

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

:

Appellee,

: Case No. 11-0857

-vs-

: Appeal taken from Cuyahoga County  
Court of Common Pleas

DENNY OBERMILLER,

: Case No. CR-10-542119-A

Appellant.

: **This is a death penalty case**

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## **PREFACE**

Appellant Denny Obermiller hereby provides the following key to describe citations to the record made in this brief:

Transcript - Tr. \_\_\_\_

Supplemental Transcript - Supp. Tr. \_\_\_\_

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## STATEMENT OF CASE AND FACTS

This case involves the homicide of Candace and Donald Schneider. The Schneiders lived at 5529 Thomas Avenue, Maple Heights Ohio. Candace Schneider was the maternal grandmother of Denny Obermiller. On August 14, 2010 the bodies of the Schneiders were found in their home.

### **The Arrest of Denny Obermiller**

On August 15, 2010 Sheriff's deputies from Licking County were alerted that Obermiller was a suspect in a homicide investigation in Maple Heights and was allegedly en route to Buckeye Lake, Ohio or that region. Tr. 59, 832, 846. He was believed to be driving a silver 2009 Kia Rio with an Illinois registration. Tr. 57, 847. Several officers were briefed at the National Trails Racetrack near Buckeye Lake. Tr. 82, 833. Officers converged in the area where Obermiller was spotted.

Obermiller's car had been spotted in the parking lot of a gas station on State Route 79. Tr. 60, 834, 849. Obermiller went into the store and then returned to the car. While out of the car Obermiller was confronted by Det. Sgt. Chris Slayman of Licking County. Tr. 852. Obermiller began running. Tr. 835, 852. The officer pursued him; Officer Slayman shouted "taser, taser" while in pursuit Tr. 64, 854 Several officers converged on Obermiller. Tr. 87.

Obermiller slowed his pace, dropped something, stopped and got down on his knees and went into a prone position face down in the parking lot. Tr. 835, 854. Other officers arrived and Obermiller was taken into custody, patted down and cuffed. Tr. 65 837, 855. Det. Chris Barbuto spoke to Obermiller and thanked him for giving up. Tr. 88. Obermiller made a comment as Barbuto was walking away, a comment about "dying." Tr. 89, 837. Barbuto and Deputy Chad Dennis helped Obermiller to his feet. After Obermiller's comment about dying, Dennis made the

remark that it was not worth dying for. Tr. 105, 838. Dennis later testified that Obermiller said "I ain't worried, I killed my grandmother three days ago." Tr. 105, 838. Dennis asked "why?" Dennis testified that Obermiller replied, "I was beating up my grandfather and she got in the way." Tr. 843. At no point during this process was Obermiller advised of his Miranda rights. Tr. 75, 93, 114-15.

The object thrown to the ground was a revolver, later determined to be a blank gun. Tr. 66, 856 Obermiller's car was secured and another gun was found in the driver's door pocket. Tr. 862. It was later determined to be a tear gas pistol. Tr. 931.

Sgt. Tyo transported Obermiller to county jail in New Washington. Tr. 69. He was then transported back to Cuyahoga County. Obermiller was read his Miranda rights and declined to speak to detectives on the way back. Tr. 128, 131.

### **The Indictment**

This case was indicted under Cuyahoga County case number 541010 and then re-indicted under case number 542119. Obermiller was charged with aggravated murder under O.R.C. § 2903.01(A) and 18 additional counts. In **Count 1**, he was charged with the aggravated murder of Donald Schneider with prior calculation and design, a course of conduct specification under § 2929.04(A)(5), a murder to escape specification under § 2929.04(A)(3), a retaliation for testimony specification under § 2929.04(A)(8), and three felony murder specifications under § 2929.04(A)(7) (aggravated robbery, kidnapping, and aggravated burglary). **Count 2** charged Obermiller with the aggravated murder of Donald Schneider under O.R.C. § 2903.01(B) while committing or attempting to commit aggravated robbery and the same specifications as Count 1. **Count 3** charged Obermiller with the aggravated murder of Donald Schneider under O.R.C. §

2903.01(B) while committing or attempting to commit aggravated burglary, and the same specifications as Count 1.

**Count 4** charged Obermiller with the aggravated murder with prior calculation and design of Candace Schneider under O.R.C. § 2903.01(A). Count 4 contained the same specifications as Count 1. **Count 5** charged Obermiller under O.R.C. § 2903.01(B) with the aggravated murder of Candace Schneider while committing or attempting to commit aggravated robbery. Count 5 carried the same specifications as Count 1. **Count 6** charged Obermille under O.R.C. § 2903.01(B) with the aggravated murder of Candace Schneider while committing or attempting to commit aggravated burglary with the same specifications as Count 1. **Count 7** charged Obermiller with the aggravated murder of Candace Schneider under § 2903.01(B) while committing or attempting to commit rape and the same specifications as Count 1.

The remaining counts of the indictment were as follows: **Count 8**, Kidnapping of Donald Schneider under O.R.C. § 2905.01(A)(3) with Notice of Prior Conviction and Repeat Violent Offender Specification; **Count 9**, Kidnapping of Candace Schneider under O.R.C. § 2905.01(A)(3) with Notice of Prior Conviction and Repeat Violent Offender Specification; **Count 10**, Aggravated Robbery (Donald Schneider) under § 2911.01(A)(3) with Notice of Prior Conviction and Repeat Violent Offender Specification; **Count 11** Aggravated Robbery (Candace Schneider) under § 2911.01(A)(3) with Notice of Prior Conviction and Repeat Violent Offender Specification; **Count 12**, Rape of Candace Schneider under O.R.C. § 2907.02(A)(2), with Notice of Prior Conviction and Repeat Violent Offender Specification (NPC and repeat violent offender were deleted by the prosecutor, 3, 367); **Count 13**, Aggravated Burglary (§ 2911.11(A)(1)) with Notice of Prior Conviction and Repeat Violent Offender Specification (NPC and repeat violent offender were deleted by the prosecutor, 3, 367); **Count 14**, Tampering with

Evidence (§ 2921.12(A)(1)); **Count 15**, Theft (§ 2913.02(A)(1)); **Count 16**, Theft (§ 2913.02(A)(1)); **Count 17**, Attempted Aggravated Arson (§ 2923.02/2909.02(A)(2)); **Count 18**, Burglary (§ 2911.12(A)(3)) with Notice of Prior Conviction and Repeat Violent Offender Specification; and **Count 19**, Theft (§ 2913.02(A)(1)).

### **Pre-Plea Discussions and Plea Hearing**

Prior to his trial, on January 10, 2011, Obermiller asked to address the court. Obermiller stated that he wanted to change his plea to guilty and that he would like to represent himself. Tr. 218. The court conducted a colloquy with Obermiller. He stated that he was taking Neurontin and Remeron. Tr. 213. Obermiller was informed by the court that he would be before a panel of three judges. Tr. 219. He was questioned about his lawyers and about his background. The court denied the request for self-representation, but stated that the issue would be revisited with the three judge panel. Tr. 222, 225. The court continued to question Obermiller about his decision to waive a jury trial. Tr. 223, 226-232, 241-243. The court then accepted the waiver.

The three judge panel consisted of Judges Saffold, McGinty, and Sutula. The panel conducted an additional colloquy on the jury waiver and Obermiller's request to represent himself. Tr. 248-284. After more than thirty minutes of questioning by the panel about his decision to represent himself, Obermiller gave up, saying that his attorneys could stay on because they could only do what he told them to do anyway. Tr. 284. The panel accepted the jury waiver. Tr. 284-85 Defense counsel advised the court that Obermiller wanted to enter a guilty plea. Tr. 286 Another colloquy was conducted. Tr. 290-311 Obermiller entered his pleas. Tr. 323-379

Obermiller had also agreed to share information about the pretrial competency evaluation. Tr. 236. Dr. Connell was appointed as the expert. The result of the evaluation was that Obermiller was competent and had no mental retardation issue. Tr. 236.

Defense counsel had also requested Obermiller's penal records and records maintained by the Department of Children and Family Services. These records were released to counsel by the court. Tr. 18. Defense counsel had indicated to the trial court prior to trial that they had requested a mitigation specialist, Cici McDonnell. Supp. Tr. 5. Ms. McDonnell would do the mitigation investigation and collect the records. Supp. Tr. 12. Counsel also indicated that they would pick a psychologist to examine Obermiller and to address relevant issues. Supp. Tr. 5. These requests were approved by the court. Supp. Tr. 13. At that time counsel declined a court competency evaluation or court psychiatric evaluation. Supp. Tr. 5.

#### **Evidence Presented to the Three Judge Panel**

Donald and Candace Schneider had a campsite in Portage county. Tr. 421. They were at the campsite from August 5 through August 8, 2010. Evidence was presented that during that time Obermiller broke into Donald Schneider's home office and took coins from Donald's coin collection. Tr. 414, 455-59, 917. On August 7, 2010 Obermiller went to a coin shop in Cleveland to sell some of the coins. He returned to the shop on August 9 to sell more coins. Tr. 698-721.

On August 10, Donald called Obermiller because he had discovered the theft of the coins. He also called the Maple Heights police to report the theft and name Obermiller as the suspect. The police came to the home, took photos and began an investigation. Two false alarms were later noted at the address, explained by Donald as his attempts to change the alarm code. Tr.

464-468. This is the last time Donald was seen alive. Candace was last seen leaving her job at Speedway at 11:46 p.m on the same day. Tr. 634.

On August 11 there were several transactions at a bank ATM attempting to access the Schneider account. Tr. 867-72. Candace's employer at Speedway received a call from someone purporting to be Candace's nephew saying that she would not be in to work. Tr. 630.

Evidence was also presented that Obermiller offered to sell his boss a television set. Tr. 600; 655-61. On that same day Obermiller went back to the coin shop to sell more coins. The coin shop owner testified that Obermiller told him his grandfather had passed away and left things to him in his will. Tr. 698-721.

On August 12 Obermiller drove his grandmother's van to Elyria and spent time with his ex-girlfriend Gina Mikluscak. On that day he sold his boss the television set and tools, later identified as belonging to Donald Schneider. Tr. 415, 655-61. Obermiller also asked his former step-mother and cousin, Stacy Lykins (Muzic), to rent a car for him. Tr. 636. He rented a Kia under someone else's name. Tr. 635-42.

On August 13 Candace Flagg, an Akron resident and one of Candace Schneider's grandchildren, called Obermiller because she had not heard from her grandmother. He told her he would check on their grandparents. Tr. 434-36. Later that day Obermiller sold an air conditioner from his grandparents' house to his half-sister. Tr. 985. The next day he returned to the coin shop to sell more coins. Tr. 710-11. Obermiller made plans with Gina to go to Florida. Tr. 558-60. He also received another call from Candace Flagg. Ms. Flagg then called the Maple Heights police, and the police went to the Schneider home on Saturday, August 14. Tr. 437. They entered the home, found gas coming from the stove, small candles burning, and the bodies of Candace and Donald Schneider. Tr. 471-510.

Testimony was presented that the bodies had been there for three or four days, and that there were used condoms around the body of Candace and semen inside of her. Both victims were strangled, Candace with a cord and Donald with a sheet. Donald also had a surface wound on his face. Obermiller's DNA could not be excluded as the source of DNA on the condoms. His DNA matched the seminal material from the vaginal swab. Tr. 725-43, 768-79, 806, 895, 908. Both victims were handcuffed. Joseph Felo, D.O. testified that he believed the handcuffs were put on after death. Tr. 780-81, 785-86. Donald's blood contained alcohol; Candace's had marijuana. Tr. 779-80.

Witnesses testified as to Obermiller's involvement and statements about these offenses. Candace Flagg identified belongings of her grandparents. Tr. 442, 445-49. Gina Mikluscak testified that Obermiller confessed to her that he had killed his grandparents. Family members also testified that Obermiller confessed to them. Tr. 563, 597. Gina contacted police when she learned of Obermiller's actions. Tr. 565. Obermiller's father testified that Obermiller said Donald had a gun. Tr. 599. Gina also testified that Obermiller said he punched his grandmother and that Donald had a gun Tr. 1256.

### **The Verdict**

The three judge panel found that Obermiller entered a plea of guilty to all counts, 1 through 19 inclusive, and to each specification set forth as to to each count in the indictment. Tr. 1367. The panel unanimously found that the State had produced evidence convincing the panel beyond a reasonable doubt as to Obermiller's guilt as to each essential element of each count and each specification. Tr. 1367-68. The panel returned guilty verdicts on all counts.

## **The Penalty Phase**

At the commencement of the penalty phase defense counsel indicated to the court that Obermiller intended to offer no mitigation. Tr. 1383. Obermiller declined the presentence investigation and a court psychiatric evaluation for purposes of mitigation. Tr. 1392. The court referred Obermiller to the court psychiatric clinic for an evaluation of his competency to waive mitigation. Tr. 1392. The Court Psychiatric Clinic conducted a "Competency to Waive Mitigation Evaluation" of Obermiller and concluded that he was competent. Ct. Ex. 10. At this time counsel also stated that a substantial amount of work had been done prior to trial without the defendant's cooperation or consent. Tr. 1396-97.

The court conducted a colloquy with Obermiller and accepted his waiver. Tr. 1441-464. The court also noted that it was free to consider any factors in mitigation already presented in evidence in this process. Tr. 1386.

The mitigation competency report and other testimony provided compelling evidence to call for a sentence less than death in this case. Obermiller lost his mother at a very early age, when he was only 2 years old. His mother died under violent circumstances—shot by the abusive boyfriend of a friend. Tr. 603; Ct. Ex. 10. Obermiller's home life became transitory. At the time his mother was shot his father served five or six years in the Ohio State Reformatory for burglary. Tr. 622. He lived with his maternal grandmother and step-grandfather, Candace and Donald Schneider, from age 2 through 14. Then he lived with his father for six months and his aunt for nine months. His father admitted that he failed Denny, "I wasn't in shape to take care of him after his mom passed and I was kind of young..." Tr. 590; Ct. Ex. 10. Obermiller was then placed in an Ohio Department of Youth Services correctional facility for three and one-half years from age 15 through 18; he was then incarcerated from ages 18 through 27. The lack of structure

and guidance is evidenced by Obermiller's description of his childhood as "spoiled, did whatever I felt like doing...I got into a lot of trouble with the law when I was younger." Poor school attendance led to failure of 8<sup>th</sup> or 9<sup>th</sup> grade. He said no one knows where his younger brother is living. Ct. Ex., p. 2. The only counseling that Obermiller received was for a few months when he was 5 or 6 years old. *Id.*, p. 4.

When asked about childhood physical and sexual abuse, Obermiller did not deny it, instead he answered, "I don't want to answer that." Obermiller's stepmother Stacy Lykins (Muzic) testified that Donald Schneider hit Obermiller on the head with a phone when Obermiller was three years old. Obermiller told Ms. Lykins throughout his life that Donald had locked him in the attic, beaten him, made him urinate in cans, and deprived him of food for as long as two days. Much of this happened when Obermiller was around 12 or 13. Although his brother and he told his grandmother Candace about the abuse, she did not believe them. Tr. 1321-24.

Undoubtedly as a result of the turmoil of his childhood, Obermiller had a history of fighting and angry behavior. He was in special education classes for "behavioral issues" and was suspended from school "over a dozen times...mostly for fighting." Eventually, Obermiller was arrested numerous times as a juvenile. Along with the behavioral problems, his history reveals early substance use including marijuana, alcohol, heroin, cocaine, LSD and "whippets" (inhaled nitrous oxide cartridges). He first used marijuana and alcohol when he was 12 or 13 years old. Obermiller's family history also includes marijuana use. His medical history includes at least five instances of losing consciousness. Ct. Ex. 10, pp. 2-3 Obermiller was married to a guard at Mohican Juvenile Correctional Facility from March 2001 until 2002 when she committed

suicide. *Id.*, p. 3. Obermiller's history reveals many difficulties and an apparent lack of any meaningful counseling or intervention.

Obermiller obtained his high school diploma in 2000 from the ODYS Mohican Juvenile Correctional Facility. He also took classes in Business Administration through Ashland University while in prison. *Id.*, p. 2. While incarcerated, Obermiller developed recurring depression. He was prescribed medication, which he took for a few weeks during each episode. He described prison as a "zoo, and you're the animal." *Id.*, p. 8. When he confronted life once more on the "outside" after spending his formative years in prison it was stressful, but he received no mental health services. *Id.*, p. 4. During the evaluation to determine his competency to waive mitigation, Obermiller was diagnosed with Major Depressive Disorder, Recurrent, In Partial Remission. Symptoms include depressed mood, marked diminished interest in almost all activities, decreased appetite, increased sleep, decreased energy, feelings of worthlessness, and decreased concentration. *Id.*, p. 7. At the time of his trial, Obermiller was taking Neurontin and Remeron for "anxiety." *Id.*, p. 3.

Immediately prior to this offense, Obermiller was employed as a roofer, and did not have disciplinary issues at work. He was a reliable worker. *Id.*, p. 3; Tr. 4, 652.

Obermiller expressed remorse regarding the aggravated murder of Candace Schneider. Ct. Ex. 10, p. 7. He expressed horror over his action, and feelings of worthlessness. He realized how much his actions had hurt his family. *Id.*, p. 5. Obermiller has consistently chosen to plead guilty. *Id.*, p. 7. He has not denied that he committed these crimes.

### **Merger**

For purposes of sentencing the State moved to merge the specifications for aggravated burglary, kidnapping, aggravated robbery, and murder to escape into the retaliation for testimony

specification for Donald Schneider Tr. 1434-35. This left after merger two aggravating circumstances, course of conduct and retaliation for testimony. For Candace Schneider, the State moved to merge the aggravated burglary, kidnapping, aggravated robbery and murder to escape into the retaliation for testimony specification, leaving course of conduct, retaliation for testimony, and rape specifications. Tr. 1435. The State also elected to merge the multiple aggravated murder counts for Donald and Candace into the one count of aggravated murder with prior calculation and design for each victim. Tr. 1473. Sentencing then proceeded on Counts 1 and 4, with the attached merged specifications. Tr. 1474.

### **Sentencing**

The court imposed death sentences on Obermiller for Counts 1 and 4 and further sentenced him on the remaining counts of the indictment. Tr. 1488-1501.

## PROPOSITION OF LAW NO. 1

A defendant has a constitutional right to waive counsel and represent himself when the waiver is made knowingly, intelligently and voluntarily. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 10, 16.

Denny Obermiller was denied his constitutional right to represent himself at his capital trial.

### I. Facts.

Obermiller was appointed two attorneys, James McDonnell and Kevin Spellacy, to represent him in his capital case. Tr. 6. Before trial began, Obermiller told the court that he wished to change his plea to guilty and represent himself. Tr. 218. The court engaged in a colloquy with Obermiller about the plea and attendant jury waiver. Tr. 218-24; 226-36. The court also asked questions about Obermiller's desire to represent himself. Obermiller indicated that he was satisfied with his attorneys' representation but that he wished to proceed on his own. Tr. 219. Obermiller also told the court that he had represented himself in a juvenile proceeding. Tr. 221. The court informed Obermiller that it would not grant his request to represent himself because he did not have the experience necessary to do so adequately. Tr. 222.

Obermiller's jury waiver was completed (tr. 243), and a three-judge panel was convened. Tr. 247. The panel members, on their own, began questioning Obermiller about his desire to represent himself. Tr. 250. This questioning went on for more than thirty transcript pages. Tr. 250-84. The judges asked Obermiller whether he had ever been to trial before (tr. 251); whether he had ever seen a jury (*id.*); how far he went in school (tr. 252); whether he had ever taken any criminal law courses or independently studied the law (tr. 253, 255); whether he had ever read chapter 29 of the Ohio Revised Code (*id.*); what his grade point average was (tr. 254); whether he understood how much education it takes to become an attorney and how much experience

attorneys must have before being assigned to a capital case (tr. 255-56); whether he would know when to make an objection, how to give an opening statement, or how to form a trial strategy (tr. 258, 259); and whether he had familiarized himself with the hundreds of other death penalty cases in Ohio (*id.*).

The court asked Obermiller why he wanted to proceed without his attorneys. Tr. 260. Obermiller responded that he did not need them because even if he kept them, he would not let them present a defense. *Id.* Obermiller indicated that he had been thinking about representing himself since the time of his arrest. Tr. 262. The panel questioned Obermiller about his satisfaction with his attorneys. Tr. 262-64. Obermiller indicated that he was satisfied with their work but that he still wished to proceed on his own. *Id.* The panel went on to ask Obermiller if he was familiar with the rules of criminal procedure and the rules of evidence (tr. 267-68) and informed him that they would be unable to advise him on such matters (tr. 269). The panel questioned Obermiller about his knowledge of appellate procedure and told him that he would be giving up his right to ineffective assistance of counsel claims and that he would likely fail to preserve other issues for appeal if he represented himself. Tr. 271-72. They asked Obermiller if he understood lesser included offenses and the difference between aggravated murder, murder, and manslaughter. Tr. 274. The panel then went through the entire indictment and asked Obermiller if he understood the elements of the charges. Tr. 275-81. The panel asked whether he understood mitigation and affirmative defenses. Tr. 281-82.

At the conclusion of this extensive questioning, one of the judges told Obermiller that he was beginning to think that Obermiller wanted to represent himself so that he could present no defense and that he wanted to “sit there and take punches.” Tr. 283. Obermiller agreed. *Id.* After this exchange, Obermiller gave up. Obermiller said that even if his attorneys stayed on,

they could do only what he would tell them to do. Tr. 284. He went on, “as a matter of fact, they can stay. I really don’t care at this point.” *Id.* The Court, after first denying Obermiller’s request to represent himself, had brought up the issue again and successfully bullied Obermiller out of his desire to represent himself.

## **II. Case law supports Obermiller’s right to represent himself.**

The seminal case regarding the waiver of counsel is *Faretta v. California*, 422 U.S. 806 (1975). The United States Supreme Court held that when the accused knowingly, voluntarily and intelligently elects to represent himself he has a constitutional right to self-representation. *Id.* at 835.

This Court, in *State v. Dean*, 127 Ohio St. 3d 140, 937 N.E.2d 97 (2010), held that a defendant may defend himself if he elects to do so voluntarily, knowingly, and intelligently. *Id.* at 151, 937 N.E.2d at 107. The trial court, to establish that the waiver of the right to counsel is effective, “must make sufficient inquiry to determine whether defendant fully understands and intelligently relinquishes that right.” *Id.*, 937 N.E.2d at 108.

In *State v. Taylor*, 98 Ohio St. 3d 27, 781 N.E.2d 72 (2002), this Court held that the issue is not whether the accused is making a smart decision, but “whether he ‘fully understands and intelligently relinquishes’ his right to counsel.” *Id.* at 35, 781 N.E.2d 81; (citing to *State v. Gibson*, 45 Ohio St. 2d 366, 345 N.E.2d 399 (1976)). This Court did not find any error with the defendant’s exercise of his right to represent himself. *Id.* at 37, 781 N.E.2d at 82.

## **III. Obermiller properly invoked his right to represent himself.**

In Obermiller’s case, the trial court improperly denied his request to represent himself. Then, the trial court resurrected the issue seemingly only for the purpose of wearing Obermiller down to agree with its decision. The trial court went well beyond ensuring that Obermiller

understood the perils of self-representation. Instead, the trial court grilled Obermiller for half an hour<sup>1</sup> about his education, his knowledge of the rules of evidence and criminal procedure, his knowledge of Ohio criminal law, his motives for wanting to represent himself, etc.

Obermiller's request to represent himself was unequivocal. He stated to the court, "I would also like to represent myself from this point forward." Tr. 218. He went on to say that his attorneys had represented him adequately, but that he would "just like to go by myself from this point forward." Tr. 219. Moreover, the request was made knowingly, intelligently, and voluntarily. Obermiller indicated that he had represented himself in a juvenile proceeding and understood that the burden of proof was different in this criminal proceeding. Tr. 221-22. He informed the court that he was satisfied with his representation, but that he simply wished to proceed without counsel. Tr. 219.

Prior to convening the panel, the trial judge denied the request, finding that Obermiller did not have "the experience necessary to adequately represent [himself] at this proceeding." Tr. 222. The trial judge went on to say that Obermiller had been assisting his attorneys and that he had indicated to the court that his attorneys had provided competent representation. Tr. 222-23. Finally, the trial judge stated that there was "no reason at this time to relieve them of their responsibility." Tr. 223. But this is not the standard. The court did not need a reason to allow Obermiller to represent himself aside from his stated desire to do so. That the decision may not be in his best interest is not the issue. As long as Obermiller fully understood and intelligently relinquished his right to counsel, the trial court was bound to allow him to do so. *Taylor*, 98 Ohio St. 3d at 35, 781 N.E.2d at 81.

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<sup>1</sup> The transcript is time stamped. The timestamp at the start of the questioning on this subject is 3:24:51PM (tr. 250), and the timestamp at the conclusion of the questioning is 3:58:24PM (tr. 284).

When the panel was convened, it took it upon itself to revisit the issue of self-representation. Tr. 250. The colloquy that followed should not have taken place at all. Obermiller had asserted his right to self-representation, and the trial court had inappropriately denied it. But the colloquy was designed to wear Obermiller down to the point of agreeing not to waive counsel, which is exactly what he ultimately did.

The trial court also failed to discuss the option of appointing standby counsel—a procedure that has been approved by this Court—to assist Obermiller in representing himself. *Taylor*, 98 Ohio St. 3d at 41, 781 N.E.2d at 85; *State v. Jordan*, 101 Ohio St. 3d 216, 218, 804 N.E.2d 1, 6 (2004).

#### **IV. Conclusion.**

Obermiller's assertion of his right to represent himself and waive counsel was made knowingly, intelligently and voluntarily and should have been granted by the trial court. According to this Court's and the United State's Supreme Court's precedents, Obermiller's right to self-representation was violated. This Court should reverse and remand this case to the trial court for a proper inquiry into Obermiller's right to represent himself at a new trial.

## PROPOSITION OF LAW NO. 2

A capital defendant's right to a reliable sentence is violated when the three judge panel fails to properly weigh aggravating circumstances and mitigating factors in imposing a sentence of death. U.S. Const. Amends. VIII, XIV; Ohio Const. Art. I §§ 9, 16.

### I. Introduction

For purposes of sentencing in this case the State moved to merge the specifications for aggravated burglary, kidnapping, aggravated robbery, and murder to escape into the retaliation for testimony specification for Donald Schneider Tr. 1434-35. After merger this left two aggravating circumstances, course of conduct and retaliation for testimony. For Candace Schneider, the State moved to merge the aggravated burglary, kidnapping, aggravated robbery, and murder to escape into the retaliation for testimony specification, leaving course of conduct, retaliation for testimony, and rape specifications. Tr. 1435. The State also elected to merge the multiple aggravated murder counts for Donald and Candace into the one count of aggravated murder with prior calculation and design for each victim. Tr. 1473. Sentencing then proceeded on Counts 1 and 4, with the attached merged specifications. Tr. 1474. Obermiller was sentenced to death for each victim.

### II. The Trial Court Opinion

O.R.C. § 2929.03(F) requires the court or panel of three judges, when it imposes sentence of death, to state in a separate opinion its specific findings as to the existence of any mitigating factors set forth in division (B) of O.R.C. § 2929.04, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. *State v. Maurer*, 15 Ohio St. 3d 239, 473 N.E.2d

768 (1984). The trial court opinion in this case contains errors in the weighing process that render the death sentences arbitrary and unreliable.

**A. Improper Aggravating Circumstance**

In the sentencing opinion, the panel stated that “[a]fter merger of the counts, this Court proceeded to the second phase of this trial. Defendant pled guilty to the indictment and was convicted of three aggravating circumstances that were alleged as part of Counts 1 and 4...” The court then proceeded to list the three aggravating circumstances of course of conduct, rape, and murder of a witness. Sentencing Opinion, p. 2. (A-6). This was improper. The aggravating circumstance of rape should not have been weighed on Count 1, the aggravated murder of Donald Schneider.

When a capital defendant is convicted of more than one count of aggravated murder, the penalty for each individual count must be determined separately. Only the aggravating circumstance(s) related to a given count may be considered and weighed against the mitigating factors in determining the penalty for that count. *State v. Cooley*, 46 Ohio St. 3d 20, 544 N.E.2d 895 (1989), paragraph 3 of the syllabus; *State v. Poindexter*, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988); *State v. Hooks*, 39 Ohio St. 3d 67, 529 N.E.2d 429 (1988). The court’s improper weighing of the aggravating circumstances tipped the scale in favor of death for the aggravated murder of Donald Schneider.

**B. Failure to Consider Mitigating Evidence**

The panel’s review of mitigating factors in this case was cursory and failed to give proper consideration and weight to the evidence in favor of a sentence less than death. The panel failed to fully consider the transitory nature of Obermiller’s childhood and the effect this had on his behavior and development. After his mother was shot, his father served five or six years in the

Ohio State Reformatory for burglary. Tr. 622. Obermiller lived with his maternal grandmother and step-grandfather, Candace and Donald Schneider, from age 2 through 14. Then he lived with his father for six months and his aunt for nine months. Obermiller was then placed in an Ohio Department of Youth Services correctional facility for three and one-half years from age 15 through 18; he was incarcerated in prison from ages 18 through 27. The lack of early home structure, consistent love, and guidance is evidenced by Obermiller's description of his childhood as "spoiled, did whatever I felt like doing...I got into a lot of trouble with the law when I was younger." Poor school attendance led to failure of 8<sup>th</sup> or 9<sup>th</sup> grade. Ct. Ex. 10, p. 2. The only counseling that Obermiller received was for a few months when he was five or six years old. *Id.*, p. 4.

The panel failed to fully consider the physical and emotional abuse inflicted upon Obermiller by Donald Scheider. When asked about childhood physical and sexual abuse during the competency to waive mitigation evaluation, Obermiller did not deny it. Instead he replied, "I don't want to answer that." Ct. Ex. 10. Obermiller's former stepmother Stacy Lykins (Muzic) testified that Donald Schneider hit Obermiller on the head with a phone when Obermiller was three years old. Obermiller told Ms. Lykins throughout his life that Donald had locked him in the attic, beaten him, made him urinate in cans, and forced him to go without food for as long as two days. Much of this happened when Obermiller was around 12 or 13. Although his brother and he told his grandmother Candace about the abuse, she did not believe them. Tr. 1321-24.

As a result of the turmoil of his childhood, Obermiller had a history of fighting and angry behavior. He was in special education classes for "behavioral issues" and was suspended from school "over a dozen times...mostly for fighting." Ct. Ex. 10, p. 2. Eventually, Obermiller was arrested numerous times as a juvenile. Along with the behavioral problems, his history reveals

early substance use including marijuana, alcohol, heroin, cocaine, LSD and “whippets” (inhaled nitrous oxide cartridges). He first used marijuana and alcohol when he was 12 or 13 years old. Obermiller’s family history also includes marijuana use. His medical history includes at least five instances of losing consciousness. Ct. Ex. 10, pp. 3-4. The panel’s opinion did not consider these mitigating factors. Obermiller’s history reveals many difficulties and an apparent lack of any meaningful counseling or intervention.

The panel completely failed to consider Obermiller’s psychological difficulties and mental illness. While incarcerated, Obermiller developed recurring depression. He was prescribed medication, which he took for a few weeks during each episode. He described prison as a “zoo, and you’re the animal.” *Id.*, p. 8. When he confronted life once more on the “outside” after spending his formative years in prison it was stressful, but he received no mental health services. *Id.*, p. 4. During the evaluation to determine his competency to waive mitigation, Obermiller was diagnosed with Major Depressive Disorder, Recurrent, In Partial Remission. Symptoms include depressed mood, marked diminished interest in almost all activities, decreased appetite, increased sleep, decreased energy, feelings of worthlessness, and decreased concentration. *Id.*, p. 7. *State v. Clemons*, 82 Ohio St. 3d 438, 696 N.E.2d 1009 (1998); *State v. Hand*, 107 Ohio St. 3d 378, 840 N.E.2d 151 (2006).

As outlined in Section III, the panel clearly had misconceptions about mental illness as a mitigator. The fact that mitigating evidence “rules out a mental disease or defect and incompetency does not mean it rules out lesser but potentially mitigating conditions and disorders.” There is “no legal authority strictly limiting mitigating medical, psychiatric and psychological evidence to that of legal insanity or incompetence. In fact, evidence of conditions, disorders and disturbances are precisely the kinds of facts which may be considered by a jury as

mitigating evidence.” *Kenley v. Armontrout*, 937 F.2d 1298, 1307 (8th Cir. 1991), citing *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982). Demonstrations that a defendant is insane or incompetent “are not prerequisites to information being considered mitigating evidence.” *Kenley*, 937 F.2d at 1308.

The panel also did not consider age. Although the court acknowledged at the beginning of proceedings that “28 is very young,” the panel mistakenly believed that age was only a mitigating factor if the offender was under 18. Tr. 144, 1389. They failed to consider Obermiller’s psychological and emotional immaturity that resulted from his tumultuous childhood and early incarceration.

### **III. Nonstatutory Aggravating Circumstances**

The transcript in this case is replete with instances of the three judge panel pressing witnesses to testify to improper nonstatutory aggravating circumstances. The court recalled Gina Mikluscak to further question her about Obermiller and her relationship with him. Tr. 1122. For example, *the panel* questioned Gina about fights she had with Obermiller. She testified that they “broke up pretty badly and nobody approved of me seeing him...” Tr. 1153.

Q: ...what to you mean it broke up badly? Explain that.

A. We just weren’t getting along anymore and it became violent and I had to leave.

Q. Well, explain that.

A. We would argue over nothing, over nothing at all, and it would escalate, and it did. It became pretty violent. We would fight. Furniture would get thrown. By the time I left him...I had bruises and my face was pretty lumped up, so that’s why people didn’t want me around him.

Q. What do you mean you had bruises?

A. My fact was tore up. I had bruises everywhere. I had lumps on my head. It was bad.

Q. What do you mean by tore up?

A. I had cuts on my face. I had bruises. I had lumps on my head. I couldn't hear in one ear. I mean, it was just—it was very bad.

Tr. 1153-56. The panel continued with questions about how long it took Gina to get her hearing back and the severity of her injuries. Tr. 1157-59. They then returned to details about the fighting and Gina's family. Gina replied again that "there was no hiding it. They saw my face. They knew what happened. My cousin came and got me, and me and Denny got into it..."

Q. You say you got into it. Were you punching? Did you punch him back and injure him?

A. No.

Q. Why not?

A. I was afraid to hit him back.

Q. So you got into it. What do you mean by you got into it?

A. I just remember being in the shower and I said—we were going back and forth and I said something...and I was getting out of the shower and he came in and he just put his arms around me and started hitting me, and we went round and round...He took the phone and whipped it down the alley, throwing furniture out, things like that.

Tr. 1162-63.

The panel questioned Gina extensively about Obermiller's drug use, asking if he was a "drug fiend." They asked, "You've been around drug addicts or fiends of some sort?" Presumably this would qualify Gina to inform the panel of the mitigating value of Obermiller's drug use. Tr. 1178-86. The panel then *again* returned to the subject of physical abuse:

Q. How many times did Denny beat you up during the time that you guys were together?

A. Just that one time.

Q. And that was pretty severely?

A. Yes.

Q. Did you tell him to stop when he was beating you like that...?

A. Yeah.

Q. What happened when you told him to stop?

A. He couldn't hear anything. I couldn't have done anything...

Q. What, he like lost it?

A. Yeah.

Q. What caused him to stop, do you know?

A. I don't know. He started picking up furniture and throwing it...

Q. How did it stop though? I mean, you were beaten severely so that you lost your hearing, your face was totally...

A. I ran to the gas station to make...

Q. But how did he stop hitting you? You described a pretty severe beating.

A. I don't remember. I really don't. The whole time I was just trying to get my clothes together. He kept knocking my glasses off. I kept trying to put them on....

Q. So even though he was beating you so severely, so severe that you had bruises all over, you lost your hearing, you were pretty banged up, right? This is a pretty severe beating. And you were asking him to please stop. And he continued to beat you?

A. Uh-huh.

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Q. So when he was beating you, you don't remember what quieted his anger?

A. No. I don't.

Q. Did you walk away or did you crawl away?...

Tr. 1222-24. The panel continued with questions about whether Obermiller's anger was a "flash" or "slow burn." *Id.*

Q. You ever see him get mad at anybody else, maybe a dog or cat or something got in the way?

A. No.

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Q. But you don't know anything about how he quiets his anger? Distance wouldn't quiet it.

A. Right. And Like I said—yeah, like I said, he would usually just do something to occupy his mind....

Q. So the only way you got away from him was to get yourself away?

A. Yes.

Q. Because even when you left, he was still angry, throwing things?

A. Yes.

Tr. 1224-25.

The panel then asked a series of questions designed to elicit information from Gina emphasizing that Obermiller was a large, strong man who attacked the weak and helpless Donald Schneider.

Q. You say he [Obermiller] worked out a lot?

A. He exercised a lot.

Q. Like what?

A. We had a pull-up bar that would go over the doorway.

Q. Did he do pull-ups?

A. Yeah.

Q. How many pull-ups could he do?

A. He could do a lot. 50, 60.

Q. You have to be in pretty good shape to do that many.

A. Oh, yeah, he prided himself on that.

Q. What other kinds of things would he do?

A. Oh..

Q. Would he do 50 pull-ups all at once, or five sets, or all at once?

A. Usually all at once.

Q. He would count them and brag about it?

A. Yeah, yeah.

Q. Pretty good shape to do 50 pull-ups.

A. Yeah.

Q. Strong guy.

Q. What about weights?

A. I know there was weights at one point....

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Q. Boxer or anything?

A. When he was younger, he told me that he boxed a little bit.

Q. Any other means of self-defense or anything like that, karate or anything like that?

A. Not that I'm aware of.

Q. You ever see him get into a fight with anyone else?

A. No.

Q. Just with you.

A. Yes.

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Q. Did he work out when he was in Maple Heights?

A. A little bit....

Q. How about Mr. Scheider, was he in great shape?

A. No.

Q. What kind of shape was he in? Was he muscle-bound?

A. No.

Q. Did the defendant have good muscle tone, strong?

A. Yes.

Q. And how about Mr. Schneider, did he look like he was a strong fellow?

A. No.

Q. Did he ever work out at all?

A. No, not that I saw.

Q. Did he look like he was even capable of doing push-ups if he wanted to?

A. He could probably muster up a couple.

Q. But no 50 pull-ups.

A. No.

Q. Or pull-ups at all.

A. No.

Tr. 1225-29.

The panel asked Gina many questions about Obermiller's mental state and health, even though she was not a mental health expert and was not qualified to comment on the information being sought. At times the panel betrayed their own misconceptions about mental illness and mitigating factors.

Q. So he had medication for depression?

A. Yes, that's what he told me they were for.

- Q. Did you ever see them?
- A. Yeah, I saw bottles.
- Q. How many bottles were there?
- A. Maybe more than two.
- Q. Do you know what the medications were?
- A. I do not.
- Q. But these are something he had while in prison and he was given when he left?
- A. Correct.
- Q. And subsequently when you lived together, did he refill these prescriptions?
- A. I don't think so.
- Q. So what month did the prescriptions run out? Were they prescriptions?
- A. Yeah. Like I say, when he was released...
- Q. You can tell a prescription bottle from an over-the counter bottle, right?
- A. Yeah. When he was released, there was a few bottles, but as far as him refilling them or anything like that, I never saw a refill bottle.
- Q. Was there any change in behavior when he was on the pills in that period and off the pills in other periods?
- A. No.
- Q. How long was he on the pills...?

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- Q. Was he acting in a manner that would make you think he had a mental illness?
- A. Not until right before I left. I noticed that there was mood swings and things like that, and that's like when it started getting bad...but before that, no, I never noticed anything.
- Q. Would any of the mood swings suggest that he had a mental illness? Was he delusional?
- A. No.

Q. Was he seeing things?

A. No.

Q. Was he hearing voices that weren't there?

A. No.

Q. Was he acting in any sort of delusional behavior? Where he's seeing things that no one else would be seeing.

A. No.

Q. Was he acting in a paranoid manner that people were following him or people were after him or anything?

A. No.

Q. Any signs of schizophrenia or crazy behavior where he's lashing out at people that aren't there and attacking cars, running at busses?

A. No.

Q. Talking to trees?

A. No, no.

Q. Or even in a milder manner, anything that you considered off?

A. No.

Q. You've seen people that are off, that are, quote "off" end quote?

A. I would say I started noticing that like a couple days before we got into an altercation. I noticed that he was very short-tempered, he was very quick to fly off the handle.

Q. He was in an irritable mood?

A. Yeah.

Tr. 1241-46. The court continued with questions about mental illness and manic behavior. The court also asked Gina if she thought Obermiller knew the difference between right and wrong. *Id.* The court asked her if she knew why Obermiller had raped and killed his grandmother and

whether she thought that was “abnormal?” The court also asked her if Obermiller had ever expressed his anger sexually to her. Tr. 1247-51.

In addition to the highly prejudicial testimony of Gina, the prosecutor also questioned Stacy Lykins (Muzic), Obermiller’s former step-mother, about a purported domestic violence charge by her against Denny when he was 14. Lykins said she didn’t remember and that Denny had never put his hands on her. Tr. 1348.

In the penalty phase of a capital trial, the prosecutor may only introduce evidence in rebuttal of the mitigating evidence presented by the defendant. *State v. Gumm*, 73 Ohio St. 3d 413, 653 N.E.2d 253, syllabus (1995)(while the state may introduce evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant, rebuttal testimony may not introduce nonstatutory aggravating circumstances); *see also*, *State v. Jalowiec*, 91 Ohio St. 3d 220, 231-33, 744 N.E.2d 163, 176-77 (2001) (rebuttal on prior criminal activities permitted where defendant denied knowledge of any legitimate basis as to why particular drug trafficking charges had been brought against him and where defendant called several witnesses to testify about what a good person he was.)

It is improper for a three judge panel to circumvent this rule by questioning a witness and continuously pressing for and eliciting information that can only be a nonstatutory aggravating circumstance. Obermiller never argued to the court that he had not been involved in violence, did not have a criminal history, or that he was a “good guy” who got along with everyone. Indeed, he never denied that he committed these offenses. Further, the panel’s questions about mental illness reveal a complete misunderstanding of the mitigating value of emotional and psychological disabilities. Gina was Obermiller’s ex-girlfriend; she was not qualified to testify about mental illness.

Because this evidence was elicited by the members of the panel it must be concluded they believed this information was relevant and they considered it in their sentencing decision. This was improper. Evidence that cannot be considered by a jury cannot be considered by a three judge panel either. Any presumption that the panel considered only relevant and admissible evidence is rebutted by the record in this case. *State v. Davis*, 38 Ohio St. 3d 361, 528 N.E.2d 925 (1988) (death sentence reversed and remanded where the three judge panel improperly weighed nonstatutory aggravating circumstances against the mitigating factors.). *See also, State v. Baston*, No. L-95-087, 1997 Ohio App. LEXIS 4070, at \*15 (6th Dist. Sept. 12, 1997) (citing *State v. White*, 15 Ohio St. 2d 146, 151, 239 N.E.2d 65 (1968); also citing *State v. Post*, 32 Ohio St. 3d 380, 384, 513 N.E.2d 754 (1987)). (See Proposition of Law No. 3).

## **VI. Conclusion**

Ohio's statutory scheme for imposition of the death penalty is a response to United States Supreme Court decisions requiring that the death penalty be imposed in a rational, consistent manner. *Eddings v. Oklahoma*, 455 U.S. 104, 111 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). A state that allows the death penalty "has a constitutional obligation to tailor and *apply* its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (emphasis added); *see also, Barclay v. Florida*, 463 U.S. 939, 958-59 (1983) ("Since *Furman v. Georgia*, 408 U.S. 238 (1972), this Court's decisions have made clear that States may impose this ultimate sentence *only if they follow procedures that are designed to assure reliability in sentencing determinations.*" (Stevens, J., concurring) (citation omitted in original, emphasis added)).

To that end, discretion in sentencing by a jury or three judge panel is channeled so as to limit the possibility that a death sentence will be imposed without thorough, proper

consideration. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). In Ohio, that consideration is defined as a weighing of the aggravating circumstances present against the mitigating factors with a requirement that the jury or panel find, beyond a reasonable doubt, that the statutory aggravating circumstance outweighs all of the mitigating factors. O.R.C. § 2929.03. In this case, the panel allowed improper considerations to tilt the balance in favor of death. The death sentences must be vacated.

### PROPOSITION OF LAW NO. 3

The defendant's rights to a fair trial, due process and freedom from cruel and unusual punishment are violated when the trial court elicits and allows the pervasive introduction of evidence which is irrelevant, inadmissible and unfairly prejudicial. U.S. Const. amends. IV, V, VI, VIII and Ohio Const. art. I, §§ 2, 5, 9, 16. Ohio R. Evid. 401, 403, 404. O.R.C. §§ 2945.03, 2945.06.

Denny Obermiller's capital trial was fundamentally unfair as a result of the trial court's failure to control the presentation of evidence. The court elicited and allowed the pervasive introduction of evidence that was irrelevant, inadmissible and unfairly prejudicial to Obermiller. This evidence was constitutionally deficient and contrary to the rules of evidence and Ohio Revised Code.

#### **I. The court's statements on relevant evidence.**

The court's own statements reveal that they relied heavily on a presumption that they only consider relevant evidence. At trial, the State attempted to introduce the testimony of BCI computer forensic specialist Natasha Branam regarding several Facebook images from a computer found in the victims' house. Tr. 516. This was one of the rare situations where Obermiller gave permission to his attorneys to make an objection. Tr. 518. Here is the relevant part of the evidentiary discussion:

JUDGE McGINTY: Well, let's examine it. There's not a jury here. We're the fact finder on this issue and we'll sort it out at the end if it's *relevant or not relevant* and we'll discard it if it isn't.

MR. SPELLACY: But it's prejudicial.

MR. McDONNELL: Why can you do that and you don't let jurors do that?

JUDGE SUTULA: Because we're smarter.

JUDGE McGINTY: Because we can be the judge of the law and the facts at the same time.

JUDGE SAFFOLD: There's a presumption that we consider only those things that are *relevant*.

Tr. 522-23 (emphasis added).

Later, Judge McGinty reaffirmed this attitude, stating: "I don't think we're limited to the -- we'll decide later what's relevant and what isn't. We can separate the wheat from the chaff at the correct point." Tr. 582. Judge McGinty also referenced relevant evidence later in the trial, saying, "[l]et's see what's relevant and we'll disregard what isn't relevant, and consider what is." Tr. 1282. Judge Saffold repeated the presumption as well. Tr. 878. But the court never said when that "correct point" would be. Nor did the court ever state what was relevant but inadmissible. Since the court elicited much of the inadmissible or unfairly prejudicial evidence, it should be assumed the court considered it in their guilt and sentencing determinations.

This talk about "relevant" evidence misses the point. Trial evidence must not only be relevant, but it must be otherwise admissible and properly presented under the constitution, rules of evidence, and Ohio Revised Code. But much of the inadmissible and unfairly prejudicial evidence (discussed below) was elicited *by the court*. Therefore, it should be reasonably assumed the court believed it was admissible and considered it for some purpose. Obermiller was prejudiced by the admission of this evidence, and the prejudicial impact spilled over into the sentencing determination.

## **II. Legal foundation.**

### **A. Not all relevant evidence is admissible.**

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

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

The Eighth Amendment's protects against unreliable sentencing determinations. "The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-999 (1983). The Eighth Amendment's protections are applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962).

Assume, *arguendo*, that the trial court correctly admitted and considered only relevant evidence, as it repeatedly suggested. The court would still be in error for admitting relevant but *inadmissible* evidence. Whether it is a coerced confession, the fruits of an illegal search, or unfairly prejudicial evidence, the exclusion of relevant but constitutionally deficient evidence is firmly grounded in criminal procedure jurisprudence.

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

Evidence Rule 403(A) provides that evidence is not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evidence Rule 403(B) provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or

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

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

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

**B. The trial court had a duty to exclude inadmissible evidence.**

O.R.C. § 2945.03 outlines the evidentiary duties for Ohio judges. The statute is as follows:

The judge of the trial court *shall control* all proceedings during a criminal trial, and *shall limit* the introduction of evidence and the argument of counsel to relevant and material matters with a view to expeditious and effective ascertainment of the truth regarding the matters in issue.

O.R.C. § 2945.03 (emphasis added).

This statute reflects the judge's mandatory duties as gatekeepers of the trial evidence.

The procedure for trial by the court is outlined in section 2945.06. That section begins as follows:

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner *as if the cause were being tried before a jury....*

O.R.C. § 2945.06 (emphasis added).

Thus, in a three-judge panel trial, the court must proceed as if the case were being tried before a jury. Evidence that would have rightfully been excluded in a jury trial should not have been considered by the panel.

### **III. Argument.**

Assuming, *arguendo*, that the court only considered relevant evidence in Obermiller's case, that evidence must still be properly presented and competent. The court erred by eliciting and allowing inadmissible and unfairly prejudicial evidence, contrary to constitutional law, the rules of evidence, and O.R.C. §§ 2945.03 and 2945.06.

After ceding the power to put on a defense to their client, Obermiller's attorneys objected only when Obermiller gave them permission and rarely confronted the evidence against him. *See* Proposition of Law 4. This led to a judicial free-for-all where the three-judge panel peppered witnesses on irrelevant, inadmissible and unfairly prejudicial issues.

#### **A. The record rebuts the court's presumption.**

"As there is no conflict in the procedural requirements of Crim.R. 11 and O.R.C. § 2945.06, we hold that when a defendant pleads guilty to aggravated murder in a capital case, a three-judge panel is required to examine witnesses and to hear any other *evidence properly presented* by the prosecution in order to make a Crim.R. 11 determination as to the guilt of the

defendant.” *State v. Kelley*, No. 87324, 2006 Ohio 5432, 2006 Ohio App. LEXIS 5426 (8th Dist. Oct. 19, 2006) \*P20 (emphasis added) (citing *State v. Green*, 81 Ohio St. 3d 100, 104-05, 689 N.E.2d 556 (1998)).

“A trial before a three-judge panel, like any bench trial in a criminal case, gives rise to a presumption that the court considered only relevant, material and competent evidence in reaching its judgment. This presumption is rebuttable and obtains no force when the record affirmatively reveals the contrary.” *State v. Baston*, No. L-95-087, 1997 Ohio App. LEXIS 4070, \*15 (6th Dist. Sept. 12, 1997) (citing *State v. White*, 15 Ohio St. 2d 146, 151, 239 N.E.2d 65 (1968); also citing *State v. Post*, 32 Ohio St. 3d 380, 384, 513 N.E.2d 754 (1987)).

The court relied on the presumption that, as judges, they considered only relevant evidence numerous occasions at trial. Tr. 523, 582, 878, 1282. Assuming, *arguendo*, that the court considered only relevant evidence, the evidence must still be “properly presented” or “relevant, material and competent,” which it was not.

**B. The court’s evidentiary rulings were contrary to statute.**

The court did not follow the mandatory language of O.R.C. § 2945.06 requiring bench trials to proceed as if it were being tried before a jury. Instead, the court treated Obermiller’s trial like an evidentiary free-for-all and leaned heavily on the presumption that judges only consider relevant evidence. When the record is reviewed, that presumption falls apart, and the court’s error in allowing inadmissible and unfairly prejudicial evidence prejudiced Obermiller at trial and sentencing.

Contrary to the statutory language, the court expressly stated that they considered themselves to be “smarter” than jurors and did not need to treat the trial “as if it were being tried

before a jury.” O.R.C. § 2945.06. The following discussion reveals the court’s attitude in Obermiller’s trial:

JUDGE McGINTY: Well, let’s examine it. There’s not a jury here. We’re the fact finder on this issue and we’ll sort it out at the end if it’s relevant or not relevant and we’ll discard it if it isn’t.

MR. SPELLACY: But it’s prejudicial.

MR. McDONNELL: Why can you do that and you don’t let jurors do that?

JUDGE SUTULA: Because we’re smarter.

JUDGE McGINTY: Because we can be the judge of the law and the facts at the same time.

JUDGE SAFFOLD: There’s a presumption that we consider only those things that are relevant.

Tr. 522-23.

Thus the court expressly stated that they were treating the trial differently than they would if it were in front of a jury, in violation of O.R.C. § 2945.06. This was also revealed when defense counsel noted his concern that the court admitted evidence of the repeat violent offender specification instead of bifurcating the analysis as they would in a jury trial. Tr. 875. The relevant exchange is as follows:

MR. McDONNELL: I believe it should have been bifurcated, and I’ll stand on what I said.

JUDGE McGINTY: Well, with the jury that would be a good tactic, but why with three judges?

MR. McDONNELL: Same point. Obviously you haven’t made your mind up yet. This introduction now may change your mind.

Tr. 877-78.

This shows the court considered Obermiller’s trial to be procedurally different than “if it had been tried before a jury.” O.R.C. § 2945.06. This was contrary to the statutory language and

defense counsel had valid concerns about the effect it might have on the court. The court's evidentiary rulings and direct evocation of inadmissible and prejudicial evidence were also contrary to O.R.C. § 2945.03. That statute states:

The judge of the trial court *shall control* all proceedings during a criminal trial, and *shall limit* the introduction of evidence and the argument of counsel to relevant and material matters with a view to expeditious and effective ascertainment of the truth regarding the matters in issue.

O.R.C. § 2945.03 (emphasis added).

The court did not follow the statute's mandates. Instead of limiting the introduction of evidence, the court directly introduced irrelevant and unfairly prejudicial evidence by asking irrelevant and improper questions.

**C. The court elicited inadmissible and prejudicial evidence.**

The court elicited an exhaustive amount of irrelevant and unfairly prejudicial evidence during the testimony of Obermiller's former girlfriend Gina Mikluscak. *See* Proposition of Law No. 2. Obermiller allowed his counsel to object to the irrelevant and prejudicial line of questioning by the court. Counsel stated that "the purpose here is for the judges to conduct an examination to determine whether or not the aggravating circumstances have been proven. I think this is way outside the scope of the examination." Tr. 576-77.

Counsel's concerns were initially heeded, as the court sustained the objection, only to automatically reverse its own ruling and "open up" the questioning. Tr. 577. Gina was later recalled and her questioning became a judicial free-for-all. Tr. 1122. For example, *the court* questioned Gina about fights she had with Obermiller. Tr. 1155-63, 1222-25. The court's questioning was extensive and is explored more fully in Proposition in Law No. 2.

The court also questioned Gina about Obermiller's drug use and weight-lifting habits. Tr. 1178-86, 1225-29. The panel went on to ask Gina numerous questions about Obermiller's mental

state and health, even though she was not a mental health expert and was not qualified to comment on the information being sought. Tr. 1241-46. The court continued with questions about mental illness and manic behavior. The court also asked Gina if she thought Obermiller knew the difference between right and wrong. Tr. 1241-46. The court asked her if she knew why Obermiller had raped and killed his grandmother, and if she thought that was “abnormal?” The court also asked her if Obermiller had ever expressed his anger sexually to her. Tr. 1247-51.

Since Obermiller had already pled guilty, these questions would have been irrelevant to the determination of guilt (and irrelevant in general), and therefore, they could have only have been improperly considered as non-statutory aggravating factors. Obermiller was prejudiced by the evidence the court elicited when he received his death sentence.

**D. The State improperly introduced prejudicial evidence of a juvenile offense.**

The State improperly introduced irrelevant and prejudicial evidence of a juvenile domestic violence offense during the testimony of Stacy Lykins (Muzic), Obermiller’s former step-mother. Tr. 1348. This evidence was not previously admitted nor did Obermiller stipulate to its admission. Also, the evidence concerned a juvenile offense from when Obermiller was 14 years old in 1996. Tr. 1348. The offense was nearly fifteen years past by the time of trial and was irrelevant to the proceedings. The probative value of the testimony, if any, far outweighed the prejudice to Obermiller. This evidence was particularly prejudicial because it involved a violent act against another of Obermiller’s caregivers. The prejudicial impact was further exacerbated by the testimony of Gina Mikluscak cited above. Together, this irrelevant and unfairly prejudicial evidence would have made Obermiller appear to be highly violent and increase the likelihood that the court would favor the death penalty.

Obermiller did not open the door to this questioning. Ms. Lykins was called by the court, and her testimony that Obermiller was never in trouble when he lived with her was in response to the panel's questioning, not Obermiller's. Tr. 1331-33. The evidence was inadmissible and should not have been allowed by the court.

**E. The court permitted an overwhelming number of prejudicial photos.**

During the trial phase, the State a total of 131 photos of Candace's and Donald's bodies: 18 photos of Candace's body at the scene, 14 photos of Donald's body at the scene, 60 photos of Candace's body during the autopsy, and 39 photos of Donald's body at the autopsy. See Proposition of Law No. 7. These included graphic photographs of Donald's and Candace's bodies at the crime scene as well as photos of blood at the scene.

Even though the evidence in this case was heard by a three-judge panel and not a jury, the cumulative use of these graphic photographs still would have had a strong emotional impact on the fact-finders and violated Evid. R. 403. The unfair prejudice far outweighed any minimal probative value that the photographs may have had. Accordingly, the trial court should have limited the use of the photos.

**F. The court commented on Obermiller's invocation of his constitutional right.**

The court's comments invoking Obermiller's constitutional right to remain silent were so over-the-line that *the State* objected to them. During the State's case, the court questioned Maple Heights Detective Allen Henderson about transporting Obermiller from Licking County to Cuyahoga County. Tr. 1011-12. As Det. Henderson began to describe what he told Obermiller, the State objected.

Likely surprised, the court asked, "Who said that?" Tr. 1012.

The exchange continued as follows:

MR. AWADALLAH: I did. I want to make sure we're not getting into any issues about his right to silence or anything like that. *There's a reason we didn't go down that road.*

JUDGE SAFFOLD: What reason?

MR. AWADALLAH: I don't want to comment on Mr. Obermiller exercising his right to silence after being given Miranda.

Tr. 1012.

Undeterred by the State's concerns, the court overruled the objection and continued:

JUDGE SUTULA: Did you have an opportunity to question him?

THE WITNESS: No, your honor....Once we got in the car, I issued Miranda and after that he told me pretty much that he didn't have anything on his mind to talk about and chose not to speak to me and he stayed quiet the rest of the time.

JUDGE SUTULA: So there was never any further statement other than the statement made to the arresting officers?

THE WITNESS: Yeah....

JUDGE SUTULA: I just wanted to know if there was any statement we hadn't heard about.

Tr. 1012-13.

**G. The court expressed concern about the unchallenged hearsay.**

So much hearsay was unchallenged by defense counsel that the court expressed their concern about it. When the State concluded its questioning of Denny Lykins, Obermiller's father, Judge Sutula asked, "Mr. McDonnell, there was some substantial testimony here as to hearsay conversations with the father of the defendant. Was it the trial strategy of the defendant not to object to any such hearsay?" Tr. 675.

Defense counsel agreed, saying:

You have to inquire as to [Obermiller], Judge. I have been instructed not to do that. There's certainly been hearsay throughout the whole - - everything. There's

been testimony about people's convictions from 20 years ago, but I have been told not to object. So it's not my strategy, if that's your question.

Tr. 675.

Having acknowledged their concern about pervasive and unchallenged hearsay, the court should have limited it, particularly in light of the on defense counsel's abdication of their duties as well as the mandatory limitations of O.R.C. § 2945.03.

**H. The court may have considered withdrawn evidence.**

At trial, the State attempted to introduce the testimony of BCI computer forensic specialist Natasha Branam regarding several Facebook images found on a computer in the victims' house. Tr. 516. Defense counsel objected. *Id.* The State indicated that she would testify that Obermiller had accessed pornographic websites. Tr. 518-19. The State ultimately withdrew the witness. Tr. 537.

However, when the court called its own witnesses, Branam was brought back. Tr. 1284. Before Branam took the stand, the following exchange took place:

JUDGE SAFFOLD: Well, he got one picture on the exhibit that's nude.

JUDGE MCGINTY: Well, that was with the computer witness and the evidence was withdrawn.

JUDGE SAFFOLD: Oh, it was? Was that evidence withdrawn?

MR. AWADALLAH: Yes, Your Honor. Those were Facebook pictures that were on back in May.

Tr. 1027. At least one of the panel members seemed to have been considering the prosecutor's remarks as though they were evidence.

When Branam took the stand, defense counsel placed an objection on the record as to all questions asked of the witness. Tr. 1284 During her testimony, the court and the prosecutor discussed what Branam had found on the computer. The prosecutor began talking about the

Facebook account, but defense again objected. Tr. 1297. The prosecutor indicated that the information “may be relevant to the way that perhaps Grandma Schneider died or in terms of being tied up and all of that, of a sexual nature.” Tr. 1297-98.

While ultimately the witness did not testify about these matters, the State had again successfully placed prejudicial innuendo about the sexual, and perhaps violent, nature of what was found on the computer. Given that the court had already demonstrated an inability to put aside what the prosecutor had told them about what was found on the computer, it is reasonable to conclude that this statement also played into the court’s considerations and prejudiced Obermiller.

#### **IV. Conclusion.**

While a three judge panel does enjoy a the presumption that, as judges, they consider only relevant, admissible evidence. That presumption is rebutted in this case by the pervasive inadmissible and prejudicial evidence in the record, most of which was elicited by the court. Even if some of the evidence was relevant to the case, relevant but otherwise inadmissible evidence must still be excluded. The court also erred by acting contrary to the rules of evidence and the statutory language of O.R.C. § 2945.03 and § 2945.06.

By eliciting most of this evidence, it should reasonably be assumed the court thought the evidence was admissible. It should also be assumed that the court had a purpose for admitting the evidence and considered it during the guilt and sentencing decisions. The court did not state this purpose explicitly, nor did they provide any detail of what, if anything, they considered to be inadmissible or prejudicial. Since Obermiller had already pled guilty, this evidence would have gone to the penalty determination and made Obermiller appear to be less sympathetic.

Obermiller was prejudiced when the court considered inadmissible and prejudicial evidence which made the court more likely to impose the death sentence.

The cumulative effect of the pervasive inadmissible evidence deprived Obermiller of his right to a fair trial, due process, and a reliable sentencing determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Obermiller's convictions therefore must be overturned, or at a minimum, his death sentence vacated.

## PROPOSITION OF LAW NO. 4

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

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

### I. Standards for ineffective counsel claim.

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

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

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

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

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

## **II. Background.**

At the time that Obermiller waived jury and changed his plea to guilty, he also informed the court that he wished to represent himself. Tr. 218. The trial court, prior to the panel being convened, denied that request. Tr. 222; *see also* Proposition of Law No. 1. After the panel was convened, it returned to the issue of self-representation. Tr. 250. After more than thirty minutes of grilling Obermiller about his ability to represent himself, Obermiller finally gave up, telling the court his attorneys could stay on but that “they can only do what I tell them to do.” Tr. 284. Throughout the trial and mitigation phases of Obermiller’s trial, his counsel informed the court that their client did not want them to object, cross-examine witnesses, or present any evidence. Trial counsel did as Obermiller wished, only objecting on a handful of occasions when Obermiller gave his consent for them to do so.

### III. Argument.

While it is true that attorneys have a “duty to consult with the client regarding ‘important decisions,’ including questions of overarching defense strategy,” counsel is not required to “obtain the defendant’s consent to ‘every tactical decision.’” *Florida v. Nixon*, 543 U.S. 175, 187 (2004). It is counsel who has the last say in how the defense engages in the trial. *Taylor v. Illinois*, 484 U.S. 400, 418 (1988). The decisions left to the province of the defendant include the choice to waive counsel, to plead guilty or not guilty, to waive jury, to testify, to present mitigation, and to appeal. *State v. Pasqualone*, 121 Ohio St. 3d 186, 192, 903 N.E.2d 270, 276 (2009) citing *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938) and *Nixon*, 543 U.S. at 187; *State v. Ashworth*, 85 Ohio St. 3d 56, 63, 706 N.E.2d 1231, 1237-38 (1999). If counsel needed the client’s approval for every tactical decision, “[t]he adversary process could not function properly . . . .” *Nixon*, 543 U.S. at 187.

This Court too has recognized that it is counsel who has the authority to decide what arguments will be pursued, what evidentiary objections will be raised, and what agreements will be entered into regarding the admission of evidence. *Pasqualone*, 121 Ohio St. 3d at 192, 903 N.E.2d 275-76.

Thus any deficient performance on the part of trial counsel is not cured by the fact that Obermiller did not want counsel to object, cross-examine, or perform any of the duties that they should have performed during the course of the trial and mitigation phase. The deficiencies were many:

#### A. Failure to object to prosecutorial misconduct.

The State elicited improper victim impact evidence and juxtaposed Obermiller against both his victims and his cousin. See Proposition of Law No. 6. Throughout Obermiller’s cousin,

Candace Flagg's, testimony, the prosecutor asked questions designed to elicit information about the how loving and nurturing Obermiller's grandmother was to him. This included testimony about Candace Schneider putting herself in debt to send care packages to Obermiller while he was incarcerated (tr. 425), allowing Obermiller to live with her after his release despite her husband's reservations (tr. 425-26), and taking him shopping for new clothes upon his release (tr. 424). The implication was clear, that Obermiller had brutally murdered the woman who had put herself out to care for him. Yet, there was no objection from defense counsel.

The State also juxtaposed Obermiller against his cousin, Candace Flagg, by asking her about her past including the fact that she had graduated eleventh in her class with a 4.0 G.P.A. despite being in foster care. Tr. 428. In closing arguments, the prosecutor then referred to Ms. Flagg as "one of the grandchildren who miss Schneider would be proud to say is one of [her] grandchildren." Tr. 1103. Still, no objections from the defense.

**B. Failure to object to the improper and excessive use of graphic photos.**

Trial counsel failed to object to the State's introduction of 131 gruesome photographs of Candace's and Donald's bodies both as they were found in the house and also from their autopsies. *See* Proposition of Law No. 7. Despite this case being heard by a three-judge panel, the use of so many graphic photographs would still have had an emotional impact on the finders of fact—a prejudicial effect that would have far outweighed any minimal probative value that the photographs may have had. In fact, the probative value of the pictures was especially low given that the causes of death were not disputed and defense counsel had even stipulated to the findings of the coroner's office. Tr. 727-32, 767. The photographs were cumulative, adding to their prejudicial impact, and many were simply not relevant as to the deaths—such as the photographs of Candace Schneider's exposed brain and open chest cavity.

**C. Failure to file a meaningful motion to suppress Obermiller's statements.**

Trial counsel filed a motion to suppress statements made by Obermiller at the time of his arrest in Licking County. 10/19/2010 Motion to Suppress (A-23); *see also* Proposition of Law No. 8. The statements were made as Obermiller was being arrested. Tr. 105-06. He was not Mirandized. Tr. 75, 93, 114, 115. It was undisputed that Obermiller was not Mirandized at the time of his arrest. *Id.* Thus, the issue was whether the statements were in response to custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

The motion to suppress filed by trial counsel does not address the issue of custodial interrogation at all. 10/19/2010 Motion to Suppress. The motion gives a one-paragraph description of the circumstances surrounding the statements being made, although it does not even recount what the statements were or what the officers said to elicit those statements. *Id.* The motion instead addresses the law regarding waiver of Miranda rights—something that was not at issue in this case because no Miranda warnings were given. *Id.*

The motion utterly failed to address the issue involved in this case. Had counsel appropriately argued Obermiller's case for suppression, the trial court's ruling would have been different.

**D. Failure to cross-examine witnesses.**

Trial counsel failed to cross-examine any witnesses. At the end of most of the witnesses' testimony, counsel told the trial court that Obermiller did not want them to ask any questions. Tr. 450 (Candace Flagg); 462 (Michael Gazer); 469 (Brian Kevern); 478 (Kevin Pozek); 510 (Daniel Winterich); 581 (Gina Mikluscak); 627 (Denny Lykins); 721 (Jason Bartel); 744 (Jimmie Smith, M.D.); 782 (Joseph Felo, D.O.); 814 (Lisa Przepyszny); 840 (Chad Dennis); 864 (Chris

Slayman); 873 (Fred Harvey); 900 (Lisa Moore); 909 (Nasir Butts); 979 (Allen Henderson). After each of the other witnesses testified, trial counsel simply indicated that they had no questions. Tr. 635 (Vern Jordi); 641, 646 (Stephen Samuel); 675, 683 (Michael Rimar); 1280 (Gina Mikluscak—recalled); 1351 (Stacy Lykins (Muzic)).

**E. Failure to object to inadmissible evidence elicited by the panel members.**

Throughout Obermiller's capital trial, the three-judge panel extensively questioned witnesses and even called witnesses on their own at the close of the State's case. During its questioning, the court elicited inadmissible and prejudicial evidence. (*See* Proposition of Law No. 3.) Trial counsel failed to object to this evidence, yet it was so egregious that at one point even the prosecutor objected. Tr. 1102.

Through Gina Mikluscak, the trial court elicited inadmissible other acts evidence. The trial court questioned Mikluscak about a domestic violence incident between her and Obermiller in which Obermiller had beaten her (tr. 1555-57, 1162-63) and also questioned her about Obermiller's drug use (tr. 1178-80).

The trial court elicited other irrelevant and unfairly prejudicial evidence through the testimony of Mikluscak. *See* Propositions of Law Nos. 2 and 3. The panel asked Mikluscak numerous questions about Obermiller's mental state and health, even though she was not a mental health expert and was not qualified to comment on the information being sought. Tr. 1241-46. The court continued with questions about mental illness and manic behavior. The court also asked Gina if she thought Obermiller knew the difference between right and wrong. Tr. 1241-46. The court asked her if she knew why Obermiller had raped and killed his grandmother, and if she thought that was "abnormal?" The court also asked her if Obermiller had ever expressed his anger sexually to her. Tr. 1247-51.

**F. The trial court improperly commented on Obermiller's invocation of his right to silence.**

The trial court improperly brought out Obermiller's invocation of his right to silence. The court asked Detective Allen Henderson, the Maple Heights officer who transported Obermiller from Licking County, if he had had a chance to question Obermiller and if Obermiller talked to him. Tr. 1011. When Det. Henderson began to describe what Obermiller said to him, the prosecutor objected, saying that he did not want any comments made about Obermiller's decision to exercise his right to silence. Tr. 1012. The panel, however, was undeterred—overruling the objection and continuing with the questioning. Tr. 1012-13. Yet counsel did not object.

**G. Failure to object to inadmissible evidence elicited by the State.**

The State improperly introduced irrelevant and prejudicial evidence of a juvenile domestic violence offense through Stacy Lykins (Muzic). Tr. 1348; *see* Proposition of Law No. 3. The offences occurred in 1996 when Obermiller was 14 years old. *Id.* It was irrelevant to the issues in Obermiller's trial. And Obermiller did nothing to open the door to this testimony. *See* Proposition of Law No. 3.

Trial counsel failed to object to hearsay. *See* Proposition of Law No. 3. Both Obermiller and his father did construction work through Rimar's construction company. Tr. 650-51. During Rimar's testimony, there was a considerable amount of hearsay, specifically Rimar testified about things Obermiller's father had told him. Tr. 662-63. The trial court pointed out to defense counsel that there had been a significant amount of hearsay in Rimar's testimony and asked if it was their trial strategy to not object. Tr. 675. Counsel indicated that he could not answer that question, that the court would have to ask Obermiller because Obermiller had instructed them not to object. *Id.*

**H. Failure to present arguments in trial and sentencing phases.**

Trial counsel failed to present opening or closing arguments in both the trial and sentencing phases. Obermiller's attorneys thus left the State's interpretation of the evidence unchallenged to Obermiller's prejudice.

**I. Failure to brief mitigating factors for the trial court.**

Although Obermiller had waived the presentation of mitigating evidence, the trial court afforded defense counsel the opportunity to present mitigation evidence via a brief or to summarize evidence that had already been presented that could be considered mitigating. Tr. 1455. Defense counsel declined to do so and indicated that they had discussed the matter with Obermiller. *Id.* While Obermiller had the authority to waive a formal presentation of mitigation evidence, counsel could have and should have taken the opportunity to at least highlight the evidence that had already been presented. *Ashworth*, 85 Ohio St. 3d at 63, 706 N.E.2d at 1237-38; *see* Proposition of Law No. 2.

**IV. Conclusion.**

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

## PROPOSITION OF LAW NO. 5

The sentence of death imposed on Obermiller was unreliable and inappropriate. U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, §§ 9 and 16 and O.R.C. § 2929.05.

### I. Introduction

For purposes of sentencing in this case the State moved to merge the specifications for aggravated burglary, kidnapping, aggravated robbery, and murder to escape into the retaliation for testimony specification for Donald Schneider Tr. 1434-35. After merger this left two aggravating circumstances, course of conduct and retaliation for testimony. For Candace Schneider, the State moved to merge the aggravated burglary, kidnapping, aggravated robbery and murder to escape into the retaliation for testimony specification, leaving course of conduct, retaliation for testimony, and rape specifications. Tr. 1435. The State also elected to merge the multiple aggravated murder counts for Donald and Candace into the one count of aggravated murder with prior calculation and design for each victim. Tr. 1473. Sentencing then proceeded on Counts 1 and 4, with the attached merged specifications. Tr. 1474. Obermiller was sentenced to death for each victim.

Ohio Revised Code § 2929.05(A) requires this Court to determine the appropriateness of the death penalty in each capital case it reviews. The statute directs the appellate courts to “affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.” *Id.* The statute requires this Court to make an independent review of the record and decide for itself, without any deference given to the determinations below, whether it believes that this defendant should be sentenced to death. *State v. Jenkins*, 15 Ohio St. 3d 164, 473 N.E.2d 264

(1984); *State v. Maurer*, 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984). The record in this case merits the independent conclusion by this Court that the death sentences are not appropriate for Obermiller.

## **II. Mitigation Evidence**

This Court has frequently described a mitigating factor as one that “lessens the moral culpability of the offender or diminishes the appropriateness of death as the penalty.” *State v. DePew*, 38 Ohio St. 3d 275, 292, 528 N.E.2d 542, 560 (1988), quoting *State v. Steffen*, 31 Ohio St. 3d 111, 129, 509 N.E.2d 383, 399 (1987). Although this was a shocking and tragic crime there are factors that mitigate against the death sentences imposed in this case.

### **A. Obermiller’s history and background is mitigating**

The United States Supreme Court has long held that a troubled history is relevant to assessing a defendant’s moral culpability. *Wiggins v. Smith*, 539 U.S. 510, 535 (2003), citing *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) *rev’d on other grounds Penry v. Johnson*, 532 U.S. 782 (2001) (evidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background...may be less culpable than defendants who have no such excuse.”); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (noting that consideration of the offender’s life history is a “part of the process of inflicting the penalty of death.”). This Court has considered a poor family environment as a mitigating factor. *State v. McGuire*, 80 Ohio St. 3d 390, 686 N.E.2d 1112 (1997); *State v. Dennis*, 79 Ohio St. 3d 421, 683 N.E.2d 1096 (1997).

Prior to the sentencing phase of these proceedings, the Court Psychiatric Clinic conducted a competency evaluation pursuant to Obermiller’s statements that he wanted to waive the presentation of mitigating evidence. Court’s Ex. 10. (A-13). The mitigation competency

report as well as facts that were presented through the trial phase provide compelling evidence to call for a sentence less than death in this case. Obermiller lost his mother at a very early age, when he was only 2 years old. His mother died under violent circumstances—shot by the abusive boyfriend of a friend. Tr. 603, Ct. Ex. 10. Obermiller's home life became transitory. At the time his mother was shot his father served five or six years in the Ohio State Reformatory for burglary. Tr. 622. He lived with his maternal grandmother and maternal step-grandfather, Candace and Donald Schneider, from age 2 through 14. Then he lived with his father for six months and his aunt for nine months. His father admitted that he failed Denny, "I wasn't in shape to take care of him after his mom passed and I was kind of young..." Tr. 590. Ct. Ex. 10. Neither his father nor his former step-mother could remember why Obermiller was placed in juvenile detention. Tr. 604-06, 1306-07.

Obermiller was placed in an Ohio Department of Youth Services correctional facility for three and one-half years from age 15 through 18; he was incarcerated in prison from ages 18 through 27. The lack of early home structure, consistent love, and guidance is evidenced by Obermiller's description of his childhood as "spoiled, did whatever I felt like doing...I got into a lot of trouble with the law when I was younger." Ct. Ex. p. 2. Poor school attendance led to failure of 8<sup>th</sup> or 9<sup>th</sup> grade. He said no one knows where his younger brother is living. *Id.* The only counseling that Obermiller received was for a few months when he was 5 or 6 years old. *Id.*, p. 4.

When asked about childhood physical and sexual abuse, Obermiller did not deny it, instead he replied, "I don't want to answer that." *Id.*, p. 2. Obermiller's former stepmother Stacy Lykins (Muzic) testified that Donald Schneider hit Obermiller on the head with a phone when Obermiller was three years old. Obermiller told Ms. Lykins throughout his life that

Donald had locked him in the attic, beaten him, made him urinate in cans, and forced him to go without food for as long as two days. Much of this happened when Obermiller was around 12 or 13. Although his brother and he told his grandmother Candace about the abuse, she did not believe them. Tr. 1321-24.

Undoubtedly as a result of the turmoil of his childhood, Obermiller had a history of fighting and angry behavior. He was in special education classes for "behavioral issues" and was suspended from school "over a dozen times...mostly for fighting." Ct. Ex. 10, p. 2. Eventually, Obermiller was arrested numerous times as a juvenile. Along with the behavioral problems, his history reveals early substance use including marijuana, alcohol, heroin, cocaine, LSD and "whippets" (inhaled nitrous oxide cartridges). He first used marijuana and alcohol when he was 12 or 13 years old. Obermiller's family history also includes marijuana use. His medical history includes at least five instances of losing consciousness. Ct. Ex. 10, pp. 3-4. Obermiller was married to a guard at Mohican Juvenile Correctional Facility from March 2001 until 2002 when she committed suicide. *Id.*, p. 3. Obermiller's history reveals many difficulties and an apparent lack of any meaningful counseling or intervention.

Obermiller obtained his high school diploma in 2000 from the ODYS Mohican Juvenile Correctional Facility. He also took classes in Business Administration through Ashland University while in prison. *Id.*, p. 2. While incarcerated, Obermiller developed recurring depression. He was prescribed medication, which he took for a few weeks during each episode. He described prison as a "zoo, and you're the animal." *Id.*, p. 8. When he confronted life once more on the "outside" after spending his formative years in prison it was stressful, but he received no mental health services. *Id.*, p. 4. During the evaluation to determine his competency to waive mitigation, Obermiller was diagnosed with Major Depressive Disorder, Recurrent, In

Partial Remission. Symptoms include depressed mood, marked diminished interest in almost all activities, decreased appetite, increased sleep, decreased energy, feelings of worthlessness, and decreased concentration. *Id.*, p. 7. Obermiller is taking Neurontin and Remeron for “anxiety.” *Id.*, p. 3. *State v. Clemons*, 82 Ohio St. 3d 438, 696 N.E.2d 1009 (1998); *State v. Hand*, 107 Ohio St. 3d 378, 840 N.E.2d 151 (2006).

Immediately prior to this offense, Obermiller was employed as a roofer and did not have disciplinary issues at work. He was a reliable worker. *Id.*, p. 3; Tr. 4, 652. *State v. Fox*, 69 Ohio St. 3d 183, 631 N.E.2d 1096 (1994).

**B. Obermiller’s age is mitigating**

The court at the beginning of proceedings acknowledged that Obermiller was a very young person, saying “28 is very young.” Tr. 144. But given that Obermiller had been incarcerated since the age of 15, his emotional and psychological age is undoubtedly much younger.

**C. Other evidence relevant to sentencing**

Finally, this Court must consider any other mitigation evidence that would be relevant to whether Obermiller should be sentenced to death. O.R.C. § 2929.04(B)(7). Obermiller expressed remorse regarding the aggravated murder of Candace Schneider. Ct. Ex. 10, p. 7. *State v. Highbanks*, 99 Ohio St. 3d 365, 792 N.E.2d 1081 (2003). He felt that he had “betrayed” his grandmother, the “only person” who cared for him. Ct. Ex. 10, p. 7. He told his girlfriend Gina that he believed he had broken everyone’s hearts. He was very sorry and felt bad. Tr. 1203-04. He expressed horror over his actions, and feelings of worthlessness. He realized how much his actions had hurt his family. Ct. Ex. 10, p. 5.

Obermiller consistently chose to plead guilty. Ct. Ex. 10, p. 7. He has not denied that he committed these crimes. *State v. Newton*, 108 Ohio St. 3d 13, 840 N.E.2d 593 (2006); *State v. Mink*, 101 Ohio St. 3d 350, 805 N.E.2d 1064 (2004). In fact, he pled guilty to all charges, even in the absence of any plea offer from the State.

### **III. Weighing aggravating circumstances against mitigating factors.**

This Court must independently examine the mitigating factors and decide for itself whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. O.R.C. § 2929.05. This Court must confine its consideration of the arguments in favor of death to proven aggravating circumstances for each count of aggravated murder. Furthermore, when, as in the present case, the defendant is convicted of more than one count of aggravated murder, only the aggravating circumstances related to a given count may be considered in assessing the penalty for that count. *State v. Cooney*, 46 Ohio St. 3d 20, 544 N.E.2d 895, para. 3, syl. (1989). Although the crimes in the present case were horrific, the evidence demonstrates that Obermiller's culpability is reduced by compelling mitigating factors.

### **IV. Conclusion.**

Our law requires "a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). A humane and principled ruling in this case requires vacating Obermiller's death sentence because it is unreliable and inappropriate.

## PROPOSITION OF LAW NO. 6

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

Multiple instances of prosecutor misconduct were committed during Obermiller's capital trial. The cumulative effect of the professional misconduct violated Obermiller's due process rights.

### I. Legal standards for prosecutor misconduct claims.

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

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

## II. Argument.

### A. Victim Impact Evidence

Obermiller's trial was rendered unfair by the prosecutor's use of prejudicial themes to obtain convictions. Victim impact evidence must be excluded from the trial phase because it "serves to inflame the passion of the jury with evidence collateral to the principal issue at bar." *State v. White*, 15 Ohio St. 2d 146, 239 N.E.2d 65, 70 (1968). The prosecutor may only introduce victim impact evidence at the trial phase when it relates to the "facts attendant to the offense." *See State v. Fautenberry*, 72 Ohio St. 3d 435, 650 N.E.2d 878, 883 (1995); *State v. Allard*, 75 Ohio St. 3d 482, 663 N.E.2d 1277, 1292 (1996). The State exacerbated the effects of the victim impact evidence by juxtaposing the victims against Obermiller—painting the victims as kind and giving and Obermiller as taking advantage of that kindness.

Much of the victim-impact evidence was elicited by the State through Candace Flagg. Ms. Flagg is one of Candace's grandchildren. Tr. 408. Ms. Flagg testified that Candace and Donald liked to spend time at their camper in Portage County and that they would go every chance they got. Tr. 421. She also testified that Candace loved Winnie the Pooh. Tr. 429. She said that she and Candace were planning to get tattoos together—Candace was going to get a Winnie the Pooh tattoo. *Id.* According to Ms. Flagg, Candace had Winnie the Pooh stuffed animals, candles, lights, and toys, as well as a Winnie the Pooh mural on her bedroom wall. *Id.* Ms. Flagg further testified about Candace's bumper sticker on her van that said, "Happiness is Being a Grandparent." Tr. 429.

Ms. Flagg testified that while Obermiller was in prison, Candace stayed in contact with him and constantly sent him care packages. Tr. 425. Ms. Flagg also told the panel that Candace was putting herself in debt doing this and that Donald did not like Candace spending so much

money on Obermiller. *Id.* She also said that Candace and Donald picked Obermiller up from prison the day he was released and that Candace was going to take him shopping for clothes. Tr. 424.

Ms. Flagg also testified that she was in foster care for six years and that she graduated eleventh in her high school class with a 4.0 grade point average. Tr. 428.

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

### **B. Improper Innuendo**

The State called Natasha Branam, a BCI computer forensic specialist to testify about what she had found on a computer found in the Schneiders’ home. Tr. 516. After a defense objection, the State indicated that she would testify that Obermiller had accessed pornographic websites. Tr. 516-19. Ultimately, the State withdrew the witness. Tr. 537. However, when the court called its own witnesses, Branam was brought back to court. Tr. 1284.

While Branam was being questioned by the panel members, the prosecutor and court discussed what Branam had found on the computer. The prosecutor began talking about the Obermiller’s Facebook account, but defense again objected. Tr. 1297. The prosecutor then told the court that the information, “may be relevant to the way that perhaps Grandma Schneider died or in terms of being tied up and all that, of a sexual nature.” Tr. 1297-98.

Branam never actually testified about the Facebook account or the pornographic websites. However, the State had successfully placed prejudicial innuendo about the sexual, and perhaps violent, nature of what was found on the computer.

### **III. Prejudice to Obermiller.**

The cumulative effect of the prosecutor's misconduct prejudiced Obermiller's right to a fair trial.

#### **A. Victim Impact Evidence**

The State played on the panel members' emotions by introducing victim impact evidence. The State portrayed Candace as loving and nurturing to Obermiller while painting Obermiller as having taken advantage of her giving nature.

The panel picked up on this theme. When the panel recalled Obermiller's former girlfriend, Gina Mikluscak, to the stand, they asked her who picked up the tab when they all went camping. Tr. 1275. Gina responded that Donald and Candace paid. *Id.* They then asked if Obermiller ever kicked in to "help with the steaks, the food" and asked if Obermiller bought his own beer. Tr. 1276. The panel also noted that it sounded like Candace was very supportive of Obermiller and always looked out for him and nurtured him. Tr. 1276-77. The panel also asked Stacy Lykins (Muzic) (Obermiller's stepmother and Candace's niece) if Candace was a good person. Tr. 1324. Ms. Lykins responded that Candace was a good person who never did anything bad in her life and who would give you the shirt off her back if it would help you. Tr. 1325.

Moreover, the State juxtaposed Ms. Flagg, as a grandchild, against Obermiller, as a grandchild. After eliciting her testimony that she graduated eleventh in her class with a 4.0 while she was in foster care (tr. 428), the State argued in closing that she was "one of the grandchildren who miss Schneider would be proud to say is one of my grandchildren." Tr. 1103.

The panel members were clearly influenced by the State's improper use of victim impact testimony. And that effect would have carried over into the sentencing phase. It would have had a particularly harmful effect there because no mitigating evidence was presented.

**B. Improper Innuendo**

The court was influenced by the State's innuendo regarding the information gleaned from the computer. After the first Branam was called and before the second time, the following exchange took place about this issue:

JUDGE SAFFOLD: Well, he got one picture on the exhibit that's nude.

JUDGE MCGINTY: Well, that was with the computer witness and the evidence was withdrawn.

JUDGE SAFFOLD: Oh, it was? Was that evidence withdrawn?

MR. AWADALLAH: Yes, Your Honor. Those were Facebook pictures that were back in May.

Tr. 1027.

This evidence was highly inflammatory and the prejudicial impact would have also affected the court's sentencing deliberations.

**IV. Conclusion.**

Pervasive and deliberate prosecutor misconduct undermined Obermiller's due process rights. *See Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Obermiller is therefore entitled to a new trial, or alternatively, a new penalty phase under O.R.C. § 2929.06(B).

## PROPOSITION OF LAW NO. 7

The introduction of graphic photographs with no probative value but which are highly prejudicial violates a capital defendant's right to a fair trial, due process, and a reliable determination of guilt as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10, and 16 of the Ohio Constitution.

### **I. Introduction.**

During the trial phase, the State introduced numerous photographs of the bodies of Candace and Donald Schneider. These included graphic photographs of Donald's and Candace's bodies at the crime scene as well as photos of blood at the scene. There were a total of 131 photos of Candace's and Donald's bodies: 18 photos of Candace's body at the scene, 14 photos of Donald's body at the scene, 60 photos of Candace's body during the autopsy, and 39 photos of Donald's body at the autopsy. Even though the evidence in this case was heard by a three-judge panel and not a jury, the extensive use of these graphic photographs still would have had a strong emotional impact on the fact-finders. This prejudice far outweighed any minimal probative value that the photographs may have had. Accordingly, the trial court should have limited the use of the photos.

### **II. Facts.**

The State presented 18 photos of Candace's body as it was found at the house. (State's Exs. D105, D107, D108, D116-120, D123, D124, D126-128, D130-132, D135, D136.) Not only were the photos extremely graphic, but many of them were repetitive. D107 and D108 are almost the exact picture except that D108 is very slightly closer up. The same is true of D116 and D117, D120 and D123, D126 and D127, D128 and D130, and D135 and D136. These photos show Candace's mostly naked body handcuffed, bloody, bloated, and in a state of

decomposition. Moreover, fecal matter can be seen in the some of the photos and condoms and condom wrappers are also seen in several of them.

The State used 14 photos of Donald's body as it was found at the house. (State's Exs. D138, D141-146, D150-156.) Like the photos of Candace's body, these too are repetitive. D144 and D146 are basically the same except that D144 is closer up. D150, D151, and D152 are the same except that they are progressively closer up. And D156 is a slightly closer up version of D155. As with the photos of Candace, the photos of Donald are extremely graphic—showing him bloodied and decomposing with a sheet still tied around his neck and a wound to his face. His bed is stained with blood, and his underwear are stained with fecal matter.

There are another 11 photos of various blood stains. (State's Exs. D159-163, D173-176, D181). Again these are duplicative. (*See e.g.*, State's Exs. D159 and D160; D173-D176 and D181.)

The photos only get more graphic. There are sixty photos of Candace's body at the coroner's office. Eleven of those photos are full body shots taken prior to the autopsy and show basically the same things as the photos of the body at the scene. (State's Exs. A4-10, A24-27.) Sixteen of the photos are close-up shots of Candace's hands and wrists. (State's Exs. A11-18, A23, A41-47.) There are three photos showing the back of Candace's head with an electrical cord around her neck. (State's Exs. A20-22.) Six of the photos show Candace's face and/or forehead. (State's Exs. A19, A28-33.) Of these, three of them are almost identical photos of Candace's face. (State's Exs. A19, A28, A32.) And four are very similar photos of the wounds on her forehead. (State's Exs. A29-31, A33.) There are seven photos of Candace's neck. (State's Exs. A34-40.) Two of the photos are close-ups of Candace's genitals. (State's Exs. A50, A51.) There are four photos of Candace's skull with the scalp pulled back. (State's Exs.

A54-57.) And there are another four photos of Candace's brain after the medical examiner cut her skull open. (State's Exs. A58-61.) There are also two photos of the open chest cavity. (State's Exs. A62, A63.)

On direct, Jimmie Smith, who performed the autopsy on Candace, did not testify about any of the above-mentioned pictures. The prosecutor merely asked him if those exhibits were "fair and accurate photographs of the autopsy." Tr. 742. Smith testified that the cause of death was asphyxia by cervical compression and that there were no other injuries that could have caused her death. *Id.* The panel members questioned Dr. Smith about some of the other injuries. He indicated that there was a bruise on the back of Candace's left hand, a bruise on the inside of the left knee, a hemorrhage in the deep scalp tissue, and an abrasion on her forehead. Tr. 750-53. There was nothing in his testimony about anything in her chest cavity or her brain. Moreover, the defense stipulated as to Dr. Smith's report. Tr. 727-32.

There are 14 photos of Donald taken during the autopsy. Eight of these are full body shots that show essentially how he was found at the crime scene. (State's Exs. B4-B12.) There are another six full-body shots taken after Donald's clothing was removed. (State's Exs. B13-16, B18, B19.) Ten of the photos are close-ups of wounds found on Donald—many of which are repetitive. (State's Exs. B22-27, B29-32.) There are six photos of Donald's hands. (State's Exs. B17, B33-37.) Four photos depict Donald's head and neck with the sheet still around it. (State's Exs. B38-41.) And there is another photo of his face without the sheet. (State's Ex. B46.)

Dr. Joseph Felo performed the autopsy of Donald Schneider. Tr. 768. As they did with Candace's autopsy, the defense again stipulated as to Dr. Felo's report. Tr. 766-67. Dr. Felo testified on direct that the cause of Donald's death was asphyxia by cervical compression and that it was a homicide. Tr. 770. Dr. Felo further testified about the wound on Donald's face. He

also testified that he witness a test firing of a “blank” gun by the trace evidence department and indicated that this could have been the object that caused the injury to Donald’s face. Tr. 772-73.

There was no dispute as to the cause of death of either Candace or Donald. The defense stipulated to the medical examiners’ findings and did not even cross-examine them while on the stand. Tr. 767.

Trial counsel failed to object to the use of these photographs. (See Proposition of Law No. 4). Thus the claim is subject to plain error review. An error is plain when it denies the defendant a fair trial. See *State v. Fears*, 86 Ohio St. 3d 329, 332, 715 N.E.2d 136, 143 (1999) (citing *State v. Wade*, 53 Ohio St. 2d 182, 189, 373 N.E.2d 1244 (1978)). See also *State v. Lilly*, 87 Ohio St. 3d 97, 104, 717 N.E.2d 322, 328 (1999) (Cook, J., concurring) (plain error is obvious, palpable and fundamental to the fairness of the judicial proceedings) (citations and quotation marks omitted).

### III. Law.

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

Evidence Rule 403(A) provides that evidence is not admissible “if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. The determination of whether a piece of evidence is inadmissible under this standard is left to the sound discretion of the trial court. *State v. Crotts*, 104 Ohio St. 3d 432, 437, 820 N.E.2d 302, 308 (2004). All evidence that tends to prove the State’s version of the

facts necessarily is prejudicial to the defendant. *Id.* Thus, the Rules of Evidence do not bar all prejudicial evidence, only unfairly prejudicial evidence is excludable. *Id.*

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

Further Rule 403 must be applied more strictly in capital cases. *State v. Morales*, 32 Ohio St. 3d 252, 257-58, 513 N.E.2d 267, 273 (1987). Whereas exclusion under Rule 403 generally requires that the probative value of photographs be minimal and the prejudice great, in capital cases, the probative value of each photograph must outweigh any potential danger of prejudice to the defendant. *Id.* at 258, 513 N.E.2d at 274. If the probative worth of the photographs does not outweigh the danger of prejudice to the defendant, the evidence must be excluded. *Id.* Moreover, even if the probative value of the photographs does outweigh the danger of unfair prejudice, the photographs still must be excluded if they are "repetitive or cumulative in number." *State v. Maurer*, 15 Ohio St. 3d 239, syl. para. 7, 473 N.E.2d 768 (1984).

A defendant's due process rights are violated when evidence is "so unduly prejudicial that it renders the trial fundamentally unfair." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). In capital cases, where an individual's life is at stake, the United States Supreme Court has insisted upon even higher standards of reliability and fairness. *See e.g., Beck v. Alabama*, 447 U.S. 625 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Moreover, courts must guard against

unreliable sentencing determinations in capital cases. *California v. Ramos*, 463 U.S. 992, 998-99 (1983).

#### **IV. Argument.**

It was undisputed that both Candace and Donald Schneider died as a result of asphyxia by cervical compression. The defense stipulated to the medical examiners' findings and did not even cross-examine them while on the stand. The many, many photographs of Candace and Donald at the scene and at the time of the autopsies were therefore cumulative and highly prejudicial.

Many of the photos were flatly unnecessary and unrelated to the cause of death (e.g., the photos of Candace's chest cavity and brain) and many were merely slightly different angles of the same things. Because the photographs were unrelated to the cause of death or cumulative, they had little or no probative value.

The prejudice produced by the photographs was substantial. The images are extremely graphic. Regardless of the fact that Obermiller plead guilty to the charges against him, these photos would have had such an impact upon the fact-finders that the passions and prejudices they arose would have carried over to sentencing. All of these photos were introduced in the sentencing phase. Tr. 1472. These gruesome images would have roused the fact-finders' emotions during its sentencing deliberations, violating the Eighth and Fourteenth Amendment guarantees "that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). See also *State v. Thompson*, 33 Ohio St. 3d 1, 514 N.E.2d 407 (1987).

**V. Conclusion.**

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

## PROPOSITION OF LAW NO. 8

The introduction of a defendant's statement made during a custodial interrogation and without Miranda warnings violates a capital defendant's protection against self-incrimination as well as his rights to a fair trial, due process, and a reliable determination of guilt as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 9, 10, and 16 of the Ohio Constitution.

Obermiller's Fifth Amendment right not to incriminate himself was violated when the arresting officers elicited inculpatory statements from him and the trial court denied the motion to suppress these statements.

### I. Facts

Obermiller was arrested in Licking County by sheriff's deputies. The Licking County Sheriff's Office received a request for assistance from Maple Heights police on August 15, 2010. Tr. 831. Licking County was informed that Obermiller, wanted in a homicide, may be meeting his cousin in the Buckeye Lake area. Tr. 832. Several patrol cars responded to a gas station where Obermiller's car was spotted. Tr. 83. Detective Slayman approached Obermiller as he was about to fill his car at the gas pump. Tr. 62-63. Slayman had his weapon drawn and instructed Obermiller to put his hands up or something to that effect. Tr. 63. Obermiller began to run across the parking lot away from Slayman. Tr. 63. Slayman removed the taser from his belt and yelled, "taser, taser." Tr. 64-65. At that point, Obermiller slowed down, threw something, stopped, and lay face down in the parking lot. Tr. 65. Other officers had arrived on the scene by then. *Id.* They patted Obermiller down and cuffed him. *Id.*

Detective Barbuto was one of the officers who cuffed Obermiller. Tr. 87. After officers stood Obermiller up, Barbuto thanked him for not continuing to run. Tr. 88. As Barbuto was walking away, Obermiller responded, saying something like "it wasn't worth dying for" or "I didn't want to die today." Tr. 105. Deputy Dennis, another officer at the scene, said to

Obermiller, "it's not worth dying for." *Id.* Obermiller then said, "I ain't worried, I killed my grandma three days ago." Tr. 106. Dennis asked Obermiller, "why?" Obermiller said, "I was beating up my grandfather and she got in the way." *Id.* At no point during this process was Obermiller given *Miranda* warnings. Tr. 75, 93, 114, 115.

Defense counsel moved to suppress Obermiller's three statements. (10/19/10 Motion to Suppress). A hearing was held on the issue on December 8, 2010 and December 15, 2010. Tr. 54, 126. The trial court denied the motion. Tr. 139. The trial court found that as to the first two statements, Barbuto and Dennis did not ask questions and that these were just statements "incident to people having contact with each other." Tr. 138. As to the third statement, the Court found that there was no custody:

This Court finds this was a quick conversation incident to the two individuals meeting each other and an arrest was in the process, custodial care was in the process, and had not been formally engaged and you have Obermiller then saying because I was beating up my grandfather and she got in the way.

At that point they did not place him under arrest. They were in the process of placing him under arrest.

The Court finds the conversation they engaged in was incident to their arrest, and not custodial arrest.

Tr. 139.

During the trial, when Deputy Dennis testified, the State did not ask him about Obermiller's statement regarding the fight with Donald and Candace getting in the way. The prosecutor asked only about the first two statements. Tr. 837-38. One of the panel members asked, if someone asked Obermiller why he had killed his grandmother. Tr. 840. Deputy Dennis indicated that he had asked "why?" but did not repeat Obermiller's response. Tr. 841. However, Judge Saffold, who had presided over the suppression hearing before the panel was convened, asked, "Wasn't there another statement from the defendant?" Tr. 843. At that point, Deputy

Dennis stated that Obermiller had said, “[b]ecause I was beating up my grandfather and she got in the way.” *Id.*

## II. Law

The State is barred from using statements made during custodial interrogation unless it can establish that procedural safeguards were used to protect the right against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). This Court too has recognized that it is well established that when a defendant is subjected to custodial interrogation, the defendant must be Mirandized and that the statements are admissible only if made after a knowing and intelligent waiver of the *Miranda* rights is obtained. *State v. Treesh*, 90 Ohio St. 3d 460, 470, 739 N.E.2d 749, 763-64 (2001).

“It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect’s freedom of action is curtailed to a ‘degree associated with formal arrest.’” *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (citing *California v. Beheler*, 463 U.S. 1121, 1125 (1983)). This Court has recognized that “[a] defendant need not be under arrest . . . to be ‘in custody’ for *Miranda* purposes.” *State v. Farris*, 109 Ohio St. 3d 519, 522, 849 N.E.2d 985 (2006). Obermiller was in custody, and therefor *Miranda* warnings were necessary before interrogation could take place. He had been pursued by an officer with his gun drawn; he lay face down on the ground and was cuffed behind his back. Tr. 63-65.

Custodial interrogation is “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444. More specifically, “interrogation” in the *Miranda* context is not limited to express questioning. “Interrogation” includes anything said or done by law enforcement that officers should know is “reasonably likely to elicit an incriminating

response.” *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). After Obermiller stated that he had killed his grandmother, Deputy Dennis asked, “why?” Tr. 106. This question constituted custodial interrogation. It was an express question about Obermiller’s reasons for killing his grandmother. The question was reasonably likely to elicit an incriminating response.

Even the State conceded that there was a question as to whether Obermiller’s third statement was in violation of *Miranda*. Tr. 136.

### **III. Prejudice**

Obermiller was prejudiced by the admission of his statement. It is likely that the trial court’s ruling denying his motion to suppress tainted his decision to plead guilty to the charges against him and that he would not have done so but for that erroneous ruling.

### **IV. Conclusion**

Obermiller’s Fifth Amendment rights were violated by the admission of his un-Mirandized statement. Accordingly, this Court should reverse and remand this case for a new trial.

## PROPOSITION OF LAW NO. 9

Ohio's death penalty law is unconstitutional. Ohio Rev. Code Ann. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Obermiller. U.S. Const. Amends. V, VI, VIII, And XIV; Ohio Const. Art. I, §§ 2, 9, 10, And 16. Further, Ohio's death penalty statute violates the United States' obligations under international law.<sup>2</sup>

The Eighth Amendment to the Constitution and Article I, § 9 of the Ohio Constitution prohibit the infliction of cruel and unusual punishment. The Eighth Amendment's protections are applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962). Punishment that is "excessive" constitutes cruel and unusual punishment. *Coker v. Georgia*, 433 U.S. 584 (1977). The underlying principle of governmental respect for human dignity is the Court's guideline to determine whether this statute is constitutional. *See Furman v. Georgia*, 408 U.S. 238 (1972) (Brennan, J., concurring); *Rhodes v. Chapman*, 452 U.S. 337, 361 (1981); *Trop v. Dulles*, 356 U.S. 86 (1958). The Ohio scheme offends this bedrock principle in the following ways:

### A. **Arbitrary and unequal punishment**

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

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

Ohio's capital punishment scheme allows the death penalty to be imposed in an arbitrary and discriminatory manner in violation of *Furman* and its progeny. Prosecutors' virtually uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death penalty. Mandatory death penalty statutes were deemed fatally flawed because they lacked standards for imposition of a death sentence and were therefore removed from judicial review. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Prosecutors' uncontrolled discretion violates this requirement.

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. *Commonwealth v. O'Neal*, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring); *State v. Pierre*, 572 P.2d 1338 (Utah 1977) (Maughan, J., concurring and dissenting). Moreover, where fundamental rights are involved personal liberties cannot be broadly stifled "when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). To take a life by mandate, the State must show that it is the "least restrictive means" to a "compelling governmental end." *O'Neal II*, 339 N.E.2d at 678.

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

#### **B. Unreliable sentencing procedures**

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

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

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

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor are within the individual decision-maker’s discretion. *State v. Fox*, 69 Ohio St. 3d 183, 193, 631 N.E.2d 124, 132 (1994). Giving so much discretion to juries inevitably leads to arbitrary and capricious judgments. The Ohio open discretion scheme further risks that constitutionally relevant mitigating factors that must be considered as mitigating [youth or childhood abuse (*Eddings v. Oklahoma*, 455 U.S. 104 (1982)), mental disease or defect (*Penry v. Lynaugh*, 492 U.S. 302 (1989) *rev’d on other grounds Penry v. Johnson*, 532 U.S. 782 (2001)), level of involvement in the crime (*Enmund v. Florida*, 458 U.S. 782 (1982)), or lack of criminal history (*Delo v. Lashley*, 507 U.S. 272 (1993))] will not be factored into the sentencer’s decision. While the federal constitution may allow states to shape consideration of mitigation, *see Johnson v. Texas*, 509 U.S. 350 (1993), Ohio’s capital scheme fails to provide adequate guidelines to sentencers, and fails to assure against arbitrary, capricious, and discriminatory results.

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

**C. Defendant's right to a jury is burdened**

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

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

**D. Mandatory submission of reports and evaluations**

Ohio's capital statutes are unconstitutional because they require submission of the presentence investigation report and the mental evaluation to the jury or judge once requested by a capital defendant. O.R.C. § 2929.03(D)(1). This mandatory submission prevents defense

counsel from giving effective assistance and prevents the defendant from effectively presenting his case in mitigation.

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

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

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

**F. Proportionality and appropriateness review**

Ohio Revised Code §§ 2929.021 and 2929.03 require data be reported to the courts of appeals and to the Ohio Supreme Court. There are substantial doubts as to the adequacy of the information received after guilty pleas to lesser offenses or after charge reductions at trial. O.R.C. § 2929.021 requires only minimal information on these cases. Additional data is

necessary to make an adequate comparison in these cases. This prohibits adequate appellate review.

Adequate appellate review is a precondition to the constitutionality of a state death penalty system. *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *Pulley v. Harris*, 465 U.S. 37 (1984). The standard for review is one of careful scrutiny. *Zant*, 462 U.S. at 884-85. Review must be based on a comparison of similar cases and ultimately must focus on the character of the individual and the circumstances of the crime. *Id.*

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

The comparison method is also constitutionally flawed. Review of cases where the death penalty was imposed satisfies the proportionality review required by O.R.C. § 2929.05(A). *State v. Steffen*, 31 Ohio St. 3d 111, 509 N.E.2d 383, syl. 1 (1987). However, this prevents a fair proportionality review. There is no meaningful manner to distinguish capital defendants who deserve the death penalty from those who do not.

This Court's appropriateness analysis is also constitutionally infirm. O.R.C. § 2929.05(A) requires appellate courts to determine the appropriateness of the death penalty in each case. The statute directs affirmance only where the court is persuaded that the aggravating circumstances

outweigh the mitigating factors and that death is the appropriate sentence. *Id.* This Court has not followed these dictates. The appropriateness review conducted is very cursory. It does not “rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.” *Spaziano v. Florida*, 468 U.S. 447, 460 (1984).

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

**G. Ohio's statutory death penalty scheme violates international law.**

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

**1. International law binds Ohio.**

“International law is a part of our law[.]” *The Paquete Habana*, 175 U.S. 677, 700 (1900). A treaty made by the United States is the supreme law of the land. Article VI, United States Constitution. Where state law conflicts with international law, it is the state law that must yield. *See Zschernig v. Miller*, 389 U.S. 429, 440 (1968). In fact, international law creates remediable rights for United States citizens. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal. 1987).

## **2. Ohio's obligations under international charters, treaties, and conventions**

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

The U.N. has sought to achieve its goal of promoting human rights and fundamental freedoms through the creation of numerous treaties and conventions. The United States has ratified several of these including: the International Covenant on Civil and Political Rights (ICCPR) ratified in 1992, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ratified in 1994, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) ratified in 1994. Ratification of these treaties by the United States expressed its willingness to be bound by these treaties. Pursuant to the Supremacy Clause, the ICCPR, the ICERD, and the CAT are the supreme laws of the land.

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

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

Both the ICCPR, ratified in 1992, and the ICERD, ratified in 1994, guarantee equal protection of the law. ICCPR Art. 2(1), 3, 14, 26; ICERD Art. 5(a). The ICCPR further guarantees due process via Articles 9 and 14, which includes numerous considerations: a fair hearing (Art. 14(1)), an independent and impartial tribunal (Art. 14(1)), the presumption of

innocence (Art. 14(2)), adequate time and facilities for the preparation of a defense (Art. 14(3)(a)), legal assistance (Art. 14(3)(d)), the opportunity to call and question witnesses (Art. 14(3)(e)), the protection against self-incrimination (Art. 14(3)(g)), and the protection against double jeopardy (Art. 14(7)). However, Ohio's statutory scheme fails to provide equal protection and due process to capital defendants as contemplated by the ICCPR and the ICERD.

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

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

However, several aspects of Ohio's statutory scheme allow for the arbitrary deprivation of life. *See infra* Sections a–f.

**c. Ohio's statutory scheme violates the ICERD's protections against race discrimination.**

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

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

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

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

While conditions, reservations, and understandings accompanied the United States' ratification of the ICCPR, the ICERD, and the CAT, those conditions, reservations, and understandings cannot stand for two reasons. Article II, § 2 of the United States Constitution provides for the advice and consent of two-thirds of the Senate when a treaty is adopted. However, the Constitution makes no provision for the Senate to modify, condition, or make reservations to treaties. The Senate is not given the power to determine what aspects of a treaty the United States will and will not follow. Their role is to simply advise and consent.

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

the Senate to make conditions and reservations, picking and choosing what aspects of a treaty will become law. Thus the Senate lacks the power to do just that. Therefore, any conditions or reservations made by the Senate are unconstitutional. *See id.*

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

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

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

Further, requiring the passage of legislation to implement a treaty necessarily implicates the participation of the House of Representatives. By requiring legislation to implement a treaty, the House can effectively veto a treaty by refusing to pass the necessary legislation. However, Article 2, § 2 excludes the House of Representatives from the treaty process. Therefore, declaring a treaty to be not self-executing gives power to the House of Representatives not

contemplated by the United States Constitution. Thus, any declaration that a treaty is not self-executing is unconstitutional. *See Clinton*, 524 U.S. at 438.

### 3. Ohio's obligations under customary international law

International law is not merely discerned in treaties, conventions and covenants. International law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820). Regardless of the source "international law is a part of our law[.]" *The Paquete Habana*, 75 U.S. at 700.

The judiciary and commentators recognize the Universal Declaration of Human Rights (DHR) as binding international law. The DHR "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community." *Filartiga*, 630 F.2d at 883 (internal citations omitted).

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

However, the DHR is not alone in its codification of customary international law. *Smith* directs courts to look to "the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law" in ascertaining international law. 18 U.S. (5 Wheat.) at 160-61. Ohio should be cognizant of the fact that its statutory scheme violates numerous declarations and conventions drafted and

adopted by the United Nations and the OAS, which may, because of the sheer number of countries that subscribe to them, codify customary international law. *See id.*

Ohio's statutory scheme is in violation of customary international law.

#### **H. Conclusion**

Ohio's death penalty scheme fails to ensure that arbitrary and discriminatory imposition of the death penalty will not occur. The procedures actually promote the imposition of the death penalty and, thus, are constitutionally intolerable. Ohio Revised Code §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution and international law. Obermiller's death sentence must be vacated.

## PROPOSITION OF LAW NO. 10

The cumulative effect of trial error renders a capital defendant's trial unfair and his sentence arbitrary and unreliable. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 5, 16.

Obermiller raised numerous errors worthy of this Court granting relief both from his convictions and his death sentence. Each error, standing alone, is sufficient to warrant a reversal. However, by viewing the many errors together, it is apparent that their cumulative impact rendered Obermiller's trial fundamentally unfair. *See Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983). This Court must reverse Obermiller's convictions and sentence.

From beginning to end, Obermiller's capital trial was replete with prejudicial error. *See* Propositions of Law Nos. 1 - 9. Assuming *arguendo* that none of the errors Obermiller raised alone warrant reversal of his convictions and sentence, the cumulative effect of the errors is so prejudicial that this Court must order a new trial.

The adequacy of the legally admitted evidence is only one factor for this Court to consider in determining the influence that an error has on a jury. The Supreme Court made clear in *Satterwhite v. Texas*, 486 U.S. 249 (1988), that it "is not whether the legally admitted evidence was sufficient to support" the verdict, but rather "whether the [prosecution] has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* at 258-59. Review must also determine whether the cumulative effect of the errors rendered the trial fundamentally unfair. *See Walker*, 703 F.2d at 963. "We must reverse any conviction obtained in a proceeding in which the cumulative impact of irregularities is so prejudicial to a defendant that he is deprived of his fundamental right to a fair trial. Fourteenth Amendment, United States Constitution." *State v. Wilson*, 787 P.2d 821, 821 (N.M. 1990); *United States v.*

*Wallace*, 848 F.2d 1464, 1475 (9th Cir. 1988); *State v. DeMarco*, 31 Ohio St. 3d 191, 509 N.E.2d 1256, 1261 (1987).

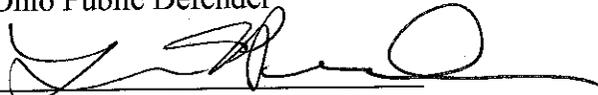
The result of cumulative error entitles Obermiller to a new trial. His convictions based upon cumulative error denied him a fair trial and his right to due process. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 5, 16. Additionally, these same errors render Obermiller's death sentence unreliable and arbitrary. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 9, 16.

**CONCLUSION**

For the foregoing reasons, Denny Obermiller's convictions and sentence must be reversed.

Respectfully submitted,

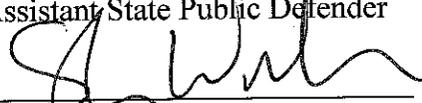
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COUNSEL FOR APPELLANT

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the MERIT BRIEF OF APPELLANT DENNY OBERMILLER and APPENDIX TO MERIT BRIEF were forwarded by regular U.S. Mail to Saleh Awadallah, Mary H. McGrath, and Margaret A. Troia, Assistant Prosecutors, Cuyahoga County, The Justice Center, 9<sup>th</sup> Floor, 1200 Ontario St., Cleveland, Ohio 44113 on this 17<sup>th</sup> day of April, 2012.



Linda E. Prucha – 0040689

COUNSEL FOR APPELLANT

364253

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
Appellee, : Case No. 11-0857  
-vs- : Appeal taken from Cuyahoga County  
DENNY OBERMILLER, : Court of Common Pleas  
: Case No. CR-10-542119-A  
Appellant. : **This is a death penalty case**

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**APPENDIX TO MERIT BRIEF OF APPELLANT DENNY OBERMILLER**

---

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COUNSEL FOR APPELLANT

In The Supreme Court of Ohio

State of Ohio,

Appellee,

-vs-

Denny Obermiller,

Appellant.

: Case No. **11-0857**

: Appeal taken from Cuyahoga County  
Court of Common Pleas

: Case No. CR-10-542119-A

: **Capital Case**

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On Appeal From The Court Of  
Common Pleas Of Cuyahoga County  
Case No. CR-10-542119-A

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Appellant Obermiller's Notice Of Appeal

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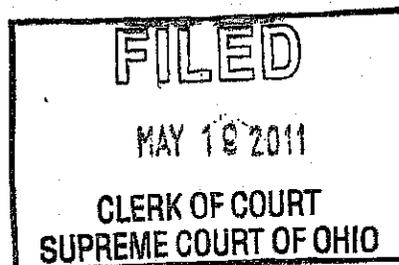
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Counsel For Appellant



In The Supreme Court Of Ohio

State of Ohio,

Appellee,

-vs-

Denny Obermiller,

Appellant.

:

: Case No.

: Appeal taken from Cuyahoga County  
Court of Common Pleas

: Case No. CR-10-542119-A

: **Capital Case**

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On Appeal From The Court Of  
Common Pleas Of Cuyahoga County  
Case No. CR-10-542119-A

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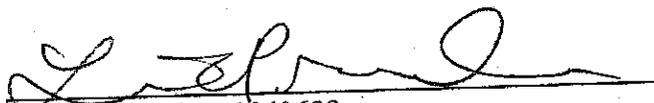
Appellant Obermiller's Notice Of Appeal

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Appellant Denny Obermiller hereby gives notice that he is pursuing his appeal as of right to obtain relief from his conviction of aggravated murder, and his death sentence, imposed on March 10, 2011 in the Cuyahoga County Court of Common Pleas. See Entry and Sentencing Opinion attached. This is a capital case, and the date of this offense was on or about August 11, 2010. See Sup. Ct. Prac. R. XIX §1(A).

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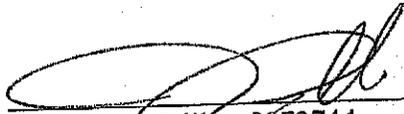
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Counsel For Appellant

Certificate Of Service

I hereby certify that a true copy of the foregoing NOTICE OF APPEAL was forwarded by regular U.S. Mail to Bill Mason, Cuyahoga County Prosecutor's Office, Justice Center Bld., 9<sup>th</sup> Floor, 1200 Ontario Street, Cleveland, OH-44113, on this 19th day of May 2011.

  
Jennifer A. Prillo - 0073744  
Assistant State Public Defender



66982057

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

PROCESSED

THE STATE OF OHIO  
Plaintiff

DENNY OBERMILLER  
Defendant

2011 FEB -1 P 3:04

GERALD E. FUERST  
CLERK OF COURTS  
CUYAHOGA COUNTY

Case No: CR-10-542119-A

Judge: SHIRLEY STRICKLAND SAFFOLD

FEB 02 2011

GERALD E. FUERST, CLERK  
COURT DEPARTMENT

INDICT: 2903.01 AGGRAVATED MURDER /CCS /MEAC  
/RTS /FMS  
2903.01 AGGRAVATED MURDER /CCS /MEAC  
/RTS /FMS  
2903.01 AGGRAVATED MURDER /CCS /MEAC  
/RTS /FMS  
ADDITIONAL COUNTS...

JOURNAL ENTRY

THREE JUDGE PANEL ASSEMBLED, TO WIT: JUDGE JOHN D SUTULA , JUDGE TIMOTHY J MCGINTY , AND PRESIDING JUDGE SHIRLEY STRICKLAND SAFFOLD .  
DEFENDANT IN COURT WITH COUNSEL KEVIN M SPELLACY & JAMES MCDONNELL. PROSECUTING ATTORNEY MARY MCGRATH PRESENT.  
COURT REPORTER PRESENT.  
A THREE JUDGE PANEL RETURNS A VERDICT OF GUILTY OF AGGRAVATED MURDER 2903.01 A WITH COURSE OF CONDUCT SPECIFICATION(S), MURDER ESCAPE ACCOUNTING FOR ANOTHER CRIME SPEC(S), RETALIATION FOR TESTIMONY SPECIFICATION(S), FELONY MURDER SPECIFICATION(S) AS CHARGED IN COUNT(S) 1, 4 OF THE INDICTMENT.  
A THREE JUDGE PANEL RETURNS A VERDICT OF GUILTY OF AGGRAVATED MURDER 2903.01 B WITH COURSE OF CONDUCT SPECIFICATION(S), MURDER ESCAPE ACCOUNTING FOR ANOTHER CRIME SPEC(S), RETALIATION FOR TESTIMONY SPECIFICATION(S), FELONY MURDER SPECIFICATION(S) AS CHARGED IN COUNT(S) 2, 3, 5, 6, 7 OF THE INDICTMENT.  
A THREE JUDGE PANEL RETURNS A VERDICT OF GUILTY OF KIDNAPPING 2905.01 A(3) F1 WITH NOTICE OF PRIOR CONVICTION SPECIFICATION(S), REPEAT VIOLENT OFFENDER SPECIFICATION(S) 2941.149 AS CHARGED IN COUNT(S) 8, 9 OF THE INDICTMENT.  
A THREE JUDGE PANEL RETURNS A VERDICT OF GUILTY OF AGGRAVATED ROBBERY 2911.01 A(3) F1 WITH NOTICE OF PRIOR CONVICTION SPECIFICATION(S), REPEAT VIOLENT OFFENDER SPECIFICATION(S) 2941.149 AS CHARGED IN COUNT(S) 10, 11 OF THE INDICTMENT.  
A THREE JUDGE PANEL RETURNS A VERDICT OF GUILTY OF RAPE 2907.02 A(2) F1 WITH NOTICE OF PRIOR CONVICTION SPECIFICATION(S), REPEAT VIOLENT OFFENDER SPECIFICATION(S) 2941.149 AS CHARGED IN COUNT(S) 12 OF THE INDICTMENT.  
A THREE JUDGE PANEL RETURNS A VERDICT OF GUILTY OF AGGRAVATED BURGLARY 2911.11 A(1) F1 WITH NOTICE OF PRIOR CONVICTION SPECIFICATION(S), REPEAT VIOLENT OFFENDER SPECIFICATION(S) 2941.149 AS CHARGED IN COUNT(S) 13 OF THE INDICTMENT.  
A THREE JUDGE PANEL RETURNS A VERDICT OF GUILTY OF TAMPERING WITH EVIDENCE 2921.12 A(1) F3 AS CHARGED IN COUNT(S) 14 OF THE INDICTMENT.  
A THREE JUDGE PANEL RETURNS A VERDICT OF GUILTY OF THEFT; AGGRAVATED THEFT 2913.02 A(1) F5 AS CHARGED IN COUNT(S) 15, 19 OF THE INDICTMENT.  
A THREE JUDGE PANEL RETURNS A VERDICT OF GUILTY OF THEFT; AGGRAVATED THEFT 2913.02 A(1) F4 AS CHARGED IN COUNT(S) 16 OF THE INDICTMENT.  
A THREE JUDGE PANEL RETURNS A VERDICT OF GUILTY OF ATTEMPTED, AGGRAVATED ARSON 2923.02/2909.02 A(2) F2 AS CHARGED IN COUNT(S) 17 OF THE INDICTMENT.  
A THREE JUDGE PANEL RETURNS A VERDICT OF GUILTY OF BURGLARY 2911.12 A(3) F2 WITH NOTICE OF PRIOR CONVICTION SPECIFICATION(S), REPEAT VIOLENT OFFENDER SPECIFICATION(S) 2941.149 AS CHARGED IN COUNT(S) 18 OF THE INDICTMENT.

PVER  
01/25/2011



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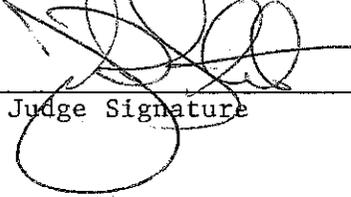
COUNT 18 OF THE INDICTMENT IS A 3RD AND 2ND DEGREE FELONY.  
DEFT ADVISED OF POST RELEASE CONTROL FOR 5 YEARS MANDATORY ON ALL AGG MURDER CHARGES AND  
FEL-1'S; 3 YEARS MANDATORY ON FEL-2'S & FEL-3'S; UP TO 3 YEARS ON FEL-4'S AND FEL-5'S. DEFENDANT  
ADVISED THAT IF PRC SUPERVISION IS IMPOSED FOLLOWING HIS RELEASE FROM PRISON AND IF HE VIOLATES  
THAT SUPERVISION OR CONDITION OF POST RELEASE CONTROL UNDER RC 2967.131(B), PAROLE BOARD MAY  
IMPOSE A PRISON TERM AS PART OF THE SENTENCE OF UP TO 1/2 OF THE STATED PRISON TERM ORIGINALLY  
IMPOSED UPON THE OFFENDER.

DEFENDANT FOUND TO BE A TIER III VIOLATOR AND WAS ADVISED IN OPEN COURT AND ON THE RECORD OF  
ALL "ADAM WALSH ACT" WARNINGS AND DUTIES TO REGISTER AS A SEX OFFENDER.

MITIGATION PHASE OF THE TRIAL WILL START AT 1:00 P.M. ON WEDNESDAY FEBRUARY 23, 2011.

01/25/2011

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_____ Judge Signature	_____ Date
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_____ Judge Signature	_____ Date
	2-1-11
_____ Judge Signature	_____ Date

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

FILED

STATE OF OHIO,

Plaintiff,

vs.

DENNY OBERMILLER,

Defendant.

2011 MAR 10 P 3:32  
GERALD E. FUERST  
CLERK OF COURTS  
CUYAHOGA COUNTY

JUDGE SHIRLEY STRICKLAND SAFFOLD  
JUDGE TIMOTHY J. McGINTY  
JUDGE JOHN D. SUTULA

SENTENCING OPINION AND  
JOURNAL ENTRY

CASE NO. CR 542119

SHIRLEY STRICKLAND SAFFOLD, JUDGE:

**I. SENTENCING PHASE**

On February 23, 2011, prior to the commencement of the trial for the second phase of this matter, the State moved to merge the counts in this matter as follows:

**Count 1—Aggravated Murder with prior calculation and design in violation of R.C. 2903.01(A) (Donald Schneider);**  
Course of Conduct in violation of R.C. 2929.04(A)(5);  
Retaliation for Testimony in violation of R.C. 2929.04(A)(8);  
*(Counts 2 and 3 merge with Count 1)*

**Count 4—Aggravated Murder with prior calculation and design in violation of R.C. 2903.01(A) (Candace Schneider);**  
Course of Conduct in violation of R.C. 2929.04(A)(5);  
Retaliation for Testimony in violation of R.C. 2929.04(A)(8);  
*(Counts 5 and 6 merge with Count 4)*

**Count 12—Rape in violation of R.C. 2907.02(A)(2), a first degree felony (Candace);**

**Count 13—Aggravated Burglary in violation of R.C. 2911.11(A)(1), a first degree felony (Donald and Candace Schneider);**  
*(Counts 8, 9, 10 and 11 all merge with Count 13)*

**Count 15—Theft in violation of R.C. 2913.02(A)(1), a fifth degree felony (date range 8/10/11-8/14/11)**

**Count 16—Theft of a motor vehicle, in violation of R.C. 2913.02(A)(1), felony of the fourth degree (date 8/11/10)**

CR10542119-A

67619496



**Count 17—Attempted Aggravated Arson**, in violation of R.C. 2923.02/2009.02(A)(2), a third degree felony  
*(Count 14 merges with Count 17)*

**Count 18—Burglary** in violation of R.C. 2911.12(A)(3), a third degree felony (date range 8/5/10-8/9/10) (Donald and Candace Schneider);  
*(Count 19 merges with Count 18)*

After merger of the counts, this Court proceeded to the second phase of this trial. Defendant pled guilty to the indictment and was convicted of three aggravating circumstances that were alleged as part of Counts 1 and 4, namely:

1. That the aggravated murder was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons, namely, Donald and Candace Schneider. R.C. 2929.04(A)(5).
2. That the Defendant committed the Aggravated Murders while he was committing, attempting to commit, or fleeing immediately after committing or attempting to commit the rape of Candace Schneider. R.C. 2929.04(A)(7).
3. That the victims of the Aggravated Murder were witnesses to an offense who were purposely killed to prevent the victim's testimony in any criminal proceeding. R.C. 2929.04(A)(8).

At the start of the mitigation hearing, the State, without objection, resubmitted all of its exhibits and evidence from the first phase as proof of the aggravating circumstances.

The Defendant was provided with the opportunity to present mitigation evidence as set forth in the Revised Code. Defendant subsequently waived his right to present such evidence. Defendant, after being referred to the Court Psychiatric Clinic, was found by that Clinic and this Court to be competent to waive presentation of mitigation. Both the State and the Defendant stipulated to the accuracy of the report of the Court Psychiatric Clinic. The Court accepted the stipulation from both parties and after further examination through questioning of the Defendant, is

satisfied that the Defendant knowingly, intelligently, and voluntarily waived said right to present mitigation evidence.

The Court carefully examined any and all mitigating factors that were supported by the evidence in both phases of this case, and finds that these factors are outweighed by the aggravating circumstances by proof beyond a reasonable doubt. After said review, the Court found nothing anywhere in the record of either phase of the trial that would even come remotely close to equaling or outweighing the aggravating circumstances for which he was convicted.

Evidence considered in mitigation is discussed below.

First, the Defendant admitted his guilt in committing all these crimes and expressed remorse for the crimes upon his grandmother. He expressed shame and disgust for his conduct.

The Court took into consideration the Defendant's background and family history. Defendant was born February 11, 1982. Both his parents were relatively young at the time, and never married. When he was only two years old, the Defendant's mother was murdered. Defendant's father was incapable of caring for him, and shortly after the death of his mother, was incarcerated. Defendant was then largely raised by his maternal grandparents, Donald and Candace Schneider, the victims in this case. His father played little role in raising him. Defendant was treated by a psychologist between the ages of six to nine years old.

Defendant began to get involved in trouble that brought him to the attention of the Juvenile Court system and Family Services at a young age. He was close to his grandmother, but there appears to have been tension between the defendant and the grandfather/victim. After the defendant was released from prison in 2009 and the two moved into the victim's home, the defendant told his girlfriend that his grandfather, Donald Schneider, had punished him cruelly as a child.

Custody of the Defendant changed a number of times between his grandparents and his father and stepmother (who is also his deceased mother's first cousin). Eventually, both the father and stepmother were incarcerated, leaving custody of the Defendant to his stepmother's parents (his great aunt and great uncle).

Defendant had charges as a juvenile, including an aggravated robbery of a gas station. At age 15, he was sentenced to a juvenile correctional institution. While there, he was convicted of felonious assault upon a guard and attempted escape. Defendant was convicted as an adult and sentenced to state prison for nine years. He was released in August 2009 at age 27, having served 12 consecutive years in both the juvenile and adult institutions.

While Defendant was incarcerated, his father never visited him but did communicate with him two to three times per year. Victim Candace Schneider sent him "care" packages. While incarcerated the Defendant married a woman who was a guard at one of the previous institutions where he was held. Defendant was approximately 21 years old when they married. His wife shortly thereafter committed suicide.

After completion of his sentence in 2009, Defendant came back to the Cleveland area and resided at first with the victims, over the objections of Donald Schneider, then lived in his own apartment with his then girlfriend. Defendant's father helped him obtain a job with him as a roofer. By all accounts, Defendant was a good worker.

The Court also took note of his educational history. The Defendant obtained a GED and took some courses in business administration through Ashland College while he was incarcerated.

The Defendant Motion for Mitigation Expert was granted and a report was being prepared, but the Defendant instructed his appointed attorneys not to present any of the information gathered in their investigation.

## II CONCLUSION

The Court therefore finds the aggravating circumstances the Defendant was found guilty of committing outweigh the factors in mitigation of the imposition of the sentence of death beyond a reasonable doubt. The mitigation pales in comparison to the brutal and callous aggravating circumstances. As such, the sentence of the Court is as follows:

As to Count 1, Aggravated Murder with prior calculation and design in violation of R.C. 2903.01(A) (Donald Schneider), Course of Conduct in violation of R.C. 2929.04(A)(5) and Retaliation for Testimony in violation of R.C. 2929.04(A)(8), as well as Count 4 Aggravated Murder with prior calculation and design in violation of R.C. 2903.01(A) (Candace Schneider), Course of Conduct in violation of R.C. 2929.04(A)(5) and Retaliation for Testimony in violation of R.C. 2929.04(A)(8), Defendant has plead guilty to each count and specification and the State has produced evidence that has independently convinced the Court of Defendant's guilt. Furthermore, the Court has found that the aggravating circumstances have been established beyond a reasonable doubt and that they far outweigh any mitigating factors for Counts 1 and 4. Thus, the sentence of the Court is the mandatory sentence of death, to be imposed one year from sentencing on February 25, 2012.

As to Count 12, Rape in violation of R.C. 2907.02(A)(2) a first-degree felony, the sentence of the Court is ten years incarceration.

As to Count 13, Aggravated Burglary in violation of R.C. 2911.11(A)(1), a first-degree felony, the sentence of the Court is ten years incarceration.

As to Count 15, Theft in violation of R.C. 2913.02(A)(1), a fifth-degree felony, the sentence of the Court is twelve months incarceration.

As to Count 16, Theft of a Motor Vehicle in violation of R.C. 2913.02(A)(1), a fourth-degree felony, the sentence of the Court is eighteen months incarceration.

As to Count 17, Attempted Aggravated Arson in violation of R.C. 2923.02/2009.02(A)(2), a third-degree felony, the sentence of the Court is five years incarceration.

Finally, as to Count 18, Burglary in violation of R.C. 2911.12(A)(3), a third-degree felony, the sentence of the Court is five years incarceration.

These sentences are to run consecutively for a total of 32.5 years incarceration. After handing down the preceding sentence the Court advised the Defendant of the five year mandatory post release control and his appellate rights. The State Public Defender was appointed to represent him.

Defendant was also advised that due to his conviction of Rape in Count 12 of the indictment that he is now found to be a Tier III violator and was advised of all "Adam Walsh Act" warnings and duties to register as a sex offender under R.C. 2950.032. At the conclusion of his sentencing, the "Defendant signed the Explanation of Duties as a Sex Offender" form and added an obscene remark directed to the court that typified his attitude towards this proceeding and the justice system.

IT IS SO ORDERED.

Date 5/10/11  
Date 3-10-11  
Date 3-10-11

[Signature]  
Judge Shirley Strickland Saffold  
[Signature]  
Judge Timothy J. McGinty  
[Signature]  
Judge John D. Sutila

THE STATE OF OHIO Cuyahoga County	SS.	I. GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN AND COPIED FROM THE ORIGINAL <u>Journal</u> <u>entry CR 54219</u>		
NOW ON FILE IN MY OFFICE.		
WITNESS MY HAND AND SEAL OF SAID COURT THIS <u>25</u> DAY OF <u>3</u> A.D. 20 <u>11</u>		
GERALD E. FUERST, Clerk		
By <u>Carol Hajer</u> Deputy		



**COURT PSYCHIATRIC CLINIC**  
COUNTY OF CUYAHOGA • COURT OF COMMON PLEAS

PHILLIP J. RESNICK M.D.  
Director

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Associate Director

February 22, 2011

The Honorable Shirley Strickland Saffold  
Courts Tower, 21-B  
Justice Center  
Cleveland, Ohio 44113

**RE: DENNY OBERMILLER**  
**DOCKET NO: CR-10-542119-A**  
**IDENTIFICATION NO: 12178026**  
**REFERRED UNDER: 2945.371(A)**

**COMPETENCY TO WAIVE MITIGATION EVALUATION**

**Identifying Data:** Denny Obermiller is a 29-year-old man referred to the Court Psychiatric Clinic for evaluation pursuant to Ohio Revised Code Section 2945.371(A) - Competence to Waive Mitigation. On January 11, 2011, the defendant pled guilty to the charges of Aggravated Murder (seven counts, each with capital specifications), Kidnapping (two counts), Aggravated Robbery (two counts), Rape, Aggravated Burglary, Burglary, Tampering with Evidence, Aggravated Theft (three counts), and Attempted Aggravated Arson stemming from his conduct on August 11, 2010. On January 25, 2011 a three-panel judge returned a verdict of guilty on all charges. Mr. Obermiller is currently in jail awaiting the mitigation phase of the trial.

**Statement of Non-confidentiality:** At the beginning of the interview, we informed the defendant of the nature and purpose of the evaluation. We explained that although we are psychiatrists, we would not be involved in his treatment. He was informed that the information he provided to us was not confidential, and that we would be preparing a report for the court. He read the Court Psychiatric Clinic's Client Rights form and Memorandum regarding the non-confidential nature of the evaluation. He expressed understanding, signed these forms, and agreed to proceed with the evaluation.

**Sources of Information:**

- 1) Interview with Mr. Obermiller at the Court Psychiatric Clinic conducted by me (psychiatrist Abhishek Jain, M.D.) and Phillip J. Resnick, M.D., Director of the Court Psychiatric Clinic, on February 8, 2011 lasting one hour and 45 minutes. A

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- follow-up interview was conducted by me and Dr. Resnick on February 10, 2011 lasting 25 minutes.
- 2) Collateral information obtained by Michael Caso, LISW-S, Court Psychiatric Clinic Chief Social Worker, on January 26, 2011 and January 27, 2011.
  - 3) Telephone contact with defense attorney Kevin Spellacy on February 11, 2011.
  - 4) Telephone contact with defense attorney James McDonnell on February 21, 2011.
  - 5) Transcript of the State of Ohio vs. Denny Obermiller court hearing from January 10, 2011 through January 25, 2011.
  - 6) Court Psychiatric Clinic File.
  - 7) Collateral information.
  - 8) Mr. Obermiller declined to release his Cuyahoga County Corrections Center medical and psychiatric records. He stated, "It's my right, it's my information, I don't want to release that information. Anything you want to know, you can ask me."

**Relevant Background History:** Mr. Obermiller reported that he was born on February 11, 1982 in Cleveland, Ohio. He lived with his mother until she died when he was two years old. He lived with his maternal grandmother and maternal step-grandfather from age two through 14. He then lived with his father for six months and his aunt for nine months. He was placed in an Ohio Department of Youth Services correctional facility for three and one-half years from around age 15 through age 18. He was then transferred to prison from ages 18 through 27. After he was released from prison, he lived with his maternal grandmother and maternal step-grandfather from August 2009 through February 2010 (age 27). He then lived with his girlfriend in his own apartment from February 2010 until his arrest in August 2010 (age 28).

Mr. Obermiller described his childhood as "spoiled, did whatever I felt like doing . . . I got into a lot of trouble with the law when I was younger." When asked about being physically or sexually abused as a child, he said, "I don't want to answer that." Mr. Obermiller said that he had a younger brother, "But no one knows where he is." Mr. Obermiller told me he has a supportive family, which included his father, uncles, paternal grandmother, cousins, a step-brother, and a step-sister.

**Educational History:** Mr. Obermiller said that he attended public school until 1997 (age 15) when he was incarcerated in Ohio Department of Youth Services (ODYS) correctional facilities. He earned a high school diploma in 2000 from the ODYS Mohican Juvenile Correctional Facility. He took classes in Business Administration for "a couple" semesters through Ashland University while he was in prison. He did not earn any degrees and has not pursued any further education.

Mr. Obermiller reported that he failed 8<sup>th</sup> or 9<sup>th</sup> grade because of poor attendance. He took summer classes and caught up to his appropriate grade level. He said he was in special education classes for behavioral issues but never for a learning disability. He told me he graduated high school with a 3.7 grade-point average. Mr. Obermiller was never expelled from school. He was suspended "over a dozen times . . . mostly for fighting."

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**Employment History:** Mr. Obermiller stated that he worked with his father as a roofer for Primera Construction from August 2009 through August 2010. He said he was a good worker and performed well. He did not have any disciplinary issues at work.

**Military Service:** Mr. Obermiller reported that he does not have any military experience. He said that he thought about joining the Army and performed well on the Armed Services Vocational Aptitude Battery (ASVAB), but "caught another case" and therefore could not join the military.

**Relationship History:** Mr. Obermiller told me that he was married to a guard at Mohican Juvenile Correctional Facility from March 2001 until 2002 when she committed suicide. Mr. Obermiller was in a relationship with his girlfriend Gina Mikluscak from October 2009 to August 2010. He said they broke up a couple weeks before his arrest in August 2010 because he "beat her up." Mr. Obermiller does not have any children.

**Legal History:** Mr. Obermiller said that he was arrested 24 times as a juvenile. His most serious offense was Aggravated Robbery (age 15), for which he was sentenced to three years in Ohio Department of Youth Services (ODYS) correctional facilities. He told me that while he was incarcerated, he was charged with Kidnapping, Felonious Assault, and Attempted Escape. He was tried as an adult and sentenced to prison. He served nine years in prison and was released in August 2009 with three years of post-release control.

**Medical History:** Mr. Obermiller told me that he was required to take a six-month course of medication after being exposed to tuberculosis in 1997. He did not have any medical consequences after completing the six-month course of medication. He had his wisdom teeth removed around 1999. He said he has had chronic back pain since 2000. He lost consciousness about five times throughout his life. Each episode lasted for a few seconds. He has never had any medical consequences related to losing consciousness. The last time he lost consciousness was 2005. He has never had a significant head injury or a seizure.

**Family Psychiatric History:** Mr. Obermiller stated that he had a family history of marijuana abuse. He did not state which family members abused marijuana. He did not report a family psychiatric history, such as psychiatric hospitalizations, suicides, or suicide attempts.

**Current Medications:** Mr. Obermiller told me that he has been prescribed Neurontin and Remeron for the past five months during his incarceration at the Cuyahoga County Jail. He is taking Neurontin (gabapentin) 900 mg twice daily for back pain. He is taking Remeron (mirtazapine) 15 mg or 30 mg at bedtime for "anxiety."

**Substance Use History:** Mr. Obermiller told me that he has used marijuana, alcohol, heroin, cocaine, LSD (hallucinogenic), and "whippits" (inhaled nitrous oxide cartridge that results in an euphoric effect).

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Mr. Obermiller said that he first used marijuana when he was 12 or 13 years old. He smoked marijuana about three or four times before being incarcerated at age 15. He said that he smoked six or seven times while incarcerated from ages 15 through 27. He had a positive drug screen after each use. He smoked about an ounce of marijuana every three days from August 2009 until his incarceration in August 2010.

Mr. Obermiller told me that he first drank alcohol when he was 12 or 13 years old. He drank about two or three beers twice a month. He did not drink any alcohol while incarcerated from ages 15 through 27. He drank about 12 times from August 2009 to August 2010. He said that he usually drank about two beers each time. He consumed a large amount of alcohol twice, including 12 shots of alcohol and around five beers on his birthday and a similar amount on Christmas 2009.

Mr. Obermiller reported that he used heroin five times, cocaine twice, LSD once, and "whippits" twice.

I systematically screened Mr. Obermiller for the symptoms of substance abuse and dependence as delineated in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders - Fourth Edition - Text Revision* (DSM-IV-TR). He did not report symptoms consistent with substance abuse or dependence for marijuana, alcohol, heroin, cocaine, LSD, or "whippits."

**Psychiatric History:** When asked when he first experienced psychiatric symptoms, Mr. Obermiller reported that he saw a counselor when he was five or six years old. He said his maternal grandmother took him to see a counselor because he was getting into trouble and to address issues related to his mother's death. He followed up with the counselor for a "few months." Mr. Obermiller did not have any further psychiatric symptoms or psychiatric treatment until his early 20s.

Mr. Obermiller developed depression in his early 20s while incarcerated. He said that he had four to five periods of depression lasting one to two weeks while incarcerated from ages 15 to 27. His symptoms during each episode of depression included a depressed mood, markedly diminished interest in activities, decreased appetite, increased sleep, decreased energy, feelings of worthlessness, and decreased concentration. He was prescribed anti-depressant medications during each episode of depression. He said that he took the anti-depressant medications for a "few weeks" each time and then stopped.

Mr. Obermiller said that from his prison release in August 2009 until his arrest in August 2010, his mood was "stressful." He said he "experienced a lot of things for the first time, first time I had to make bill payments." Although he reported a "stressful" mood, he did not report having any psychiatric symptoms, such as symptoms of depression or anxiety. He was not receiving any mental health services prior to his incarceration in August 2010.

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Mr. Obermiller said that right after his arrest in August 2010, his mood was "pretty fucked up." He said that he went through "spouts when it (his actions leading to his arrest and his current situation) really hit me and everything it entails, how much it hurt my family . . . I was hateful of myself . . . I felt worthless, like a maggot . . . I had a lot of nightmares about what I did . . . didn't eat much, lost about 20 pounds." He said that his concentration and energy were also low. He did enjoy visits from his family. He rated his mood during that month as a -5 on a scale from -5 to +5, with -5 being the "worst mood imaginable," 0 being "okay," and +5 being "the best mood imaginable." He said his low mood lasted for about one month.

When asked, Mr. Obermiller said that he has never made a suicide attempt or engaged in self-injurious behavior. He stated that when he was first incarcerated in August 2010, he was placed on Klonopin (anti-anxiety medication) 2 mg three times daily while in the psychiatric pod. He said this was an excessive dose and he had to be taken to the hospital. He said that this was not a suicide attempt and he did not take an intentional overdose.

I systematically screened Mr. Obermiller for current symptoms of depression, mania (abnormal elevated mood), psychosis (including schizophrenia), posttraumatic stress disorder (PTSD), and anxiety disorders as delineated in the DSM-IV-TR. Mr. Obermiller reported that after his first month of being incarcerated in August 2010, his mood has been "pretty much even keeled." He enjoys visits from his family. He has a decreased appetite, but "forces" himself to eat and has regained the weight that he lost during the first month of his incarceration. He has been sleeping "enough." He said that his energy is "fine." He continues to feel worthless related to raping and murdering his grandmother on August 11, 2010. He said that his concentration is "fine." Although he is seeking the death penalty, he does not have any suicidal thoughts or plans to harm himself.

When asked about symptoms of PTSD, he said that after murdering his step-grandfather and raping and murdering his grandmother, he responded with intense horror. He had nightmares of the event daily for the first month, and now has nightmares about twice weekly. He avoids thoughts or conversations about the events. He had difficulty falling asleep, difficulty staying asleep, and difficulty concentrating for the first month after the events, but now his sleep and concentration have improved.

Mr. Obermiller did not report any symptoms consistent with mania, psychosis, generalized anxiety disorder, or panic disorder.

*Mental Status Examination on February 8, 2011 and February 10, 2011:* Mr. Obermiller appeared his stated age. He had a visible tattoo on his neck. He was dressed in a jail uniform. He made good eye contact and remained cooperative throughout the evaluation. No unusual movements were noted.

Mr. Obermiller described his mood as "even keeled." His appearance was consistent with his description. His emotional expression was somewhat blunted, but overall appropriate for the evaluation. His thoughts were not disjointed. His speech was clear, coherent, and easy to

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understand. He was not hearing or seeing hallucinations. There was no evidence of paranoia or delusions. Mr. Obermiller stated that he does not have any thoughts of harming himself or others. When asked about suicide, he said, "I don't think I'm capable of it." He said that his sleep, energy, and concentration were "okay."

Mr. Obermiller was oriented to place, time, and his current situation. His remote memory was intact based on correctly answering personal history questions that I verified through an objective source. His recent memory was good based on correctly recalling three out of three unrelated items after a few minutes. His concentration was good demonstrated by correctly subtracting 7 from 100 five out of five times in a series and correctly spelling "train" forward and backward. His attention was intact throughout the evaluation. His fund of knowledge was good based on naming the current and past four United States Presidents. His abstraction was good based on correctly interpreting two out of two simple proverbs and two out of two similarity questions. His insight into his current situation was intact. His judgment was fair based on his response to hypothetical situations.

**Summary of Collateral Information:**

Note dictated by Michael Caso, LISW-S, Court Psychiatric Clinic Chief Social Worker, on January 26, 2011: "According to Mr. Spellacy (Mr. Obermiller's attorney) the referral originated from the Bench. Mr. Spellacy stated that he has no Competency concerns. He stated that his client is 'probably' diagnosed with Bipolar Disorder and 'likely' diagnosed with some type of substance use problem. He indicated that his client received a private Competence to Stand Trial Evaluation with Dr. Connell. He reported that Dr. Connell opined that the client was competent to stand trial and the trial and hearing proceeded . . . Mr. Spellacy stated that his client is refusing mitigation for the capital phase of his case. He commented, 'He just wants to die.'"

Note completed by Michael Caso, LISW-W on January 27, 2011: "Mr. Obermiller came to the Court Clinic on this date for a brief interview to attempt to obtain medical records. He refused to sign any release forms and he refused to say why he was refusing to sign the releases. He stated that he is currently on Remeron and Neurontin 'for anxiety'. He stated that he was in special classes for students with behavior problems in the Cleveland schools. He refused to say whether he has had any psychiatric hospitalizations. He indicated that he was not participating in outpatient care prior to his current incarceration . . . The defendant's only question was how long the evaluation process would last. He sat calmly during the brief meeting. He agreed to meet with a doctor to participate in the competency exam."

Telephone contacts with defense attorneys Kevin Spellacy and James McDonnell: Mr. Spellacy and Mr. McDonnell did not report any concerns regarding Mr. Obermiller's competence to waive mitigation. They also indicated that Mr. Obermiller has an accurate understanding of the likely sentences with and without presentation of mitigation.

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Diagnostic Impression:

1) Major Depressive Disorder, Recurrent, In Partial Remission – 296.35

This diagnosis is based on Mr. Obermiller's history of having at least four periods of depression lasting one to two weeks. His periods of depression included having a depressed mood, marked diminished interest in almost all activities, decreased appetite, increased sleep, decreased energy, feelings of worthlessness, and decreased concentration. He was prescribed anti-depressant medications during each episode of depression.

Mr. Obermiller's most recent episode of depression lasted for one month after his arrest in August 2010. His symptoms included having the lowest mood of his life, decreased appetite with a 20-pound weight loss, difficulty sleeping, decreased energy, feelings of worthlessness, and decreased concentration.

The modifier *In Partial Remission* is given because Mr. Obermiller has not meet the minimal criteria for a Major Depressive Episode for at least four months, but continues to have symptoms of decreased appetite and feelings of worthlessness. However, Mr. Obermiller's appetite has improved over the past four months and he has regained twenty pounds.

I considered the diagnosis of post-traumatic stress disorder based on Mr. Obermiller's history of experiencing intense horror after murdering his grandparents. He had recurrent nightmares of the event, avoided thoughts and conversations about the event, and had difficulty concentrating and difficulty falling and staying asleep for one month after the event. However, at least three symptoms of avoidance are necessary to make this diagnosis and Mr. Obermiller only had one (avoiding thoughts and conversations about the event). Mr. Obermiller no longer has difficulty concentrating or difficulty falling and staying asleep.

Competency to Waive Mitigation Evaluation: Mr. Obermiller said that he never changed or regretted his decision to plead guilty to his current charges. The hearing transcript from January 10, 2011 through January 25, 2011, and Mr. Obermiller's attorneys Mr. Spellacy and Mr. McDonnell, indicate that Mr. Obermiller has consistently chosen to plead guilty.

Mr. Obermiller said that his decision to waive presenting mitigation has been "firm" and he has never changed in his desire to receive a death sentence. According to the hearing transcript on January 25, 2011, defense attorney Mr. McDonnell states, "After having discussions with Mr. Obermiller over the course of our representation, it's his intent to offer no mitigation."

When asked about his understanding of death, Mr. Obermiller said he was raised Catholic and he believes in a "hereafter." He said that he will go to "Hell" in the hereafter because of his actions. He does not view going to "Hell" as a reason to choose life in prison instead of a death sentence. He does not believe he deserves forgiveness. He said that he "betrayed" his grandmother, who was the "only" person who cared for him. He did not express remorse for killing his step-grandfather. He understood the irreversibility of death.

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When asked the meaning of mitigation, Mr. Obermiller said, "I say my side of the story, I can present any evidence I want so that I would not get the death penalty." When asked the benefits of proceeding with mitigation, he said, "To prevent someone from getting the death penalty." When asked the drawbacks of presenting mitigation, he said he did not want to partake in any actions that would prevent him from receiving a death sentence.

When asked what waiving mitigation means, he said, "I'm more likely to get the death penalty if I don't put on mitigation." When asked the benefits of waiving mitigation, he said, "Because I want the death penalty rather than spend the rest of my life in prison." When asked the drawback of waiving mitigation, he said, "It would not make my family happy . . . but they're not the ones spending the rest of their lives in prison."

When asked the likely outcome of mitigation, Mr. Obermiller stated, "There is way too much evidence against me." He said that at most his sentence would be reduced to life in prison. He reiterated that he prefers to be sentenced to death rather than sentenced to life in prison.

I asked Mr. Obermiller the benefits and drawbacks of being sentenced to life in prison compared to the benefits and drawbacks of being sentenced to death. Mr. Obermiller said that the benefit of being sentenced to life in prison was that his family would be less sad than if he received the death penalty. Mr. Obermiller said the drawback of going to prison is "I don't want to spend the rest of my life in prison, especially now that I know what a family is like and life is like out there (outside of prison). I don't want to spend my life like that (in prison). It (prison) is a zoo, and you're the animal."

When asked if concern for his personal safety in prison is a factor for preferring a death sentence rather than life in prison, he told me that he is not concerned for his safety in prison. He said that he holds a high-ranking position in the Aryan Brotherhood; therefore he would have support and protection from other Aryan Brotherhood members while in prison.

Mr. Obermiller said that the benefit of receiving the death penalty is, "I don't want to spend the rest of my life in prison . . . It (a death sentence compared to life in prison) is the lesser of two evils." Mr. Obermiller said the drawback of receiving the death penalty is that his family "will be sad" and that his relatives do not want him to die. He added, "But everyone's gotta die . . . I'm going to die in prison either way." He understood that even with a death sentence, he may not be executed for "years." He stated that "years" on death row would be better than spending an even longer time in prison.

**Opinion:** It is our opinion, with reasonable medical certainty, that although Mr. Obermiller has Major Depressive Disorder, in Partial Remission, he understands the choice between life and death and has the capacity to knowingly and intelligently decide not to pursue mitigation. The following evidence supports this opinion:

- 1) Mr. Obermiller has consistently expressed that he wants to waive mitigation.

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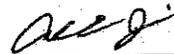
- 2) Mr. Obermiller has consistently expressed that he prefers being sentenced to death rather than life in prison.
- 3) Mr. Obermiller had a rational understanding of the likely outcomes of presenting mitigation.
- 4) Mr. Obermiller has a rational understanding of death.
- 5) Mr. Obermiller understood the pros and cons of proceeding with mitigation evidence.
- 6) Mr. Obermiller understood the pros and cons of waiving mitigation.
- 7) Mr. Obermiller understood the pros and cons of life in prison.
- 8) Mr. Obermiller understood the pros and cons of being sentenced to death.
- 9) Mr. Obermiller was able to apply the pros and cons of proceeding with mitigation, waiving mitigation, life in prison, and receiving a death sentence to his own situation.
- 10) Although Mr. Obermiller has the residual Major Depressive Disorder symptoms of decreased appetite and feeling worthless, these symptoms do not impair his capacity to waive mitigation.
  - a. His appetite has significantly improved.
  - b. His decision to waive mitigation is based on preferring a death sentence rather than being sentenced to life in prison. His decision is not based on feelings of worthlessness.
- 11) Mr. Obermiller's attorneys do not have any specific concerns regarding his competence to waive mitigation.
- 12) Mr. Obermiller does not have any delusions or hallucinations.
- 13) Mr. Obermiller does not report suicidal ideation.
- 14) Mr. Obermiller has not been coerced to waive mitigation.

In summary, it is our opinion with reasonable medical certainty that although Mr. Denny Obermiller is diagnosed with Major Depressive Disorder, In Partial Remission, he understands

**RE: DENNY OBERMILLER**  
**COMPETENCY TO WAIVE MITIGATION**  
**February 2011**

the choice between life and death and has the capacity to knowingly and intelligently decide not to pursue mitigation.

Sincerely,



---

**Abhishek Jain, M.D.**  
**Psychiatrist**



---

**Phillip J. Resnick, MD**  
**Director, Court Psychiatric Clinic**



IN THE COURT OF COMMON PLEAS  
CRIMINAL DIVISION  
CUYAHOGA COUNTY, OHIO

2010 OCT 19 P 2:35

STATE OF OHIO )

CASE NO.: 542 119

Plaintiff )

- vs - )

GERALD E. FUERST  
CLERK OF COURT  
CUYAHOGA COUNTY

JUDGE SHIRLEY STRICKLAND SAFFOLD

DENNY OBERMILLER )

Defendant )

DEFENDANT'S MOTION TO  
SUPPRESS STATEMENTS  
OBTAINED IN VIOLATION  
OF DEFENDANT'S  
CONSTITUTIONAL RIGHTS

**DEFENDANT'S MOTION TO SUPPRESS STATEMENTS OBTAINED  
IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS**

Defendant, through counsel, respectfully moves this Court to conduct an evidentiary hearing at which Defendant will demonstrate that Plaintiff's agents violated his U.S. and Ohio constitutional rights when they obtained statements attributed to him.

**MEMORANDUM IN SUPPORT**

On August 15, 2010 Maple Heights Police learned that the Defendant was on his way to Buckeye Lake, Ohio. As a result of this information, Licking County Sheriff Officers made plans to arrest the Defendant. The Police observed the Defendant's car leaving the parking lot in Licking County. They then observed the Defendant exit the driver's side of his vehicle and enter a store. Upon leaving the store, the police observed the Defendant return to his car at which point the police pulled their guns and arrested Mr. Obermiller. The police then removed their tasers and announced, "Taser taser". At this point, the Defendant allegedly made oral statements. The Defendant was not given his miranda warnings prior to making these statements.

PROCESSED

OCT 20 2010

GERALD E. FUERST, CLERK  
IMAGING DEPARTMENT

It is a long and well-established principle that alleged waivers of such fundamental constitutional rights as the right to counsel and the privilege against self-incrimination will be upheld only after careful inquiry into factual basis for the alleged waiver. Johnson v. Zerbst, 304 U.S. 458 (1938). Waivers of such constitutional rights not only must be voluntary but must be knowing and intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. Brady v. United States, 397 U.S. 742, 750 (1970). The State bears the heavy burden of demonstrating that the accused was sufficiently aware of the consequences of what he was doing and that he knowingly and intelligently waived these vital constitutional rights. Miranda v. Arizona, 384 U.S. 436 (1966).

The question of whether the accused waived his right "is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case." North Carolina v. Butler, 441 U.S. 369 (1979). Moreover, it is clear that courts "must indulge in every reasonable presumption against waiver." Brewer v. Williams, 430 U.S. 387 (1977).

The test to determine whether a knowing and intelligent waiver was made rests on an inquiry into the totality of circumstances surrounding the interrogation. Miranda, 384 U.S. at 475-77. The question of waiver must be determined on "the particular facts and circumstances surrounding the case." Johnson, 304 U.S. at 464; Butler, 441 U.S. 369; Schneekloth v. Bustamonte, 412 U.S. 218 (1973).

Whether a confession is voluntary is an issue independent of whether there was "formal compliance with the requirements of Miranda." State v. Chase, 55 Ohio St.2d

237, 246 (1978); State v. Kassow, 28 Ohio St.2d 141 (1971). The burden is on the prosecution to show that, considering the totality of the circumstances, the confession was voluntarily given. Bram v. United States, 168 U.S. 532, 549 (1897); United States v. Brown, 557 F.2d 541, 546-47 (C.A. 6, 1977); State v. Edwards, 49 Ohio St.2d 31, 40-41 (1976), death penalty vacated, 438 U.S. 911 (1978). Psychological as well as physical coercion may render a confession involuntary. Townsend v. Sain, 372 U.S. 293, 307 (1963).

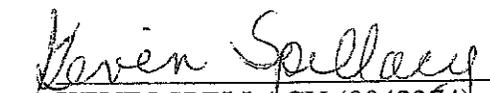
An involuntary confession is inadmissible at trial. Bram, 168 U.S. 532. The admission into evidence of an involuntary confession deprives the defendant of his Fourteenth Amendment right to due process of law. Jackson v. Denno, 378 U.S. 368 (1964). The standard by which voluntariness is to be judged is whether the confession was a "product of a rational intellect and free will." Townsend, 372 U.S. 293. If a confession has been made voluntarily, any subsequent conviction cannot stand. Stroble v. California, 343 U.S. 181 (1952).

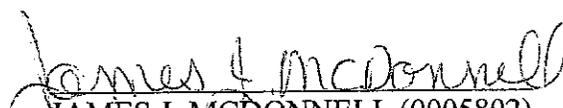
In Edwards, 49 Ohio St.2d 31, the Ohio Supreme Court held that a decision as to whether a confession was voluntarily given must take into account the totality of the circumstances, including, but not limited to: the age, mentality, and prior criminal experience of the accused; the length, intensity and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement. Id. at 40-41. It follows that the physical and mental status of the person making the confession are critical aspects to be reviewed in determining if the confession was in fact made voluntarily.

Because this is a capital case, the constitutional issues implicated herein require heightened scrutiny in order to protect Defendant's Ohio and Federal constitutional rights to effective assistance of counsel, due process of law, equal protection of the law, and freedom from cruel and unusual punishment. U.S. Const. amends. V, VI, VIII, IX, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16, and 20. Defendant's "life" interest is at stake in the proceedings. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five Justice recognized a distinct "life" interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests.) Death is different. For that reason more process is due, not less. All measures must be taken to prevent arbitrary, cruel, and unusual results in a capital trial. See Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). Therefore, at bare minimum this Court should conduct an evidentiary hearing to address the constitutional violations alleged in the instant motion.

#### **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing DEFENDANT'S MOTION TO SUPPRESS STATEMENTS OBTAINED IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS has been served upon William Mason, Prosecuting Attorney, at 1200 Ontario Street, Cleveland, Ohio 44113 on this \_\_\_\_\_ day of October, 2010.

  
\_\_\_\_\_  
KEVIN SPELLACY (0042374)  
Attorney for Defendant

  
\_\_\_\_\_  
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**SECTION 2, ARTICLE I, OHIO CONSTITUTION**

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

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

**SECTION 5, ARTICLE I, OHIO CONSTITUTION**

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

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

## **SECTION 9, ARTICLE I, OHIO CONSTITUTION**

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

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

## SECTION 10, ARTICLE I, OHIO CONSTITUTION

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

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

**SECTION 16, ARTICLE I, OHIO CONSTITUTION**

**§ 16 REDRESS IN COURTS.**

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

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

## AMENDMENT IV, UNITED STATES CONSTITUTION

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

## AMENDMENT V, UNITED STATES CONSTITUTION

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

## **AMENDMENT VI, UNITED STATES CONSTITUTION**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**AMENDMENT VIII, UNITED STATES CONSTITUTION**

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

## AMENDMENT XIV, UNITED STATES CONSTITUTION

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

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

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

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

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

## ARTICLE II, UNITED STATES CONSTITUTION

### Section 1.

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

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

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

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

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

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

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

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:--  
"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

## **Section 2.**

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

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

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

## **Section 3.**

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

## **Section 4.**

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

## ARTICLE VI, UNITED STATES CONSTITUTION

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

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

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

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Current through Legislation passed by the 129th Ohio General Assembly  
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\*\*\* Annotations current through January 9, 2012 \*\*\*

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

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2903.01 (2012)*

§ 2903.01. Aggravated murder

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

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

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

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

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

- (1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.
- (2) It is the offender's specific purpose to kill a law enforcement officer.

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

(G) As used in this section:

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

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

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TITLE 29. CRIMES -- PROCEDURE  
 CHAPTER 2905. KIDNAPPING AND EXTORTION  
 KIDNAPPING AND RELATED OFFENSES

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2905.01 (2012)*

§ 2905.01. Kidnapping

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

- (1) To hold for ransom, or as a shield or hostage;
- (2) To facilitate the commission of any felony or flight thereafter;
- (3) To terrorize, or to inflict serious physical harm on the victim or another;
- (4) To engage in sexual activity, as defined in *section 2907.01 of the Revised Code*, with the victim against the victim's will;
- (5) To hinder, impede, or obstruct a function of government, or to force any action or concession on the part of governmental authority;
- (6) To hold in a condition of involuntary servitude.

(B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

- (1) Remove another from the place where the other person is found;
- (2) Restrain another of the other person's liberty.

(C) (1) Whoever violates this section is guilty of kidnapping. Except as otherwise provided in this division or division (C)(2) or (3) of this section, kidnapping is a felony of the first degree. Ex-

cept as otherwise provided in this division or division (C)(2) or (3) of this section, if an offender who violates division (A)(1) to (5), (B)(1), or (B)(2) of this section releases the victim in a safe place unharmed, kidnapping is a felony of the second degree.

(2) If the offender in any case also is convicted of or pleads guilty to a specification as described in *section 2941.1422 of the Revised Code* that was included in the indictment, count in the indictment, or information charging the offense, the court shall order the offender to make restitution as provided in division (B)(8) of *section 2929.18 of the Revised Code* and, except as otherwise provided in division (C)(3) of this section, shall sentence the offender to a mandatory prison term as provided in division (B)(7) of *section 2929.14 of the Revised Code*.

(3) If the victim of the offense is less than thirteen years of age and if the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, kidnapping is a felony of the first degree, and, notwithstanding the definite sentence provided for a felony of the first degree in *section 2929.14 of the Revised Code*, the offender shall be sentenced pursuant to *section 2971.03 of the Revised Code* as follows:

(a) Except as otherwise provided in division (C)(3)(b) of this section, the offender shall be sentenced pursuant to that section to an indefinite prison term consisting of a minimum term of fifteen years and a maximum term of life imprisonment.

(b) If the offender releases the victim in a safe place unharmed, the offender shall be sentenced pursuant to that section to an indefinite term consisting of a minimum term of ten years and a maximum term of life imprisonment.

(D) As used in this section:

(1) "Involuntary servitude" has the same meaning as in *section 2905.31 of the Revised Code*.

(2) "Sexual motivation specification" has the same meaning as in *section 2971.01 of the Revised Code*.

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TITLE 29. CRIMES -- PROCEDURE  
 CHAPTER 2907. SEX OFFENSES  
 SEXUAL ASSAULTS

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2907.02 (2012)*

§ 2907.02. Rape

(A) (1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:

(a) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug, intoxicant, or controlled substance to the other person surreptitiously or by force, threat of force, or deception.

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

(c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

(B) Whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A)(1)(a) of this section substantially impairs the other person's judgment or control by administering any controlled substance described in *section 3719.41 of the Revised Code* to the other person surreptitiously or by force, threat of force, or deception, the prison term imposed upon the offender shall be one of the prison terms prescribed for a felony of the first degree in *section 2929.14 of the Revised Code* that is not less than five years. Except as otherwise provided in this division, notwithstanding *sections 2929.11 to 2929.14 of the Revised Code*, an offender under division (A)(1)(b) of this section shall be sentenced to a prison term or term of life imprisonment pur-

suant to *section 2971.03 of the Revised Code*. If an offender is convicted of or pleads guilty to a violation of division (A)(1)(b) of this section, if the offender was less than sixteen years of age at the time the offender committed the violation of that division, and if the offender during or immediately after the commission of the offense did not cause serious physical harm to the victim, the victim was ten years of age or older at the time of the commission of the violation, and the offender has not previously been convicted of or pleaded guilty to a violation of this section or a substantially similar existing or former law of this state, another state, or the United States, the court shall not sentence the offender to a prison term or term of life imprisonment pursuant to *section 2971.03 of the Revised Code*, and instead the court shall sentence the offender as otherwise provided in this division. If an offender under division (A)(1)(b) of this section previously has been convicted of or pleaded guilty to violating division (A)(1)(b) of this section or to violating an existing or former law of this state, another state, or the United States that is substantially similar to division (A)(1)(b) of this section, if the offender during or immediately after the commission of the offense caused serious physical harm to the victim, or if the victim under division (A)(1)(b) of this section is less than ten years of age, in lieu of sentencing the offender to a prison term or term of life imprisonment pursuant to *section 2971.03 of the Revised Code*, the court may impose upon the offender a term of life without parole. If the court imposes a term of life without parole pursuant to this division, division (F) of *section 2971.03 of the Revised Code* applies, and the offender automatically is classified a tier III sex offender/child-victim offender, as described in that division.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under *section 2945.59 of the Revised Code*, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise is unable to obtain the services of counsel, the court, upon request, may appoint counsel to represent the victim without cost to the victim.

(G) It is not a defense to a charge under division (A)(2) of this section that the offender and the victim were married or were cohabiting at the time of the commission of the offense.

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TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2909. ARSON AND RELATED OFFENSES

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*ORC Ann. 2909.02 (2012)*

§ 2909.02. Aggravated arson

(A) No person, by means of fire or explosion, shall knowingly do any of the following:

- (1) Create a substantial risk of serious physical harm to any person other than the offender;
- (2) Cause physical harm to any occupied structure;
- (3) Create, through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of physical harm to any occupied structure.

(B) (1) Whoever violates this section is guilty of aggravated arson.

(2) A violation of division (A)(1) or (3) of this section is a felony of the first degree.

(3) A violation of division (A)(2) of this section is a felony of the second degree.

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

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*ORC Ann. 2911.01 (2012)*

§ 2911.01. Aggravated robbery

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

- (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
- (2) Have a dangerous ordnance on or about the offender's person or under the offender's control;
- (3) Inflict, or attempt to inflict, serious physical harm on another.

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

- (1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;
- (2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

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

(D) As used in this section:

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

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

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

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*ORC Ann. 2911.11 (2012)*

§ 2911.11. Aggravated burglary

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

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

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

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

(C) As used in this section:

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

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

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CHAPTER 2911. ROBBERY, BURGLARY, TRESPASS AND SAFECRACKING  
BURGLARY

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*ORC Ann. 2911.12 (2012)*

§ 2911.12. Burglary

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

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

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

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

(B) No person, by force, stealth, or deception, shall trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present.

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

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

(E) Whoever violates division (B) of this section is guilty of trespass in a habitation when a person is present or likely to be present, a felony of the fourth degree.

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TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2913. THEFT AND FRAUD  
THEFT

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2913.02 (2012)*

§ 2913.02. Theft

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:

(1) Without the consent of the owner or person authorized to give consent;

(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;

(3) By deception;

(4) By threat;

(5) By intimidation.

(B) (1) Whoever violates this section is guilty of theft.

(2) Except as otherwise provided in this division or division (B)(3), (4), (5), (6), (7), or (8) of this section, a violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is one thousand dollars or more and is less than seven thousand five hundred dollars or if the property stolen is any of the property listed in *section 2913.71 of the Revised Code*, a violation of this section is theft, a felony of the fifth degree. If the value of the property or services stolen is seven thousand five hundred dollars or more and is less than one hundred fifty thousand dollars, a violation of this section is grand theft, a felony of the fourth degree. If the value of the property or services stolen is one hundred fifty thousand dollars or more and is less than seven hundred fifty thousand dollars, a violation of this section is aggravated theft, a felony of the third degree. If the value of the property or services is seven hundred fifty thousand dollars or more and is less than one million five hundred thousand dollars, a violation of this section is aggravated theft, a felony of the second degree. If the value of the property or services stolen is one mil-

lion five hundred thousand dollars or more, a violation of this section is aggravated theft of one million five hundred thousand dollars or more, a felony of the first degree.

(3) Except as otherwise provided in division (B)(4), (5), (6), (7), or (8) of this section, if the victim of the offense is an elderly person or disabled adult, a violation of this section is theft from an elderly person or disabled adult, and division (B)(3) of this section applies. Except as otherwise provided in this division, theft from an elderly person or disabled adult is a felony of the fifth degree. If the value of the property or services stolen is one thousand dollars or more and is less than seven thousand five hundred dollars, theft from an elderly person or disabled adult is a felony of the fourth degree. If the value of the property or services stolen is seven thousand five hundred dollars or more and is less than thirty-seven thousand five hundred dollars, theft from an elderly person or disabled adult is a felony of the third degree. If the value of the property or services stolen is thirty-seven thousand five hundred dollars or more and is less than one hundred fifty thousand dollars, theft from an elderly person or disabled adult is a felony of the second degree. If the value of the property or services stolen is one hundred fifty thousand dollars or more, theft from an elderly person or disabled adult is a felony of the first degree.

(4) If the property stolen is a firearm or dangerous ordnance, a violation of this section is grand theft. Except as otherwise provided in this division, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the third degree, and there is a presumption in favor of the court imposing a prison term for the offense. If the firearm or dangerous ordnance was stolen from a federally licensed firearms dealer, grand theft when the property stolen is a firearm or dangerous ordnance is a felony of the first degree. The offender shall serve a prison term imposed for grand theft when the property stolen is a firearm or dangerous ordnance consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(5) If the property stolen is a motor vehicle, a violation of this section is grand theft of a motor vehicle, a felony of the fourth degree.

(6) If the property stolen is any dangerous drug, a violation of this section is theft of drugs, a felony of the fourth degree, or, if the offender previously has been convicted of a felony drug abuse offense, a felony of the third degree.

(7) If the property stolen is a police dog or horse or an assistance dog and the offender knows or should know that the property stolen is a police dog or horse or an assistance dog, a violation of this section is theft of a police dog or horse or an assistance dog, a felony of the third degree.

(8) If the property stolen is anhydrous ammonia, a violation of this section is theft of anhydrous ammonia, a felony of the third degree.

(9) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by causing a motor vehicle to leave the premises of an establishment at which gasoline is offered for retail sale without the offender making full payment for gasoline that was dispensed into the fuel tank of the motor vehicle or into another container, the court may do one of the following:

(a) Unless division (B)(9)(b) of this section applies, suspend for not more than six months the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege;

(b) If the offender's driver's license, probationary driver's license, commercial driver's license, temporary instruction permit, or nonresident operating privilege has previously been suspended pursuant to division (B)(9)(a) of this section, impose a class seven suspension of the offender's license, permit, or privilege from the range specified in division (A)(7) of *section 4510.02 of the Revised Code*, provided that the suspension shall be for at least six months.

(10) In addition to the penalties described in division (B)(2) of this section, if the offender committed the violation by stealing rented property or rental services, the court may order that the offender make restitution pursuant to *section 2929.18 or 2929.28 of the Revised Code*. Restitution may include, but is not limited to, the cost of repairing or replacing the stolen property, or the cost of repairing the stolen property and any loss of revenue resulting from deprivation of the property due to theft of rental services that is less than or equal to the actual value of the property at the time it was rented. Evidence of intent to commit theft of rented property or rental services shall be determined pursuant to the provisions of *section 2913.72 of the Revised Code*.

(C) The sentencing court that suspends an offender's license, permit, or nonresident operating privilege under division (B)(9) of this section may grant the offender limited driving privileges during the period of the suspension in accordance with Chapter 4510. of the Revised Code.

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

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*ORC Ann. 2921.12 (2012)*

§ 2921.12. Tampering with evidence

(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;

(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.

(B) Whoever violates this section is guilty of tampering with evidence, a felony of the third degree.

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TITLE 29. CRIMES -- PROCEDURE  
 CHAPTER 2923. CONSPIRACY, ATTEMPT, AND COMPLICITY; WEAPONS CONTROL;  
 CORRUPT ACTIVITY  
 CONSPIRACY, ATTEMPT, AND COMPLICITY

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*ORC Ann. 2923.02 (2012)*

§ 2923.02. Attempt

(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense that was the object of the attempt was either factually or legally impossible under the attendant circumstances, if that offense could have been committed had the attendant circumstances been as the actor believed them to be.

(C) No person who is convicted of committing a specific offense, of complicity in the commission of an offense, or of conspiracy to commit an offense shall be convicted of an attempt to commit the same offense in violation of this section.

(D) It is an affirmative defense to a charge under this section that the actor abandoned the actor's effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purpose.

(E) (1) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to commit aggravated murder, murder, or an offense for which the maximum penalty is imprisonment for life is a felony of the first degree. An attempt to commit a drug abuse offense for which the penalty is determined by the amount or number of unit doses of the controlled substance involved in the drug abuse offense is an offense of the same degree as the drug abuse offense attempted would be if that drug abuse offense had been committed and had involved an amount or number of unit doses of the controlled substance that is within the next lower range of controlled substance amounts than was involved in the attempt. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense other than a viola-

tion of Chapter 3734. of the Revised Code that is not specifically classified, an attempt is a misdemeanor of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth degree if the offense attempted is a misdemeanor. In the case of an attempt to commit a violation of any provision of Chapter 3734. of the Revised Code, other than *section 3734.18 of the Revised Code*, that relates to hazardous wastes, an attempt is a felony punishable by a fine of not more than twenty-five thousand dollars or imprisonment for not more than eighteen months, or both. An attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

(2) If a person is convicted of or pleads guilty to attempted rape and also is convicted of or pleads guilty to a specification of the type described in *section 2941.1418 [2941.14.18], 2941.1419 [2941.14.19], or 2941.1420 [2941.14.20] of the Revised Code*, the offender shall be sentenced to a prison term or term of life imprisonment pursuant to *section 2971.03 of the Revised Code*.

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

(F) As used in this section:

- (1) "Drug abuse offense" has the same meaning as in *section 2925.01 of the Revised Code*.
- (2) "Motor vehicle" has the same meaning as in *section 4501.01 of the Revised Code*.

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

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*ORC Ann. 2929.02 (2012)*

§ 2929.02. Penalties for aggravated murder or murder

(A) Whoever is convicted of or pleads guilty to aggravated murder in violation of *section 2903.01 of the Revised Code* shall suffer death or be imprisoned for life, as determined pursuant to *sections 2929.022 [2929.02.2], 2929.03, and 2929.04 of the Revised Code*, except that no person who raises the matter of age pursuant to *section 2929.023 [2929.02.3] of the Revised Code* and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

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

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

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

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

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

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

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

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 PENALTIES FOR MURDER

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*ORC Ann. 2929.021 (2012)*

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

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

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

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

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

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

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*ORC Ann. 2929.022 (2012)*

§ 2929.022. Determination of aggravating circumstances of prior conviction

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

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

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

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

(b) If the offender raises the matter of age at trial pursuant to *section 2929.023 [2929.02.3] of the Revised Code* and is not found at trial to have been eighteen years of age or older at the time of the commission of the offense, conduct a hearing to determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of *section 2929.04 of the*

*Revised Code* is proven beyond a reasonable doubt. After conducting the hearing, the panel or judge shall proceed as follows:

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

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

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

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

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

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CHAPTER 2929. PENALTIES AND SENTENCING  
PENALTIES FOR MURDER

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*ORC Ann. 2929.023 (2012)*

§ 2929.023. Defendant may raise matter of age

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

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*ORC Ann. 2929.03 (2012)*

§ 2929.03. Imposing sentence for aggravated murder

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

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

(a) Life imprisonment without parole;

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

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

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

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

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

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code*, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to *section 2929.023 [2929.02.3] of the Revised Code*, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) (1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of *section 2929.04 of the Revised Code*, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to *section 2929.023 [2929.02.3] of the Revised Code*, the trial court shall impose sentence on the offender as follows:

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

(i) Life imprisonment without parole;

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

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

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

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

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

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

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

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

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

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

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

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

(D) (1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to *section 2929.023 [2929.02.3] of the Revised Code* and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to *section 2947.06 of the Revised Code*. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that

is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of *section 2929.04 of the Revised Code*, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of *section 2929.04 of the Revised Code* and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

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

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

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

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

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

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, life imprisonment with parole eligibility after serving thirty full years of imprisonment, or an

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

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

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

(i) Life imprisonment without parole;

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

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

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

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

(E) If the offender raised the matter of age at trial pursuant to *section 2929.023 [2929.02.3] of the Revised Code*, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of *section 2929.04 of the Revised Code*, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

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

(a) Life imprisonment without parole;

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

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

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

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

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

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

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

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*ORC Ann. 2929.04 (2012)*

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

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

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

(2) The offense was committed for hire.

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

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

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

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

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

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

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

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

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

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

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to *section 2929.023 [2929.02.3] of the Revised Code* or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

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

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

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*ORC Ann. 2929.05 (2012)*

§ 2929.05. Appellate review of death sentence

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

A court of appeals that reviews a case in which the sentence of death is imposed for an offense committed before January 1, 1995, shall file a separate opinion as to its findings in the case with the

clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

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

(C) At any time after a sentence of death is imposed pursuant to *section 2929.022 [2929.02.2]* or *2929.03 of the Revised Code*, the court of common pleas that sentenced the offender shall vacate the sentence if the offender did not present evidence at trial that the offender was not eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced and if the offender shows by a preponderance of the evidence that the offender was less than eighteen years of age at the time of the commission of the aggravated murder for which the offender was sentenced. The court is not required to hold a hearing on a motion filed pursuant to this division unless the court finds, based on the motion and any supporting information submitted by the defendant, any information submitted by the prosecuting attorney, and the record in the case, including any previous hearings and orders, probable cause to believe that the defendant was not eighteen years of age or older at the time of the commission of the aggravated murder for which the defendant was sentenced to death.

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*ORC Ann. 2929.06 (2012)*

§ 2929.06. Resentencing after sentence of death or life imprisonment without parole is set aside, nullified, or vacated

(A) If a sentence of death imposed upon an offender is set aside, nullified, or vacated because the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by *section 2929.05 of the Revised Code*, is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in *sections 2929.03 and 2929.04 of the Revised Code* is unconstitutional, is set aside, nullified, or vacated pursuant to division (C) of *section 2929.05 of the Revised Code*, or is set aside, nullified, or vacated because a court has determined that the offender is mentally retarded under standards set forth in decisions of the supreme court of this state or the United States supreme court, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall impose upon the offender a sentence of life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of *section 2929.03 of the Revised Code*, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of *section 2971.03 of the Revised Code* and served pursuant to that section, the court shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of *section 2929.03* or under *section 2909.24 of the Revised Code* at the time the offender committed the offense for which the sentence of death was imposed. Nothing in this division

regarding the resentencing of an offender shall affect the operation of *section 2971.03 of the Revised Code*.

(B) Whenever any court of this state or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because of error that occurred in the sentencing phase of the trial and if division (A) of this section does not apply, the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing. If the offender was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing. At the hearing, the court or panel shall follow the procedure set forth in division (D) of *section 2929.03 of the Revised Code* in determining whether to impose upon the offender a sentence of death, a sentence of life imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment. If, pursuant to that procedure, the court or panel determines that it will impose a sentence other than a sentence of death, the court or panel shall impose upon the offender one of the sentences of life imprisonment that could have been imposed at the time the offender committed the offense for which the sentence of death was imposed, determined as specified in this division, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of *section 2929.03 of the Revised Code*, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of *section 2971.03 of the Revised Code* and served pursuant to that section, the court or panel shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court or panel shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of *section 2929.03* or under *section 2909.24 of the Revised Code* at the time the offender committed the offense for which the sentence of death was imposed.

(C) If a sentence of life imprisonment without parole imposed upon an offender pursuant to *section 2929.021 [2929.02.1] or 2929.03 of the Revised Code* is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of life imprisonment without parole that is set forth in *sections 2929.03 and 2929.04 of the Revised Code* is unconstitutional, the trial court that sentenced the offender shall conduct a hearing to resentence the offender to life imprisonment with parole eligibility after serving twenty-five full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(D) Nothing in this section limits or restricts the rights of the state to appeal any order setting aside, nullifying, or vacating a conviction or sentence of death, when an appeal of that nature otherwise would be available.

(E) This section, as amended by H.B. 184 of the 125th general assembly, shall apply to all offenders who have been sentenced to death for an aggravated murder that was committed on or after October 19, 1981, or for terrorism that was committed on or after May 15, 2002. This section, as amended by H.B. 184 of the 125th general assembly, shall apply equally to all such offenders sentenced to death prior to, on, or after March 23, 2005, including offenders who, on March 23, 2005, are challenging their sentence of death and offenders whose sentence of death has been set aside,

nullified, or vacated by any court of this state or any federal court but who, as of March 23, 2005, have not yet been resentenced.

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\*\*\* Annotations current through January 9, 2012 \*\*\*

TITLE 29. CRIMES -- PROCEDURE  
CHAPTER 2945. TRIAL

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2945.03 (2012)*

§ 2945.03. Control of trial

The judge of the trial court shall control all proceedings during a criminal trial, and shall limit the introduction of evidence and the argument of counsel to relevant and material matters with a view to expeditious and effective ascertainment of the truth regarding the matters in issue.

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

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2945.06 (2012)*

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

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

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Ohio Rules Of Criminal Procedure

*Ohio Crim. R 11* (2012)

Review Court Orders which may amend this Rule.

**Rule 11. Pleas, Rights Upon Plea**

**(A) Pleas.**

A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

**(B) Effect of guilty or no contest pleas.**

With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under *Crim. R. 32*.

**(C) Pleas of guilty and no contest in felony cases.**

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to *Crim. R. 44* by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

**(D) Misdemeanor cases involving serious offenses.**

In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to *Crim. R. 44* by appointed counsel, waives this right.

**(E) Misdemeanor cases involving petty offenses.**

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

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

**(F) Negotiated plea in felony cases.**

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

**(G) Refusal of court to accept plea.**

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

**(H) Defense of insanity.**

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

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Ohio Rules Of Evidence  
Article IV Relevancy And Its Limits

*Ohio Evid. R. 401 (2012)*

Review Court Orders which may amend this Rule.

**Rule 401. Definition of "Relevant Evidence"**

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

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Ohio Rules Of Evidence  
Article IV Relevancy And Its Limits

*Ohio Evid. R. 403 (2012)*

Review Court Orders which may amend this Rule.

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

**(A) Exclusion mandatory.**

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

**(B) Exclusion discretionary.**

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

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Ohio Rules Of Evidence  
Article IV Relevancy And Its Limits

*Ohio Evid. R. 404 (2012)*

Review Court Orders which may amend this Rule.

**Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes**

**(A) Character evidence generally.**

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

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

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

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

**(B) Other crimes, wrongs or acts.**

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