 U.S. 1047, 108 S.Ct. 786, 98 L.Ed.2d 872 (1988). How can a jury consider something that they are not told they can consider. This jury was not in fact told of the ability to opt for mercy regardless of whether the aggravating factors outweigh the mitigating circumstances beyond a reasonable doubt. *Lorraine* and its progeny held that a mercy instruction is not to be permitted because mercy is not one of the mitigating factors set forth in R.C. §2929.04(B)—as if the Constitution permits such a finite list. *Lorraine* conflicts with a number of federal decisions, including *Barclay* v. *Florida*, *supra*; *Gregg* v. *Georgia*, *supra*; *Furman* v. *Georgia*, *supra*; *Eddings* v. *Oklahoma*, *supra*; *Lockett* v. *Ohio*, *supra*; and *Skipper* v. *South Carolina*,

supra.

The similarity is striking between this Court's opinion in *State* v. *Lorraine* and the Florida Supreme Court's opinion in *Cooper* v. *State*, 336 So.2d 1133, 1139 (Fla. 1976), which has since been rejected. Both cases held that only statutory mitigation evidence could be considered. In *Cooper*, the court said that the "sole issue in a sentencing hearing under Section 921.252, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [*sic*] no place in that proceeding . . . ." In *Lorraine*, this Court said: "Permitting a jury to consider mercy, which is not a mitigating factor and thus irrelevant to sentencing, would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious, or unpredictable manner. . . . The arbitrary result which may occur from a jury's consideration of mercy is the exact reason the General Assembly established the procedure now used in Ohio." 66 Ohio St.3d, at 417 citing *California* v. *Brown*, *Gregg*, and *Furman*. It did not mention *Hitchcock*, *Skipper*, *Eddings*, or *Lockett*. The conclusion that a mercy instruction results in arbitrary or capricious imposition of the death penalty is directly contrary to the United States Supreme Court rational for not limiting any mitigation, including mercy. In upholding the Kansas statutory death penalty sentencing scheme, the Supreme Court noted that the mercy instruction forecloses the possibility of "Furman-type error as it 'eliminate[s] the risk that a death sentence will

be imposed in spite of facts calling for a lesser penalty.'"

Kansas v. Marsh, 548 U.S. 163, 176, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006) ftnt 3. With all due respect, *Lorraine* is not sound constitutional reasoning based upon an expansive reading of personal liberty and limited governmental authority: it is instead crafting an opinion around a preordained result. A mercy instruction does not result in arbitrary imposition of the death penalty, it insures individualized consideration of the death penalty which isconstitutionally mandated.

In *State v. Garner*, 74 Ohio St.3d 49, 57, 1995 Ohio 168, 656 N.E.2d 623, the trial judge instructed the jury that it might consider the mitigating factors to be those circumstances which "in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability," virtually the same instruction as Appellant sought here. (See, T.d. 174.) "Such a charge constitutes adequate instruction concerning the extension of mercy to a capital defendant," said the Court in *Garner*.

If capital sentencing is to be truly individualized as required by the state and federal constitutions, a mercy option is required under all circumstances. Individualized sentencing requires that the sentencing body have the ability to choose mercy and to determine that death is not the appropriate penalty in the particular situation. In *Barclay* v. *Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), the United States Supreme Court held that the jury must be and is free to determine whether death is the appropriate punishment." *Barclay*, 463 U.S.,at 950, citing

California v. *Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

The trial court here eliminated that option. Without the mercy, Appellant faced a death verdict logically indistinguishable from a type that was voided in *Lockett.* In *California* v. *Brown* (1987), 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), the Supreme Court reaffirmed the Eighth Amendment's requirement that there be reliability in the determination that death is the appropriate punishment in a specific case. But the trial court's refusal to give the limited mercy instruction blocked such a determination and suggested to the jury, as did the voir dire questioning, that a death sentence is mandated if the jury determines that aggravating circumstances outweigh mitigating factors, regardless of whether the death penalty is appropriate in a particular case.

The Supreme Court approved an instruction virtually identical to the one sought here in *Garner*, a case decided after *Lorraine*. Without the "fairness and mercy instruction sought here, there can be no confidence from this record that Appellant's death sentence was the product of individualized sentencing as opposed to a sheer mechanical weighing of evidence. The Eighth Amendment and Ohio Constitution, Article I, Sections 1, 9, and 16 demand more, and Appellant's death sentence must be vacated.

PROPOSITION OF LAW NO. 20

Failure to file motions to challenge the constitutionality of Ohio's death penalty is a denial of the effective assistance of counsel in a capital case. Ohio Constitution, Article I, Sections 1, 2, 10, and 16, and the Sixth and Fourteenth Amendments to the U.S. Constitution.

I

Legal issues surrounding use of and imposition of the death penalty are constantly evolving. Over the past ten years, there have been numerous court ruling regarding what is and is not Constitutionally acceptable with regard to the implementation of and execution of the death penalty. Despite this, trial counsel failed to file basic motion challenging the constitutionality of the death penalty. As set forth below, there are several issues which should have been raised by trial counsel.

The length of this brief far exceeds the length of normal appellate briefs. Provisions are made in the practice rules so that briefs in death penalty cases are not subject to the normal page limitations of other cases. This is due in part to the recognition that the death penalty is "different" from any other penalty imposed by the criminal justice system. See, *Woodson* v. *North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Traditional, "normal" rules of appellate advocacy would dictate that the Appellant, after parsing the record, present to the Court perhaps four or five strongest issues, rather than throwing in every conceivable issue for review. Traditional rules of appellate advocacy were forced off of the table in capital cases—actually, in any criminal case—by the adoption of the Anti-terrorism &

Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, 28 U.S.C. 2254. Its draconian provisions harshly penalize prisoners with even the most meritorious of claims if they fall into waiver, exhaustion, or procedural default traps. As a result, trial and appellate counsel must present many arguments which, in some form or another, have already been overruled.

The necessity of avoiding the AEDPA's procedural snares is complimented by the fact that the Supreme Court of the United States does, on occasion, reverse itself. The two most notable examples as regards the death penalty in recent years are the death penalty as it relates to mentally retarded individuals and the death penalty as it relates to juveniles. See, respectively, *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), overruling *Penry v. Lynaugh*, 492 U. S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); and, *Roper* v. *Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), overruling *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).

II

The standard for establishing ineffective assistance of counsel requires that a defendant (1) "show that counsel's representation fell below an objective standard of reasonableness" and (2) that a defendant show prejudice, *i.e.*, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688,

694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reasonable probability "is a probability sufficient to undermine confidence in the outcome." 466 U.S., at 694. The standards applicable to a determination of whether a criminal defendant received the effective assistance of counsel are well known. In a brief already sufficiently lengthy, counsel will briefly sketch those standards to avoid a claim of waiver, but they are well known to this Court.

What, then, determines the proper standards for performance? The answer comes in several parts, all interrelated. First, this is a capital case. Though one could make a compelling argument to the contrary, as did the late Justice Harry A. Blackmun,[64] the Supreme Court over 20 years ago proclaimed that the duty of the judicial branch to search for constitutional error is never more exacting than it is in capital cases. *See, Burger* v. *Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) Because the plain error rule is seldom invoked, the duty of counsel to raise errors is all the greater.

Second, death is "different." *See, Woodson* v. *North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). We hear it a thousand times in every capital case, and despite its monotonous repetition, it is important enough to repeat again. Professor Anthony Amsterdam's argument almost certainly led to the crafting of this

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[64] See, *Callins v. Collins*, 510 U.S. 1141, 114 S.Ct. 1127, 127 L.Ed.2d 435 (1994) (BLACKMUN, J., dissenting from the denial of certiorari).

well known judicial pronouncement, and Amsterdam's argument is important because it does highlight the fact that our legal system has *always* recognized that death is different, and we have accordingly handled death penalty cases differently. This means that few, if any, stones should left unturned. It also means, when it comes to legal arguments, that any good faith argument not only should be asserted, but *must* be asserted. The litmus test is whether a motion is based on good faith versus an entirely frivolous one. As demonstrated *post*, the United States Supreme Court has changed its mind on occasion.[65]

Third, the American Bar Association has promulgated standards for performance in capital cases. Guideline 10.8, entitled "The Duty to Assert Legal Claims," provides:

> A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should:
> 1. consider all legal claims potentially available; and
> 2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and
> 3. evaluate each potential claim in light of:
> a. the unique characteristics of death penalty law and practice; and
> b. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and

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[65] Just to tick off a few quick examples, consider the sea change between *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and the *McGautha* case decided just one term earlier. See, *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). The Court has also engaged in sea changes in the execution of the mentally retarded, and the execution of juvenile offenders. *See*, respectively, *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), overruling *Penry v. Lynaugh*, 492 U. S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); and *Roper* v. *Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), overruling *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989).

c. the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and

d. any other professionally appropriate costs and benefits to the assertion of the claim.

B. Counsel who decide to assert a particular legal claim should:

1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and

2. ensure that a full record is made of all legal proceedings in connection with the claim.

C. Counsel at all stages of the case should keep under consideration the possible advantages to the client of:

1. asserting legal claims whose basis has only recently become known or available to counsel; and

2. supplementing claims previously made with additional factual or legal information.

Fourth, last year's decision in *Cullen v. Pinholster*, 563 U.S. ___, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), highlights the importance of litigating in state court all that can be litigated there.

There was no motion filed by the Appellant's trial counsel to dismiss the death penalty specifications, save and except on the two specific grounds, *viz.*, that the method of execution is unconstitutional because of the three drug "cocktail" which the government has now changed; and, the motion to dismiss the death penalty specifications based upon the untimeliness of the prosecution. However, as demonstrated in the sections which follow, there are a number of infirmities with Ohio's capital punishment scheme. Some have been addressed and rejected by this Court and others have not been addressed by the Court at all. The American Bar Association in September of 2007 issued a stinging indictment of the death penalty in Ohio. *See*,

American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report, An Analysis of Ohio's Death Penalty Laws, Procedures, and Practices*, (September 2007) (hereafter "ABA Study"). That study provides a good faith basis for challenging the constitutionality of the death penalty on a number of grounds. Indeed, the study recommended a suspension of executions until Ohio's capital punishment system can be studied and corrected.

> Despite the best efforts of a multitude of principled and thoughtful actors who play roles in the criminal justice process in the State of Ohio, our research establishes that at this point in time, the State of Ohio cannot ensure that fairness and accuracy are the hallmark of every case in which the death penalty is sought or imposed. Basic notions of fairness require that all participants in the criminal justice system ensure that the ultimate penalty of death is reserved for only the very worst offenses and defendants. It is therefore the conclusion of the members of the Ohio Death Penalty Assessment Team that the State of Ohio should impose a temporary suspension of executions until such time as the State is able to appropriately address the issues and recommendations throughout this Report, and in particular the Executive Summary.

Id., at vii.

Thus, even if one sets to one side the obvious failure of appellate review in Ohio, particularly as evidenced by the string of cases where federal habeas relief has been granted in the past decade; and, even if one sets aside the requirement of the ABA Guidelines to file motions any time there is a good faith basis for doing so; the ABA study, specifically geared to Ohio, outlines a number of deficiencies in Ohio's capital scheme and provides the professional basis for filing the motion and hence the duty on the part of counsel to do so.

Failure to file motions can indeed be the basis for claim of ineffective assistance of counsel. In *State v. Garrett*, 76 Ohio App.3d 57, 600 N.E.2d 1130 (11th Dist. 1983), the Court of Appeals held that it was a denial of the effective assistance of counsel for trial counsel to fail to file a motion to suppress. The appellate court cited *Kimmelman v. Morrison*, 477 U.S. 365, 91 L.Ed.2d 305, 106 S.Ct. 2574 (1986). The failure to file a motion, which possibly could be granted and which implicates matters critical to the defense, constitutes ineffective assistance of counsel. *Garrett*, 76 Ohio App.3d, at 63. There is no logical or constitutional difference between failure to file a valid motion to suppress and failure to file a valid motion to dismiss. See, *e.g.*, *State v. Fisher*, 8th Dist. No. 90997, 2009 Ohio 476.The prejudice to the Appellant is obvious. Facing a capital sentence versus not facing a capital sentence is literally the difference between life and death.

III

A

Ohio's death penalty scheme, embodied principally in R.C. 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05, violates the freedoms protected by the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and also Ohio Constitution, Article I, Sections 1, 2, 5, 9, 10, and 16. This portion of the brief is not an abolitionist essay decrying the moral depravity of the death penalty or a voice crying out in the desert that *any* death penalty is *per se* unconstitutional. The

Framers of the United States Constitution contemplated the infliction of capital punishment when the Bill of Rights was adopted for the Fifth Amendment speaks to persons being held to "answer for a capital, or otherwise infamous crime ... ." But to say that the death penalty is always constitutional is as foolish as to say that it always is unconstitutional. Obviously, not *any* death penalty statutory scheme comports with the Constitution. *See, e.g., Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Our Constitution was written in broad oracle-like phrases such as "due process of law," the "assistance of counsel,"and "cruel and unusual punishment." The law is not mired in the attitudes and traditions of the seventeenth or eighteenth centuries. The United States Supreme Court has said that the machinery of criminal justice and capital punishment "must advance also to keep pace with the times." See, *Trop* v. *Dulles,* 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), where the Court held that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man ... . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

B

The Constitution's Framers clearly could not have foreseen the calamity and complexity that surrounds the modern death penalty. The "rules" of when and how death may be inflicted as a punishment have become so arcane that former Justice

Harry Blackmun, who was always opposed to the death penalty personally, but believed that the death penalty was constitutional, gave up on making it work. Justice Blackmun joined the dissenters in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and signed on to most of the opinions upholding the death penalty in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Before his retirement, Justice Blackmun declared that he could no longer vote to uphold he death penalty in any case.

Justice John Paul Stevens was not a member of the court when *Furman* was decided in 1972. However, he was one of the three members of the famous "trioka" that essentially controlled the outcome of *Gregg* and the companion cases in 1976. While he has been a frequent dissenter in death penalty cases, Justice Stevens by no means is an abolitionist. Of all members of the Court, he has shunned both liberal and conservative agendas, an available vote for any one who can persuade him of the merits of a position based upon the facts of the case, the Constitution, and the precedents of the Court. Justice Stevens likewise announced that in his view, the death penalty is unconstitutional. Though he did not use these words, Justice Blackmun likened the death penalty in America to a chess of sorts. Every time a persuasive argument was asserted for why the death penalty violated the Constitution, courts, prosecutors, or legislators attempted to plug the hole in order to retain the death penalty. But plugging one hole simply forced a leak at the next weakest point

of the death penalty scheme, and a challenge would then be raised at that point. Justice Blackmun's point in concluding that, having for years tried to make the death penalty work, it simply cannot be done rationally and consistent with the Constitution.

The death penalty as enacted and enforced in Ohio violates both the Ohio and United States Constitutions.

IV

Government is a Creature of Limited, Delegated Powers. The most basic precept of our democratic republic is that our government is not one of plenary powers limited only by specifications in the Constitution; rather, the government is one of limited, derived powers. If the power to do an act is not enunciated in the Constitution, then the power does not exist. American government is different from any other government in the world—even the English government upon which the courts so often rely for legal guidance. In his essay, "The Bill of Rights and the Doctrine of Incorporation," reproduced in Eugene Hickok, ed., *The Bill of Rights: Original Meaning and Current Understanding* (Charlottesville, Va.: University Press of Virginia, copyright 1991), Notre Dame Law Professor Emeritus Charles Rice makes this point succinctly:

> The Constitution of the United States is the *first instance in all history* of the creation of a government *possessing only limited powers*. The Magna Charta, the Petition of Right, the English Bill of Rights, and all the other previous *efforts to restrain government* had merely imposed restrictions on the *otherwise unlimited power of government*. The framers of the Constitution, however, created a new government which would possess *only the powers delegated to it*.

Id., at 11. (Emphasis added.)

James Madison, referred to as the father of the Constitution, originally proposed, rather than a separate Bill of Rights, a preamble to the Constitution asserting that "all power is originally vested in, and consequently derived from, the people." *See, Annals of Congress*, vol. 1 (Washington, D.C.: Gales & Seaton, 1834), 424-49. Ohio's Constitution is even more explicit than the federal Constitution about the fact that government is a creature of delegated powers. *See*, Ohio Constitution, Article I, Section 20, which provides: "This enumeration of rights shall not be construed to impair or deny others *retained by the people*; and all powers, *not herein delegated, remain* with the people." (Emphasis added.) Thus, when analyzing an exercise of government power, the focus should not be on the "interests" of the government, but upon whether the government possesses the power at all—that is, whether the power sought to be exercised was delegated in the first instance and, even if so, whether any provision in the Constitution limits the exercise of that power.

V

Due Process of Law, Equal Protection of the Law, and Cruel and Unusual Punishment.

The enjoyment of life is an "inalienable," natural one, secured against government encroachment by the Ohio Constitution. *See*, Ohio Constitution, Article I, Section 1. The right is one which exists in natural law, and the Ohio Constitution is a document which specifies that every citizen is immune from government encroachment upon such natural rights. *See, e.g.*, Pollack, *Natural Rights: Conflict*

and Consequence, 27 OHIO ST.L.J. 559 (Fall 1966); Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L.REV. 1147 (1992); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L.REV. 489 (1977). Before the government can take a life by legislative mandate, the government must demonstrate that such a drastic action is the least restrictive means to further a legitimate objective of a limited government. *Gregg* v. *Georgia*, *supra*; *Commonwealth* v. *O'Neal*, 367 Mass. 440, 327 N.E.2d 662, 668 (1975).[66]

A. *Deterrence and Incapacitation.*

1. Deterrence

Despite considerable research, there is no substantial evidence that the death penalty is a deterrent superior in effect to any other form of lesser punishment. Studies reveal that executions have no discernible negative effect on homicide rates. *See*, Cochran, Chanmlin and Seth, *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 CRIMINOLOGY 107 (1994); Tabak and Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOYOLA L.REV. 59, 114-125 (1989); *see also,* Bailey and Peterson, *Murder, Capital Punishment and Deterrence: A Review of the Evidence and an Examination*

[66] Under both the state and federal constitutions, there is no such thing as a compelling governmental end. Government exists not for its own purposes, and not to enjoy or exercise any rights or interests. Government exists rather for the limited purposes of serving the citizenry which formed it: "for their equal protection and benefit." Ohio Constitution, Article I, Section 2.

of Police Killings, 50 JOURNAL OF SOCIAL ISSUES 53, 57 (1994). In many cases, the "threat of death has little or no deterrent effect." *Gregg* v. *Georgia*, 428 U.S., at 185. If the death penalty were a deterrent to capital crimes, Texas, Virginia, and Florida should not have any capital crimes being committed. Many such comparisons have been done by scholars. They consistently show that the death penalty has no effect on deterring capital homicides.[67]

2. Incapacitation of Offenders

The death penalty is not the least restrictive means for incapacitation and elimination of offenders. Ohio has recognized as much by adopting, effective July 1, 1996, a provision for life imprisonment without parole. *See*, R.C. 2929.03(D). Incapacitation can be achieved by incarceration, which is certainly a less destructive, less restrictive, less final, and more humane method of punishment and the expression of societal outrage than is execution. There is no need for the government to kill people, particularly when shocking and compelling evidence has demonstrated what those in government cannot believe but what those outside of government accept as a truism: the government does not always get it right. The history of Illinois' death row is evidence enough that the death penalty should yield to life imprisonment.

[67] Aside from the statistical analysis, one must consider that most citizens do not even know what constitutes a capital homicide. If that is the case, one can hardly imagine the would-be murderer giving pause before committing the crime to analyze, in Ohio, the aggravating circumstances in R.C §2929.04(A), and then deciding whether or not to commit the offense.

Retribution. The Supreme Court's most recent comments on retribution—"the interest in seeing that the offender gets his 'just deserts'—the severity of the appropriate punishment necessarily depends on the culpability of the offender" are found in *Atkins v. Virginia, supra*. The Court said:

> Since *Gregg,* our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes. For example, in *Godfrey* v. *Georgia,* 446 U.S. 420 (1980), we set aside a death sentence because the petitioner's crimes did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder." *Id.,* at 433. If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution. Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate.

536 U.S., at 319. The language of *Gregg* notwithstanding, it is questionable whether retribution was ever a "compelling state interest" to justify capital punishment.

The government has never produced compelling evidence that a penalty less severe than execution would not equally satisfy the public's desire for punishment. 48 states now have life without parole. Ross Byrd, son of James Byrd, the black man who was dragged to death in Texas in 1998, initially supported a death sentence for John W. "Bill" King, who was sentenced to death for Byrd's murder. However, the younger Byrd said that when he realized King had exhausted his appeals, he began thinking, "How can this [execution] help me solve my pain?" When Byrd realized it could not, he joined a vigil at Huntsville prison to oppose the execution, reported to *Houston Chronicle* on July 4, 2002. King remains on Texas' Death Row. The Georgia native has

only a tenth grade education, a prior prison record, and was only 23 when the offense was committed.

C. *Discrimination*

The death penalty is so fraught with discrimination its imposition violates the equal protection provisions of both the state and federal constitutions. *See*, Fourteenth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 2. The Ohio law is patterned after the laws of other jurisdictions which have been studied. The studies prove that capital punishment has been applied in a racially discriminatory manner as to both the race of the victim and the defendant. *See*, Bowers and Pierce, *Arbitrariness and Discrimination: Post-Furman Capital Statutes*, CRIME AND DELINQUENCY (October 1980), 563, 594-95; Greenberg, *Capital Punishment as a System* (1982), 91 YALE L.J. 908; and Baldus, Pulaski, & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J.CRIM.L. & C. 661 [the famous Baldus study examined but rejected in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). Such arbitrariness and discrimination persists under the Ohio framework which gives even greater discretion in sentencing to the trier of fact. While blacks are less than twenty percent (20%) of Ohio's population, over half the present death row inmates in Ohio are black. Office of the Ohio Public Defender, November 2011 Proportionality Statistics. As of November, 2011, only seven white inmates were on death row for killing blacks, three

of those also involved a white victim. At the same time, 40 blacks were on death row for killing whites, four of those also for killing a black. Ohio, like Georgia (as found in the Baldus study), has a clearly pronounced sentencing trend. The trend is something Justice Powell and the other members of the majority refused to address in *McCleskey, supra*. In Ohio, like Georgia, the life of a white victim is worth much more than are the life of a black victim, for killers of whites, whatever their race, are far more likely to receive the death sentence than killers of blacks. Ohio's statistical disparity in sentencing, when viewed by the factors of race of the defendant and race of the victim, is consistent with national trends. People are more likely to get the death penalty for killing white people than for black people, in violation of both the state and federal constitutions.. The ABA Study has reported that Ohio does almost nothing to investigate and stop racial discrimination in the death penalty. No system that imposes the maximum sentence known to mankind can be constitutional when it discriminates on the basis of race.

D. *Unbridled Charging Discretion*

Part of the systemic discrimination begins with the charging function. In order for the death penalty to be constitutional, sentencing discretion "must be suitably directed and limited as to minimize the risk of wholly arbitrary and capricious action." *Gregg* v. *Georgia*, *supra*, at 189. In Ohio, there is no control of the prosecutor's

unbridled discretion in charging. Capital indictments are arbitrarily issued,[68] and Ohio law provides no independent review of the propriety of the charging decision to ensure that indictments are not arbitrarily issued. No judicial or reviewing body determines the appropriateness of a charge or oversees the unbridled discretion of the prosecutor in seeking a capital specification. Because death-qualified juries are more conviction-prone than juries which are not death-qualified, the prosecutor, simply by exercising his charging function, can undermine the constitutional liberties of a fair and an impartial jury. Ohio Constitution, Article I, Sections 5, 10, and 16; Sixth and Fourteenth Amendments to the U.S. Constitution. While it is the grand jury which issues the indictment, as a practical matter, the grand jury, composed of laymen, will follow the prosecutor's recommendation as to whether to issue a death specification. By allowing the prosecutor to circumvent procedural safeguards mandated by decisions of the United States Supreme Court, the Ohio law allows arbitrary charging decisions.

The cases mentioned in the proportionality section of this brief further highlight the unbridled charging discretion. Coupled with the fact that jurors and judges are not told all cases in which death *was* imposed, *could* have been imposed, or could have been *charged*, the lack of safeguards is constitutionally intolerable. The decision of whether or not a case should be a capital case belongs almost exclusively to the county prosecutor.

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[68] Cuyahoga and Hamilton counties are prime examples.

E. *Cruel and Unusual Punishment*

Ohio had two forms of execution: electrocution, the statutorily preferred method, and lethal injection. Death by either electrocution or lethal injection constitutes cruel and unusual punishment and denies due process under the state and federal constitutions. Inflicting death as a punishment also violates internationally held principles of human rights. The Eighth and Fourteenth Amendments to the U.S. Constitution and Ohio Constitution, Article I, Sections 9 and 16 bar the imposition of penalties which are grossly disproportionate to the crime or, are excessive because they do not make a measurable contribution to an acceptable punishment goal; or, are "nothing more than the purposeful and needless imposition of pain and suffering". *Coker* v. *Georgia, supra,* 433 U.S., at 592.

F. *Ohio Constitutional Provisions*

Neither *State* v. *Jenkins*, 15 Ohio St.3d 164, 473 N.E.2d 264 (1984), *cert. denied, Jenkins v. Ohio*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985), nor *State* v. *Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984), *cert. denied, Maurer v. Ohio* , 472 U.S. 1012, 105 S.Ct. 2714, 86 L.Ed.2d 728 (1985), contain any analysis of applicable Ohio constitutional provisions. Later cases of this Court simply refer back to *Jenkins* and *Maurer*. But this Court has ignored the fact that it has never passed on the constitutionality of the Ohio death penalty law *vis-a-vís* the Ohio Constitution. *Jenkins*, at 167-179; *Maurer*, at 241-243.