ORIGINAL

IN THE SUPREME COURT OF OHIO

2011-1921

STATE OF OHIO	:	
Plaintiff-Appellee	:	
vs.	:	
	:	**This is a Death Penalty Case**
ANTHONY SOWELL		
Defendant-Appellant	:	

APPELLANT'S BRIEF AND ASSIGNMENTS OF ERROR

COUNSEL FOR APPELLEE

TIMOTHY J. MCGINTY, ESQ.
Cuyahoga County Prosecutor
BY: KATHERINE MULLIN, ESQ.
#0084122
Justice Center 9th Floor
1200 Ontario Street
Cleveland, OH 44113
216-443-7800

COUNSEL FOR APPELLANT

JEFFREY M. GAMSO, ESQ.
Counsel of Record
#0043869
1119 Adams St 2nd Flr
Toledo, OH 43604
Office Phone:
419.243.3800

ROBERT L. TOBIK, ESQ.
Chief Public Defender
BY: ERIKA CUNLIFFE, ESQ
0074480
310 Lakeside Avenue
Suite 200
216-443-7583
Fax: 216-443-3632

FILED
OCT 22 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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INTRODUCTION

Anthony Sowell was going to be found guilty. That was a given.

On the properly admissible evidence that the state would present at trial, there was no other plausible result. The jury would find Sowell guilty of the aggravated murders of eleven women and at least one statutory aggravating circumstance for each of those murders. It was likely, though perhaps less certain, that the jury would find him guilty of most if not all of the other sixty or so indicted counts. The only open question, the only thing that was uncertain, was the sentence. Would it be death or life without the possibility of parole ("LWOP")? Just as there would be no acquittal verdict, there would also be no jury recommendation of any sentence that included parole eligibility.

At its core, then, this was a life or death case, a mitigation case. That may not have been certain when trial counsel were first appointed, but it was absolutely clear well before June 3, 2011, when the venire came to court for initial orientation and to answer questionnaires. The defense seemed to acknowledge that reality, when, before the venire was sworn, they formally offered to enter a plea of guilty to all counts and all specifications, to accept maximum consecutive sentences, and to waive all appellate and post-conviction rights. (TR VI, pp. 1192-1194.)[1] They hardly would have made such an offer had there been a realistic chance of a lesser sentence.

Under the circumstances, Mr. Sowell's case should have been focused on the question of mitigation: How to convince the jury that the mitigating evidence was sufficiently compelling that the aggravating circumstances did not outweigh it. Laying the groundwork to facilitate the consideration of mitigating evidence - unearthing such evidence; presenting it in a coherent and

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[1] The transcript on this case consists of 56, sequentially paginated volumes. All transcript references in this brief will include a Roman-numeral reference to the volume number and an

persuasive manner; empanelling a jury capable of giving proper weight to such evidence; and effectively instructing the jury on how to do so – these were the concerns that should have driven this case. Those efforts, though, were hamstrung well before Mr. Sowell's trial ever began. In many ways, Mr. Sowell's trial counsel were the chief saboteurs in this regard.

As even a cursory review of the transcript reveals, trial counsel did not approach this as a mitigation case. Instead, they vigorously challenged the quality and integrity of the crime scene processing and remains excavation; they challenged the validity of forensic testing conducted; and they attacked the credibility and reliability of testifying occurrence witnesses. In so doing, counsel repeatedly directed the jurors' attention to gruesome and painfully damning evidence. All of that and more was done because counsel approached the first phase of the case as if they could convince the jury to have a reasonable doubt of Sowell's guilt.

There was an alternative. Even though Ohio's death penalty law does not permit a guilty plea if a jury is to determine punishment, counsel need not contest guilt. They can concede it. In this case, they should have. Instead, counsel aggressively undertook an unwinnable campaign to convince the jurors that they should doubt the prosecution's vastly overwhelming case. This quixotic undertaking damaged counsels' credibility, made them look desperate in the process, and likely irritated the jurors by unnecessarily dragging out the trial. Counsels' strategy was not just ill-chosen; it was irrational.

Arabic-numeral reference to the page number.

STATEMENT OF THE CASE AND FACTS

On December 1, 2009, the Cuyahoga County Grand Jury returned an 85 count indictment charging appellant, Anthony Sowell, with the aggravated murders of 11 women, the kidnapping and rape or attempted rape of three other women, and numerous counts of kidnapping, tampering with evidence abuse of a corpse, felonious assault, and attempted murder. Each count of aggravated murder was accompanied by 15 death specifications. On June 3, 2011, after numerous pre-trial hearings, the voir dire process began. On July 22, the jury returned its verdicts in the culpability phase of the trial. A mitigation hearing began on August 1, and the jury returned its verdicts recommending death for each of the 11 counts of aggravated murder before it. Sentence was imposed on August 12 and amended on August 30. This appeal followed.

On the evening of October 29, 2009, a Cleveland Police Department SWAT team went 12205 Imperial Avenue in Cleveland to execute an arrest warrant on Anthony Sowell and a search warrant for the basement, second, and third floors. They did not find Sowell, but in searching the premises, Patrolman Richard Butler discovered two decomposing dead bodies. (TR Vol. XXVI, p. 5972-5974, 5983.) Over the course of the next several days, more bodies were found in and around the house. Two were covered with a mound of dirt in a crawl space off a room on the third floor. Another was found in a plastic trash bag in that room, next to the two bodies Butler found. Another body was covered by a mound of dirt under the basement stairs. Four more were recovered from shallow graves in the back yard. And a head was discovered in a bucket in the basement. (TR Vol. XXXIII, p. 7584; Vol. XXXIV, pp. 7771, 7775, 7776; Vol. XXXV, p. 7788.)

All told, police recovered the remains of 11 women. Through DNA analysis, all of the remains were identified. The 11 women had all disappeared between June 2007 and September 2009. Autopsies revealed that each had been murdered.

Sowell was arrested on October 31. He waived his *Miranda* rights and was interrogated by police for some 12 hours. By that time, authorities had recovered 6 bodies. Sowell conceded that he must have killed the women, that nobody else could have done it, that he had dreams of doing terrible things, that he had some vague recollection of 5 of the women, but that he simply didn't remember actually killing any of them. (TR Vol. XXXIV, pp. 7693-7694, 7706-7709; Court Exhibits 2-7.)

Other facts, as relevant, will be set forth in the arguments supporting Sowell's propositions of law.

LAW AND ARGUMENT

Proposition of Law No. I:

> In a case where the pretrial publicity is absolutely overwhelming, the trial court violates the accused's rights to an impartial jury under Article I, Sections 2, 9, 10 and 16 under the Ohio Constitution and his federal constitutional rights to due process and a fair trial by failing to grant the accused's change of venue motion.

From the moment human remains were discovered in and around a house on Imperial Avenue in Cleveland's Mount Pleasant neighborhood, the publicity surrounding this case was frenzied. Fanned by unabated media attention and judicial improprieties, public focus remained fervently attracted to the case up to and throughout the trial - approximately 18 months later. Accordingly, all of the prospective jurors reported hearing about the case in some fashion and many had developed opinions about it. More importantly, since the case's media coverage was directed at the murders, the victims, and their families - the case's aggravating factors - that attention was exclusively negative as it applied to Mr. Sowell. In the months approaching trial, Mr. Sowell was assigned the moniker "the Cleveland Strangler" and variously characterized as a "serial killer" a "monster" "a miserable piece of human trash" and "an evil sadistic animal" among other things, by media reports and those exposed to them. (Motion for Change of Venue - 1/27/2010, Ex. I)

The first two judges assigned to preside over this matter gleefully leapt on the media bandwagon. Judge Timothy McGinty, to whom the case was first assigned, removed himself from the case only days later, because he had shared Sowell's psychiatric evaluation with a local news reporter.[2] (Tr. I, pp. 135, 148; II, pp. 274-285) The document the judge shared was supposed to be confidential, prepared to assist judges in classifying those convicted of sex crimes. (Tr. I, pp. 148-150) Entitled Sexual Predator Evaluation, the evaluation is dated September 7, 2005. The

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[2] Three months later, while Mr. Sowell's trial was pending, Judge McGinty (who has since resigned

evaluation provides a detailed chronicle of Mr. Sowell's history to that point, including information about the 15-year prison sentence Sowell had just served for attempted rape, as well as commentary from a court clinic evaluator. This information was posted on the websites of at least two media outlets, where it remained for several weeks. (First Amended Motion for Change of Venue, 5/20/2010)

Judge Shirley Strickland Saffold took Judge McGinty's place. The defense, however, soon requested her disqualification after comments from an email account linked to the judge surfaced and were widely disseminated through the local media. Those comments discussed the Sowell case specifically and made derogatory remarks about one of Sowell's lawyers. Judge Saffold rejected a defense request that she recuse herself. But this Court subsequently concluded that she should be disqualified. The Administrative Judge then appointed a third judge to preside over the matter.

Before trial, Sowell repeatedly asked the Court to transfer his case to another county where the attention to it was less heated. Judge Saffold, the first judge to address this motion, summarily denied it. In doing so, she observed, "The Court is mindful of Timothy McVeigh. And no one could have received greater publicity than Mr. McVeigh who blew up the Federal Building on TV, and for the entire would to see, and that case remained within the jurisdiction of the District Court." (Vol. I, p. 69)[3] As trial approached, Sowell filed two additional transfer motions. The court denied both. Specifically, in denying Sowell's First Amended Motion for Change of Venue, the court noted –

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and is now county prosecutor) gave a televised interview wherein he discussed Sowell's case.

[3] In fact, Mr. McVeigh's case was transferred from the Western District of Oklahoma to a District Court in Colorado. That transfer was granted based on identical concerns. Specifically, the court agreed with McVeigh's lawyers that the unparalleled, unabated coverage of his case made transfer the only appropriate relief. *United States v. McVeigh*, 918 F. Supp. 1467, 1472 (W.D. Oklahoma,

> THE COURT IS AWARE THAT THERE HAS BEEN EXTENSIVE MEDIA COVERAGE ABOUT THIS CASE AND THAT BOTH CONFIDENTIAL INFORMATION AND INVESTIGATORY WORK PRODUCT HAVE PREVIOUSLY BEEN "LEAKED" TO THE MEDIA. THE DANGER OF SUCH DISCLOSURES INTO THE PUBLIC DOMAIN IS THAT POTENTIAL JURORS WHO ARE EXPOSED TO THIS INFORMATION BEFORE TRIAL MAY FORM OPINIONS ABOUT THE CASE THAT COULD INTERFERE WITH THEIR ABILITY TO LISTEN TO ALL THE EVIDENCE ADMITTED AT TRIAL. THIS COULD IMPAIR CONSTITUTIONAL GUARANTEES FOR A FAIR TRIAL AND MAY CALL INTO QUESTION ANY VERDICT BASED ON INFORMATION FROM OUTSIDE THE TRIAL PROCESS

It is clear from the court's order that the judge recognized the intense media scrutiny the case had generated, and the consequences of such attention. The judge nonetheless concluded that any change of venue was premature, until prospective jurors were summoned and questioned. Perhaps in recognition of the fact that the case had become an unmitigated media circus, however, the court also went on to ban cameras from the courtroom until a jury was seated. Specifically, the court put the order this way:

> IN ORDER TO LIMIT FURTHER INFLUENCE ON THE POOL OF POTENTIAL JURORS DURING THE PRE-TRIAL PHASE OF THIS CASE, THE COURT IS LIMITING MEDIA ACCESS TO THE COURTROOM DURING PRETRIAL PROCEEDINGS. UNTIL A JURY HAS BEEN SEATED IN THIS CASE, NO CAMERAS OR RECORDING DEVICES WILL BE ALLOWED IN THE COURTROOM. MEDIA REPRESENTATIVES MAY BE PRESENT FOR PRETRIAL PROCEEDINGS TAKING PLACE IN THE COURTROOM, BUT MUST LEAVE ALL CAMERAS AND ELECTRONIC RECORDING DEVICES OUTSIDE THE COURTROOM. ONCE A JURY HAS BEEN SEATED, THE COURT WILL ALLOW THE USE OF A "POOLED" CAMERA TO COVER THE PROCEEDINGS, SUBJECT TO FURTHER ORDER OF THE COURT.

But such a remedy could not, and did not, diminish the ongoing media attention to the case.

Under Crim. R. 18 (B), the trial court is well within its discretion to transfer a matter to another location if it appears that a fair and impartial trial cannot be held in the home venue. The Sixth Amendment right to an impartial jury and the due process right to a fundamentally fair trial

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1996).

guarantee to criminal defendants a trial in which jurors set aside preconceptions, disregard extrajudicial influences, and decide guilt or innocence "based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); see also *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

As the instant case exemplifies, community passions, often inflamed by adverse pretrial publicity, can call the integrity of a trial into doubt. In some instances, the hostility of the community becomes so severe that it creates a "presumption of [juror] prejudice." *Patton v. Yount*, 467 U.S. 1025, 1031, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). Accordingly, while commonly trials occur where the crime happened,[4] transfer is justified, even required, if extraordinary local prejudice will prevent a fair trial – a "basic requirement of due process," *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

In addressing this concern, the U.S. Supreme Court has acknowledged that as the tide of public enmity rises, so too does the danger that the prejudices of the community will infiltrate the jury. *Skilling v. United States*, ___ U.S. ___, 130 S.Ct. 2896, 2948, 177 L.Ed.2d 619 (2010) (Sotomayor, J., dissenting). The jury, after all, represents that community. To that end, the driving inquiry needs to be, whether the reviewing court is confident that the jury's verdict was "induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado ex rel. Attorney General of Colo.*, 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879 (1907). That inquiry is necessarily case specific.

Accordingly, a trial court must adapt the jury selection process to the intensity, pervasiveness, and character of the pretrial publicity and community sentiment. Reviewing courts then assess whether the trial court's procedures kept the jury free from disqualifying bias. Cf.

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[4] See, Art. III, § 2, cl. 3; Amdt. 6 – right to trial by "jury of the State and district wherein the crime

Murphy v. Florida, 421 U.S. 794, 799, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975) (examining the record for "any indications in the totality of circumstances that petitioner's trial was not fundamentally fair"). In some cases, even the most probing voir dire will not ferret out prospective juror bias sufficiently to guarantee the defendant's right to a fair and impartial jury.

Some cases are so infamous that the surrounding fervor creates prejudice that warrants reversal "without pausing to examine ... the voir dire examination of the members of the jury." See, *Rideau v. Louisiana*, 373 U.S. 723, 727, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963). In *Rideau*, the defendant's confession to murder, robbery, and kidnapping was repeatedly broadcast throughout the local media. The court concluded that the broadcasts so poisoned local sentiment that it doubted even the most conscientious voir dire could secure an impartial jury. A change of venue, the Court determined, was thus the only way to assure a fair trial. *Ibid.* As the transcript of the voir dire undertaken in Mr. Sowell's case demonstrates, his was such a case.

Individual Sequestered Voir Dire

Although the pool of prospective jurors numbered some 1000 Cuyahoga County residents, only 200 or so of these individuals actually appeared and answered written questionnaires. (Tr. VI, pp. 1104-1107) Those questionnaires have been made a part of this record. In addition to general information about each prospective juror and their views on mental health and addiction issues, the questionnaire and initial voir dire were focused on three concerns: 1) Whether the extended service this case would require placed an undue hardship, financial or otherwise, on the prospective juror; 2) Whether the prospective juror's views for or against the death penalty rendered them ineligible to serve; and 3) Whether the case's notoriety had so impacted the juror's thinking about the case that he or she could not be fair.

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shall have been committed."

The questionnaires, in conjunction with the responses these individuals gave during sequestered voir dire, make it clear that the widespread attention to Mr. Sowell's case would present a substantial obstacle to the selection of a fair jury. Most of the individuals questioned had heard about the case - some had followed it closely. (Tr. VI - XXII, pp. 1240-5125) All of the jurors eventually selected had heard something about the case in advance. (Tr.VI-XIX, pp. 1328, 1501, 1592, 1744, 1898, 2099, 2376, 3983, 4083, 4135, 4293, 4413) Most of them acknowledged that they recognized Sowell from news accounts when they saw him for the first time in court. (Tr. XIII - XI, 1757, 2113, 2392; Tr. XVIII, 4309) At least 60 of the jurors questioned had developed an opinion about the case. Although all of the ones selected professed that they could put aside the information they had going in, the comments of several jurors, four in particular, suggested that they would have tremendous difficulty in actually doing so.

Juror Number 34, Ronald Barbieri, admitted that the case was the subject of conversation at work, and that he had formed "a little bit" of an opinion that Sowell was guilty "for the murders and stuff" based on the coverage he had seen. (Tr. XIII, p. 1758) Another juror, number 62, Betty Hamilton, told the court that when she had heard about the case on the news, she was struck by it because she had lived across the street from the house on Imperial Avenue, where the bodies were found. (Tr. IX, p. 2110) Juror Number 61, April Wanzo, told the court that she had formed opinions about the case based on media coverage. Specifically, she acknowledged forming opinions "of just how - how did this occur and what possibly is going to take place, and you know, just me being a part of this now." (Tr. X, p. 2379) When asked to clarify these sentiments, the following colloquy occurred:

MR. PARKER: You have no opinion [concerning whether he's guilty of the crimes charged]?

JUROR 61: No, not as far as guilty or anything like that.

MR. PARKER: Okay. Do you have an opinion about him at all?

JUROR 61: Just the case, and just what I've heard and seen in the newspaper.

MR. PARKER: And could you just give us a little - just explain to us what that is.

JUROR 61: Basically, what I mentioned to the Judge as far as how this happened and how many victims that were lost, just my heart went out to them, as far as -

MR. PARKER: Sure.

JUROR 61: -- the crime that happened.

MR. PARKER: Sure.

JUROR 61: Whether it's true or not, just the part of people's lives being lost and incidents that have occurred due to this case.

(Tr. X, pp. 2393-94)

When the court asked Juror Number 28, Jaroslaw (Richard) Romaniuk, what he knew about the case, he responded - "Not much more than was already said here in court, but enough to be scared." This juror repeatedly noted that the facts he had heard about the case were "overwhelming," that he had "problems with this issue," and that he was "scared, I have fear, fear." (Tr. XVII, pp. 4086, 4107) When probed further, this Juror advised that he had been part of a community focus group formed to address this case and develop ideas for preventing such an occurrence from happening again. (Tr. XVII, pp. 4105-06) When defense counsel asked whether this juror had developed any opinion about the case, he said this: "It is just I never - let's put it that way: I never heard any question that he's not guilty." (Tr. XVII, p. 4108)

Pretrial Publicity Compromised the Ability to Empanel an Impartial Jury

Although the other jurors seated on the Sowell case responded to the court that they could put aside what they knew and fairly assess guilt and punishment, sometimes, such assurances are

simply not good enough.[5] As Chief Justice Marshall observed two centuries ago, protestations of neutrality by a juror are not to be trusted:

> He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him . . . He will listen with more favor to that testimony which confirms, than that which would change his opinion.

United States v. Burr, 25 Fed. Case 49 (case #14, 692g, 1807). Some "forms of bias are automatic, unconscious and unintentional and escape notice, even the notice of those enacting the bias." *Miller-El v. Dretke*, 545 U.S. 231, 286, 125 S.Ct. 2317, 162 L.Ed.2d 196. (2005) (Breyer, J., concurring)

A number of factors are important in assessing whether a defendant has been so prejudiced by pre-trial publicity that venue must be changed. These factors are: a) Inflammatory tone or content of publicity; b) Confessions or admissions published; c) Prior convictions or trials; d) Media name-calling; e) Media use of the defendant's name; f) Publication of inadmissible evidence; g) "Factual" publicity which previews the trial; h) The volume and reach of publicity and size of the venue; i) Community attitudes.[6] Basically, all of these factors were present in this case.

The crimes involved here were nothing short of horrible. All of the publicity stemming from the media's coverage of the case reflected negatively on Mr. Sowell. The online commentary discussing it was even less measured and more rancorous. The commentary, amounting to tens of thousands of essentially anonymous remarks on the case, evidences community-wide revulsion about the crimes and the man accused of committing them. Stories reporting on the case included

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[5] See, e.g. Edward Bronson, *The Effectiveness of Voir Dire in Discovering Prejudice in High Publicity Cases: An Archival Study of the Minimization Effect* (1989).

[6] Fishfader et al., Evidential and Extralegal Factors in Juror Decisions: Presentation Mode, Retention and Level of Emotionality, 20 *Law and Human Behavior* 565 (1966); Kramer et al., Pretrial Publicity, Judicial Remedies and Jury Bias 14 *Law and Human Behavior* 409 (1990); and National Jury Project, Jury Work (1990), Section 7.04.

Mr. Sowell's criminal history and, aggressively disseminated new allegations as they surfaced. As noted above, Judge McGinty, who was initially assigned to the case, gave a television interview, wherein he discussed Mr. Sowell's criminal history in the context of the instant case.

As trial counsel noted in one of several change of venue motions filed on Mr. Sowell's behalf, in first eight months after the remains were discovered, the case had generated almost 1,500 news articles locally, statewide, nationally, and internationally. (First Amended Motion for Change of Venue Based on Adverse Pretrial Publicity - 5/20/2010 - and trial was still a year away at that point). In fact, the atmosphere surrounding Sowell's case pretrial seemed to be the very thing the Court addressed in *Pamplin v. Mason*, 364 F.2d 1, 11 (5th Cir. 1968) when it observed:

> Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.

Moreover, this case also involved extensive media reporting on Sowell's criminal history, and made the public at large aware of lurid and unfavorable aspects of his life - information a jury would never have learned in the usual case. Courts have consistently recognized sensationalized reporting of prior convictions or arrests to be highly prejudicial. *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959); *United States v. Williams.* 568 F.2d 464 (5th Cir. 1978).

Clearly the pretrial publicity had an impact in Sowell's case, not just on prospective jurors generally, but more importantly on the jurors actually empanelled. In *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), and *Sheppard*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, the U.S. Supreme Court addressed the question of whether any defendant in an atmosphere saturated in such pretrial publicity could receive a trial free from juror bias - and concluded that a fair trial was impossible. Both cases involved massive pretrial publicity.

In *Estes*, the Court began by rejecting the idea that the defendants "ha[d] established no

isolatable prejudice." To the contrary, the Court described the "untoward circumstances" as "inherently suspect." *Estes*, 381 U.S., at 542, 544, 85 S.Ct. 1628. Similarly, in *Sheppard*, the Court observed that it would have been difficult for the jurors not to have been swayed, at least subconsciously, by the "bedlam" that surrounded them. *Sheppard*, 384 U.S., at 355, 86 S.Ct. 1507. In both cases, the Court criticized the trial courts' failure "to protect the jury from outside influence," id., at 358, 86 S.Ct. 1507, stressing that, "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another [venue] not so permeated with publicity." *Id.*, at 363, 86 S.Ct. 1507.

Accordingly, where, as in Sowell's case, antipathy toward a defendant pervades the community, there is a high risk that biased jurors will find their way onto the panel. The danger is not merely that some prospective jurors will deliberately hide their prejudices, but also that, as "part of a community deeply hostile to the accused," "they may unwittingly [be] influenced" by the fervor that surrounds them. *Murphy*, 421 U.S., at 803, 95 S.Ct. 2031. To assure an impartial jury in such adverse circumstances, a trial court must first note knowledge and attitudes of prospective jurors, and then give heightened scrutiny to their assurances of fairness. Cf. *Morgan v. Illinois*, 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) ("[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors").

The *Irvin* case, *supra*, presented a similar atmosphere. The case is also notable because it is factually comparable to Sowell's case. There, the High Court concluded that the trial court's voir dire was not sufficiently probing to counter the "wave of public passion" that had swept the community prior to the defendant's trial. 366 U.S., at 728, 81 S.Ct. 1639. As in Mr. Sowell case, the local news had extensively covered the *Irvin* case. The case involved multiple (6) murders and

"aroused great excitement and indignation." *Id.*, at 719, 81 S.Ct. 1639 (internal quotation marks omitted). Following the defendant's arrest, the press barraged the community with "newspaper headlines, articles, cartoons and pictures" communicating numerous unfavorable details about the defendant. *Id.*, at 725, 81 S.Ct. 1639. A substantial percentage of the prospective jurors examined in voir dire "entertained some opinion as to guilt–ranging in intensity from mere suspicion to absolute certainty." *Id.*, at 727, 81 S.Ct. 1639.

Although the *Irvin* jurors had promised during voir dire that they could put aside what they knew about the case and the opinions they harbored as a result, the court was skeptical. In reversing Irvin's conviction, the court acknowledged that, "It is not required that the jurors be totally ignorant of the facts and issues involved ...It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.*, at 722-724, 727, 81 S.Ct. 1639. Nevertheless, the Court emphasized, a juror's word on this matter is not decisive, particularly when "the build-up of prejudice [in the community] is clear and convincing." *Id.*, at 725, 81 S.Ct. 1639. Many of Irvin's jurors, the Court noted, had been influenced by "the pattern of deep and bitter prejudice shown to be present throughout the community." *Id.*, at 727, 81 S.Ct. 1639 (internal quotation marks omitted). The Court did not "doubt [that] each juror was sincere when he said that he would be fair and impartial to [Irvin], but ... [w]here so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." Id., at 728, 81 S.Ct. 1639.

Like the coverage in Mr. Sowell's case, the media coverage and community animosity in *Irvin* was particularly intense. Admittedly, not all high-profile cases warrant such relief. In *Murphy*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589, for example, an infamous defendant was charged in a widely publicized Miami Beach robbery. The Court concluded that a change of venue

was not necessary. Miami is a major metropolitan area and the jury pool questioned gave no indication of overwhelming bias. 421 U.S., at 800, 95 S.Ct. 2031. Most had only a vague recollection of the robbery" and only minimal knowledge of the defendant's criminal history. Such responses, the Court concluded "might be disregarded in a case where the general atmosphere in the community or courtroom is sufficiently inflammatory, but the circumstances surrounding [Murphy's] trial [were] not at all of that variety." *Id.,* at 802, 95 S.Ct. 2031.

The Court reached a similar conclusion in *Mu'Min v. Virginia,* 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991). Mu'Min was accused of murdering a woman while out of prison on a work detail. Citing 47 newspaper articles about the crime, Mu'Min moved for a change of venue. The trial court denied the request, on appeal, the Supreme Court acknowledged that of the 12 persons who served on the jury, "8 had at one time or another read or heard something about the case. Nevertheless, the Court further noted that none of the jurors had indicated that he had formed an opinion about the case or would be biased in any way." *Id.,* at 421, 111 S.Ct. 1899. In addition, the Court noted that Mu'Min's offense occurred in the metropolitan Washington, D.C., area, "which has a population of over 3 million, and in which, unfortunately, hundreds of murders are committed each year." *Ibid.* The Court stressed, however, that its ruling was context-specific: "Had the trial court in this case been confronted with the 'wave of public passion' engendered by pretrial publicity that occurred in connection with Irvin's trial, the Due Process Clause of the Fourteenth Amendment might well have required more extensive examination of potential jurors than it undertook here." *Id.,* at 429, 111 S.Ct. 1899.

But the *Mu'Min* and *Murphy* cases stand in stark contrast to Anthony Sowell's, the circumstances of which are far more akin to those surrounding the *Rideau, Irvin* and *Sheppard* cases - where the court found intractable juror bias due to overwhelming media exposure. The

venire in Anthony Sowell's case was inevitably influenced by pre-trial publicity of an extraordinary degree and intensity. That publicity was so pervasive that jury prejudice should have been presumed. The story utterly captivated this small city. Even if not presumed, however, the possibility of juror prejudice from the pre-trial publicity was substantial, and the voir dire in Mr. Sowell's case was not an adequate tool to ensure the choice of a fair panel. *Jordan v. Lippman*, 763 F. 2d 1265 (11th Cir. 1985).

Proposition of Law No. II

> A trial court violates the defendant's rights under the Sixth and Eighth Amendments as well as the Due Process Clause when it prevents or unduly restricts the defense from questioning prospective jurors about their ability to consider mitigating factors.

The trial court placed undue and unjustifiable restrictions on Mr. Sowell's voir dire of prospective jurors. The trial court barred the defense from asking the venire about its willingness and ability to consider mitigating factors. The restricted voir dire deprived Sowell of his rights to an impartial jury, a reliable death sentence, and due process under the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution.

As the remarks introducing this brief make plain, this case was going to be decided at the penalty phase. The only issue in play was whether the case's aggravating circumstances outweighed the applicable mitigation. Accordingly, trial counsel needed to find a jury able to contemplate and give appropriate weight to mitigating evidence, even in the face of terrible crimes and overwhelming media publicity surrounding those crimes. The only way to identify and empanel such a jury was through probing voir dire. That was particularly necessary here, where the court had refused to move the trial to a different venue.

The Constitution guarantees the right to an impartial and unbiased jury. *Morgan*, 504 U.S.

719, 727, 112 S.Ct. 2222, 119 L.Ed.2d 492. In the first instance, it is the trial court's job to assure that guarantee through voir dire. *Smith* v. *United States,* 431 U.S. 291, 308, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977) Voir dire is a proceeding "subject to essential demands of fairness." *Hughes v. United States,* 258 F.3d 453, 457 (6th Cir. 2001). Accordingly, the trial court must permit the defense to undertake a voir dire that is sufficiently probing to ferret out jurors who are biased against the defense. *Miller v. Francis,* 269 F.3d 609, 615 (6th Cir. 2001)

At the very least, counsel needed to be able to explore with prospective jurors whether, and the extent to which, they could give effective weight to at least some of the various mitigating factors in Mr. Sowell's case. The trial court did not provide the defense with such an opportunity, and, indeed, prevented trial counsel from asking the venire any specifics about mitigating factors or what they considered mitigating.

The Voir Dire questions were impermissibly restrictive.

Here, the trial court forced the defense to rely on the respective jurors' vague assurances that they could weigh the aggravating factors - of which they were already well aware - against the case's "mitigation" in determining whether to impose a life or death sentence. But at the time they were asked to provide these assurances, they had no understanding of what the defense meant by "mitigation." Accordingly, although the aggravation in this case had been concretely established by the time the venire was assembled, any mitigation existed only in the abstract. In fact, the only definition the trial court provided the jury concerning mitigation was this one -

"Mitigating factors are factors about an individual or an offense that weigh in favor of a decision that the life sentence rather than a death sentence is appropriate." (Tr. XI, p. 2554)

In other words, mitigation is anything and nothing, *depending on how one looks at it.* It is the entirely subjective nature of this test that necessitates follow-up clarification questions, which the

trial court barred. By forbidding the defense from further defining or inquiring on the subject of mitigation, the trial court incapacitated Mr. Sowell's ability to empanel a jury that really could consider mitigating evidence.

In this, of all cases, such clarity was necessary. Before trial, a sustained media frenzy had fostered community obsession with the murders, the victims and their families. By the time of trial, the case's aggravation was front and center. Finding jurors who could fairly consider evidence mitigating in favor of a life sentence notwithstanding, would be challenging. Such an ambitious undertaking required the court to afford the defense some leeway during voir dire. Regrettably, the record makes it clear that none was forthcoming.

Specific Voir Dire Restrictions

In fact, the prospective jurors, though hungry for specifics on mitigation, were repeatedly denied such information. The following colloquy reflects the dilemma within which the trial court's voir dire restrictions placed the defense:

MR. PARKER: ...Do you think that Mr. Sowell and his lawyers, me and Mr. Sims, have to provide you evidence as to why he should not be executed or given the death penalty?

JUROR NO. 17: Yes.

MR. PARKER: All right. What do you think, just in general, what would you think are reasons why the death penalty should not be imposed, if we ever get to that second phase? What, in your mind, would be some reasons -

MR. BOMBIK: Objection.

MR. PARKER: --why the death penalty should not be imposed?

THE COURT: Again, I'm going to sustain that. I think we're getting outside the permissible area.

...

MR. PARKER: Judge, I think I'm allowed to inquire as to whether he will consider

mitigation, and -

THE COURT: Yes, but identifying specific factors that you'll consider in terms of mitigation -

MR. PARKER: Well, just in general, I think we need to know whether he will do that. And with respect to the burden, I mean, he's expecting us to prove why the death penalty is not appropriate, that's not the appropriate standard. It's the State that has to prove aggravation outweighs mitigation. And we have no burden of proof.

MR. BOMBIK: If you don't go forward with any mitigation, you're out of luck. The statute allows you the opportunity to mitigate against the imposition of the death penalty. The death penalty is the preferred, the preferred penalty here.

MR. PARKER: I totally object in that there is a presumption of life, unless the aggravation outweighs the mitigation.

THE COURT: But, if there is aggravating circumstances proven at trial, and no mitigation evidence, how could it not outweigh?

MR. PARKER: Because it could be mitigation from the first phase of the trial. It's mitigation from whatever source whatsoever.

MR. BOMBIK: That's fine, as long as you -

THE COURT: We're playing semantics. You can't play semantics with the jurors and expect it to be used as a challenge for cause, as a basis for a challenge for cause. You've got to ask questions that the jurors understand, because, you know -

MR. PARKER: I think he understood the question, because he answered it.

MR. BOMBIK: You're getting into facts specific here.

MR. PARKER: No, I -

MR. BOMBIK: You can't give a hypothetical that mirrors the facts of the case. It's wrong. It's wrong. You have to keep it general here.

MR. PARKER: I'll keep it general.

MR. BOMBIK: All you're doing with that 1 question alone, with 11 killings -

MR. PARKER: That's in the questionnaire.

THE COURT: I mean, the answer is on the questionnaire, that's fine. What we're starting to get into now, and I understand somewhat, that's why I let you go there, we're talking about areas even outside death penalty qualifications now, we're talking about whether or not he'd be allowed to sit on a case, because he had prior experience with a kidnapping and a rape in his family. That's kind of general voir dire stuff.

MR. PARKER: I moved away from that. I thought we should cover it at this point, because it could be -

THE COURT: We don't have the time to cover all of that stuff. So, I will say that you can ask him questions about will he consider mitigating factors, but as to what he considers to be mitigating factors, without memorizing, I didn't read to him all the things in the statute. We decided to stay away from that.

MR. PARKER: I'll try to rephrase.

THE COURT: Mitigating factors can be anything. So, probably should be left at that and not leave it to the prospective jurors to define what the mitigating factors are, when they haven't been given any law on that. So, you can continue. I'll let you wrap it up, but you're spending a little bit too much time here.

(Tr. VII, pp. 1439-1451) Later, trial counsel detailed their concerns about court's restrictions on further defining or inquiring on mitigating evidence - underscoring that such restrictions created an information vacuum that fosters misunderstanding. The discussion below demonstrates those concerns.

MR. PARKER: Judge, may I bring up one matter at this point. You know, Judge, I know we all get tired of talking repeatedly, repeatedly covering the same ground, but I just want to make sure that it's clear that it's our -- it's the defense position that mitigation can come from anywhere in the case, it's not just from what's introduced at the second phase. And I don't think it's appropriate to instruct a juror that mitigation is only what is introduced by a defendant in the second phase. I think the law is contrary to that, and I would ask that everyone be careful, the Court especially, when discussing mitigation, that it can come from anywhere in the case. It can come from any reason that a juror thinks that life is the appropriate penalty. And it's not just what we introduce, per se.

THE COURT All right. Well, again, technically, legally, I would agree with you that, you know, mitigation can come in from either the first or second phase. Again the -- and I suppose there can be a theoretical legal argument that even the State might be introducing evidence that could be used as mitigation. So, it's whatever the jury decides to use as a mitigating factor is appropriate. Many times we are trying to at least discuss this in a cognitive way for lay people, without getting too far into the theory of law. So placing it in that context of weighing of aggravating versus mitigating factors is the best way. I think we have to do that. I'll try to be a little more attentive in this, making sure that mitigating factors are not so defined as to make it appear as if there is a burden on the defendant to provide that, and if he fails to provide it, that it's then the guaranteed outweighing by the aggravating circumstances if they're proved by the State. So, I'll try to make that a little bit more clear.

(Tr. VII, pp. 1538-1539) The court broke this promise. Notwithstanding the defense team's concerns, the court forbid any elucidation of what the law contemplates regarding mitigation - what it is; what it is for; where the jury should look for it. The court even sustained the prosecution's objection when counsel asked a prospective juror whether she believed the defense had an obligation to present mitigating evidence. (Tr. IX, p. 1962) The court subsequently reiterated and amplified upon those restrictions during a later discussion.

MR. PARKER: Judge, could I ask a question, please?

THE COURT: Yes.

MR. PARKER: You know, concerning Mr. Sims' last question, are we going to be allowed to inquire of the jurors whether they will consider mercy as a factor?

THE COURT: I don't think we're going to go into specific details with respect to mitigating factors, because if we start talking about mercy, then I think to be fair we've got to discuss all of them. Then you're going to go into, you know, mental illness, all kinds of factors. So, I would prefer not going into that kind of detail with respect to particular mitigating factors.

MR. PARKER: So we're not allowed to ask about mercy or mental illness?

THE COURT: No. I don't want to get into discussions over that, over remorse, over residual doubts, or any of those issues that lawyers come up with. Mitigating factors are factors that argue against the imposition of a

death penalty and in favor of the imposition of one of the life alternatives, that's all we need to know at this point in time.

MR. PARKER: Note our objection. Thank you, Judge.

(Tr. VIII, pp. 1743-44) Every time the defense tried to illuminate what a particular juror's understanding of mitigating evidence was, the trial court sustained the prosecutor's objection and forbid any inquiry. (Tr. VIII, pp. 1880, 1915; IX, p. 2123; XI, p. 2619; XIV, p. 3323; XIX, pp. 4439)

Even when a juror made it clear that the mitigation presented would drive whatever sentencing decision she reached, the trial court prohibited the defense from following up on the issue. This occurred during the following exchange:

MR. PARKER: So if we get to the second phase, the State has proven to your satisfaction, so to the satisfaction of eleven other jurors -- because all 12 would have to agree -- the State has proven that there is a purposeful planned killing of at least one innocent person. Do you understand that?

JUROR NO. 97: Yes.

MR. PARKER: And in that situation, do you think death is the only appropriate penalty?

JUROR NO. 97: It would be the mitigating circumstances that would make my opinion.

MR. PARKER: So you would want to hear mitigation -

JUROR NO. 97: Right.

MR. PARKER: -- before you would make that decision?

JUROR NO. 97: Yes.

MR. PARKER: What would be important to you to understand or know in making that decision?

MS. CARR: Objection.

MR. BOMBIK: Objection.

THE COURT: Sustained. You don't have to answer.

(Tr. XI, pp. 2618-19) The trial court's decision to bar an open-ended question exploring the kinds of factors this juror might believe to be mitigating is unfathomable. The purpose of this voir dire was to empanel jurors able to weigh mitigation against aggravation. As counsel tried to explain the issue to the court, the defense needed to have this information -

> ...[I]'s important, Your Honor, because let's take an example of good military service, honorable military service, which we have in this case. You know, a juror might think that's not mitigation, and another juror might think it is. And we're entitled to know, and have jurors that will consider all mitigation. And that's just an example. We need to know whether that particular juror will consider it or not. If they say "No, I'm not going to consider," maybe a different example, a difficult childhood, you know, the juror might say well, everybody has a difficulty childhood, that's not mitigating. That's their opinion, fine, but then they can't be on this jury, because they won't be able to consider the mitigation that's presented.

(Tr. IX, p. 2129)

The aggravation in this case was never in doubt. Weighing the mitigation against it required a level of consistency and understanding among those assigned that task. Preventing that understanding was not only illogical, but absurd. The court-imposed restrictions on voir dire demonstrated here made it impossible for the defense to empanel a jury that could consider the mitigation in this case.

The right to a fair and impartial jury cannot be protected without a probing voir dire

There is no doubt that the Constitution permits the trial court a substantial degree of flexibility when conducting its capital voir dire. That flexibility, though, is tempered by the promise that a defendant will be afforded a fair and impartial jury. Part of that guarantee necessitates an adequate voir dire to identify jurors' qualifications to serve. See, *State v. Jackson*, 107 Ohio St.3d 53, 2005 Ohio 5981, 836 N.E.2d 1173, citing *Morgan v. Illinois*, 504 U.S., at 729, 112 S.Ct. 2222,

119 L.Ed.2d 492. Voir dire is counsel's opportunity to ensure that a jury will be impartial and indifferent to the extent provided by the Sixth Amendment. *Id.*; see also R.C. § 2945.25; Crim. R. 24 (A), (B)(9), (14).

Without an adequate voir dire, the solemn responsibility of the trial judge "to remove prospective jurors who will not be able to follow the court's instructions and impartially evaluate the evidence cannot be fulfilled." See, *Rosales-Lopez v. United States*, 451 U.S. 182, 188, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981). Furthermore, because the defendant bears the burden of establishing juror predisposition or partiality, it is "all the more imperative that a defendant be entitled to meaningful examination at voir dire in order to elicit potential biases held by prospective jurors." *Jackson*, at ¶157, citing *Mu'Min*, 500 U.S. at 441, 111 S.Ct. 1899, 114 L.Ed.2d 493 (Marshall, J., dissenting). Although the content of voir dire does not have to conform to a particular framework, *State v. Evans*, 63 Ohio St. 3d 231, 247, 586 N.E.2d 1042, 1056 (1992), the right to a fair trial requires the court to allow counsel to cover specific pertinent subjects. *Mu'Min*, 500 U.S. at 422-23, 111 S.Ct. 1899, 114 L.Ed.2d 493. No subject could be more pertinent to a capital trial than the jury's treatment of mitigating evidence.

Under the Eighth Amendment capital jurors must "be able to consider and give effect" to all mitigating evidence proffered by the defendant. *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Thus, jurors who refuse to consider mitigation and automatically vote for the death penalty are not deemed fair and impartial jurors and are subject to a challenge for cause. *Morgan*, 504 U.S. at 729. Likewise, a juror who refuses to consider particular evidence in mitigation is not qualified. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 876-877, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In *Morgan*, the U.S. Supreme Court concluded that the voir dire in a capital case was not adequate,

where the judge refused to ask jurors whether they would automatically vote for the death penalty upon a finding of guilt. *Id.* at 726. When it made that finding, the Court also held that general questions about fairness and impartiality were simply not sufficient to protect Morgan's right to a fair and impartial jury. *Id.* at 735.

The Supreme Court has long emphasized that jurors are not qualified unless they can be fair, impartial, and able to follow the law. The only realistic method for uncovering juror bias is voir dire. As noted in Proposition of Law I, the importance of voir dire has been applied in cases involving pre-trial publicity. See, *Irvin v. Dowd*, supra, and *Patton v. Yount*, supra. It has been applied in the context of seating a jury free of racial bias. *Ham v. South Carolina*, 409 U.S. 524, 93 S.Ct.848, 35 L.Ed.2d 43 (1973); *Turner v. Murray*, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). The juror impartiality principle has been also been applied to death penalty cases, requiring a jury that can set aside personal views on capital punishment and follow the law. *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

In all of these cases, the Court looked to voir dire as the essential vehicle for uncovering bias. This is really the only way for a party seeking to exclude a biased juror because to demonstrate, through questioning, that the potential juror lacks impartiality. *Id.* at 423. see also *United States v. Blount*, 479 F.2d 650, 651 (6th Cir. 1973) ("The primary purpose of the voir dire of jurors is to make possible the empanelling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel.").

Accordingly, in *Morgan*, the High Court held that the voir dire process must be sufficiently probing to identify jurors who cannot be impartial. Such jurors are unqualified because they cannot follow the law. *Morgan*, 504 U.S. at 729. The same rationale compelled the holdings in

Wainwright and *Witt*, where the court found that a comprehensive voir dire was the only way the parties could identify jurors who, because of their views against capital punishment, were not qualified. That reasoning should compel this Court to reach a similar conclusion in Mr. Sowell's case - that the voir dire process afforded him was not adequate. Where the defense is precluded 1) from addressing jurors' questions about what mitigation is; and 2) from ascertaining whether jurors can consider the specific mitigating circumstances that will be presented, no court can be sure that the jurors seated were free from bias and qualified to serve.

Mitigation is an Essential Aspect of a Capital Case

The consideration of mitigating evidence is fundamental in a capital case. In *Woodson v. North Carolina*, the U.S. Supreme Court invalidated a statute creating a mandatory death sentence for all first-degree murder convictions. One of the statute's constitutional shortcomings was its "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." 428 U.S., at 303, 96 S.Ct. 2978, 49 L.Ed.2d 944 (plurality opinion). In *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the High Court declared Ohio's death penalty statute unconstitutional, concluding that the Eighth and Fourteenth Amendments forbid limiting the sentencing jury's consideration of mitigating factors, which should include "any aspect of a defendant's character or record and any of the circumstances of the offense." *Id.*, at 604, 98 S.Ct. 2954 (footnote omitted). Specifically, the Court observed,

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

438 U.S., at 605, 98 S.Ct. 2954, 57 L.Ed.2d 973.

Lockett's holding was broadened in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). In those cases, the Court emphasized the severe and irrevocable nature of a death sentence and that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Eddings*, 455 U.S., at 112, 102 S.Ct. 869. The line of cases following *Lockett* has made it clear that when the jury is not permitted to give meaningful effect or a "reasoned moral response" to a defendant's mitigating evidence—because it is forbidden from doing so by statute or a judicial interpretation of a statute—the sentencing process is fatally flawed.

Due Process Violation Stemming from Voir Dire Restrictions

By extension, if the jurors themselves are unable, for their own internal reasons, to give meaningful effect to the defendant's mitigating evidence, the sentencing process is fundamentally flawed. The trial court's restrictions on voir dire also violated Mr. Sowell's right to due process because those restrictions substantially interfered with his statutory rights to make a challenge for cause and to use his peremptory challenges. Pursuant to R.C. § 2945.25, Sowell had a statutory right to challenge for cause any biased juror. Additionally, under R.C. § 2945.21, Mr. Sowell also had a statutory right to exercise peremptory challenges. See Crim. R. 24; *State v. Cleer*, 39 Ohio St. 3d 236, 530 N.E.2d 352 (1988). See also, *J.E.B, v. Alabama*, 511 U.S. 127, 143, 114 S. Ct. 1419, 128 L.Ed. 2d 89 (1994) ("Voir dire provides a means of discerning ... implied bias and firmer basis [for exercising] peremptory challenges intelligently").

Because the state "created this statutory framework for the selection of juries, the essential faimess required by Due Process Clause" dictates a meaningful exercise of those statutory rights. *Morgan*, 504 U.S. at 703, 112 S. Ct, at 2230 (quoting *Ham v. South Carolina* 409 U.S. at 527, 93

S.Ct. 838). Without adequate voir dire "to lay the foundation of a challenge for cause against" prospective jurors who could not consider mitigating factors, Mr. Sowell's "right not to be tried by such jurors" became "nugatory and meaningless." *Id.* at 706, 112. Ct. at 2232. The trial court's voir dire restrictions also impaired Mr. Sowell's ability to intelligently use his statutorily guaranteed peremptory challenges. See *Rosalez-Lopez*, 451 U.S. at 188, 101 S.Ct. at 1634. Without adequate voir dire, Mr. Sowell could not probe the prospective juror's attitudes about mitigating factors to discover more subtle forms of juror bias. See id.

It is the trial court's job to ensure that the jury finally seated is fair. R.C. § 2945.27. To ensure fairness in the criminal justice process, the trial court's administration of voir dire must be evenhanded. See *Lakeside v. Oregon*, 435 U.S. 333, 341-42, 98 S.Ct. 109, 55 L.Ed. 2d 319 (1978) ("It is the judge...who has the ultimate responsibility for the conduct of a fair and lawful trial."). The voir dire that took place in Mr. Sowell's case was far from even-handed, however. As noted above, this case was unique in its notoriety, and the shear nature and number of underlying crimes. Every single individual in this venire had heard about this case. Every juror questioned had a working knowledge of the case's aggravating circumstances, even *before* receiving the jury summons. For the judge to not also equip jurors with a similar working knowledge of mitigation – what it is, and what the law requires them to do with it – unfairly tips the scales in favor of the prosecution and in favor of a death sentence.

This voir dire proceeding was not fair in this case and it transgressed Mr. Sowell's right to due process, a fair trial and a reliable death sentence.

Proposition of Law No. III

A trial court compromises the fairness of the accused's trial and renders his death sentence unreliable when it fails to excuse for cause jurors who indicate that they cannot follow the law as instructed.

As noted in the previous proposition of law, a criminal defendant has a Sixth Amendment right to an impartial jury. The presence of even a single biased juror deprives a defendant of his right to an impartial jury. See *Morgan*, 504 U.S. at 729, 112 S.Ct. 2222. When this right is not zealously guarded by those assigned to such a task, the defendant's rights to due process, a fair trial, and a reliable sentence are transgressed. *Irvin v. Dowd, supra.* The Ohio Constitution acknowledges parallel rights under state law. *Cooper v. State*, 16 Ohio St. 328 (1865); *Moliter v. State*, 10 Ohio Dec. Rep. 324 (1892). Safeguarding this right is of particular importance in a capital case.

In determining whether to exclude a juror for cause, the court must ascertain "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Witt*, 469 U.S. at 424, 105 S.Ct. 844, 83 L.Ed.2d 841; See also *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980) (constitutional test for cause exclusion is whether juror's views "would prevent or substantially impair the performance of his [or her] duties as; a juror in accordance with [the] instructions and [the] oath"). The jury's verdict and judgment must not be the result of passion, prejudice, or ill will against the accused. *State v. Elliott*, 11 Ohio Dec. Rep. 253 (1891); *State v. Sheppard*, 68 Ohio Law Abs. (C.P. 1954). To that end, the trial court is obliged to remove jurors who so biased toward one side or another that their impartiality is impaired. *State v. Ellis*, 98 Ohio St. 21 (1918). The right to peremptorily challenge jurors during voir dire is a substantive right. *State v. Greer*, 39 Ohio St. 3d 236 (1988) cert, denied 490 U.S. 1028 (1989). R.C. §2945.21

The jury empanelled to decide Mr. Sowell's fate was not fair and impartial. At least five of the jurors who served ought to have been disqualified, but were not because the trial court denied valid requests to strike jurors for cause and refused to allow the parties additional peremptory challenges. Accordingly, notwithstanding the extraordinary nature of Mr. Sowell's capital case, the trial court only allowed parties the customary six peremptory challenges. Sowell's counsel used all of those peremptory challenges to remove jurors that the court should have removed for cause. As a consequence, five additional jurors, all of whom the defense had sought to remove for cause, were empanelled even though they were not qualified to serve.

Although bias against the defendant and an inability to follow the law rendered the following jurors unqualified to serve, the trial court refused to exclude them for cause.

Juror No. 21, David Gaugh, for example, made it clear from the outset that he could not consider all the sentencing options available in this case. Specifically, although the law required him to consider imposing sentences of life with parole option after 25 or 30 years, he initially professed himself to be unable to do so. (No. 21 Questionnaire, p. 31) Although, he told the court during voir dire that he could at least consider a life sentence with parole option, Mr. Gaugh also indicated that he expected the defense to prove why the death penalty should not be imposed. (Tr. VII, p. 1533) Although the court agreed that the juror had said "that he expected the defendant prove the mitigation in the second phase," the court discounted that observation as "too semantical." (Tr. VII, p. 1537) The defense later used its last peremptory challenge to remove this juror. (Tr. XXV, p. 5740)

Juror No. 22, Grace Karsnak, also should have been removed for cause. In her questionnaire, Juror No. 22 described herself as "strongly in favor" the death penalty, explaining further that, "Once again the law is the law and if the court process decides a person is guilty and death is the penalty then so be it." (No. 22 Questionnaire, p. 30) Juror No. 22 also described

herself as unable to impose any sentence with an option of parole, making it clear that only death or LWOP were reasonable options for her. (No. 22 Questionnaire, pp. 30-31) When Juror No. 22 appeared for voir dire, her views had not changed. She admitted that she believed based on the media coverage to that point that Sowell "more than likely did it." (Tr. VII, p. 1555) This juror also essentially admitted that she believed death was the only appropriate sentence. (Tr. VII, p. 1558) During further questioning, the juror did say, however, that she would consider other sentencing options. Nevertheless, because she had preconceptions about Mr. Sowell's guilt, trial counsel sought her dismissal for cause. (Tr. VII, p. 1569) The court denied that request and trial counsel was forced to exercise another peremptory challenge for her dismissal. (Tr. XXIV, p. 5681)

When Juror No. 23, Theodore Walker, was asked to explain his view of the death penalty, he noted that, "an eye for an eye seems fair depending on the circumstance." (No. 23 Questionnaire, p. 29) During voir dire, Mr. Walker was asked to follow up on this answer.

MR. SIMS:	I'm not putting words into your mouth, you correct me if I'm wrong, are you saying that if you kill, then you should be killed? Is that what you're saying?
JUROR NO. 23:	Yeah.
MR. SIMS:	Okay, That's what you believed then and what you believe now, correct?
JUROR NO. 23:	Yes.
MR. SIMS:	Yes, okay. And can you go to number 5 on page 30, please, for me. 5c. Do you see that?
JUROR NO. 23:	Yes.
MR. SIMS:	"Would you be more likely to impose the death penalty in a case involving 11 victims alleged to have been killed at separate times over a two and one-half year period," and the question is "Why?" And you said "Yes, if guilty," correct?

JUROR NO. 23: Yes

...

MR. SIMS: And then on page 30, question 7 - do you see it on there on page 30?

JUROR NO. 23: Yes.

MR. SIMS: Where the question is, "In your opinion, is the death penalty the only appropriate sentence in a case involving the purposeful killing of 11 people alleged to have been killed at separate times over a two and one-half year perios, or would a sentence of life inprison without the possibility of parole also be an appropriate sentence?" And you answered, "Yes, the death penalty is appropriate if found guilty." Correct?

JUROR NO. 23: Correct.

The juror went on to clarify that he had meant that the death penalty should be imposed on a case-by-case basis-

JUROR NO. 23: If it was a - say like a barroom brawl and somebody bumped their head and died, you know, that may not be you know, a death penalty type of sentence, in my opinion.

(Tr. VII, pp. 1584-87) The court denied the defense request to have this juror removed for cause, and the defense used another peremptory challenge to secure his dismissal. (Tr. XXIV, p. 5590)

Juror No. 36, Nanette Burks, believed Sowell was guilty before voir dire began. (Tr. VIII, p.1818) In her questionnaire, she indicated that, "there must be enough information to make these allegations." (No. 36 Questionnaire, p. 32) When asked if there was anything else the parties should know about her as a prospective juror, Ms. Burks wrote, "I have three daughters - 1 grand-daughter." (No. 36 Questionnaire, p. 33) Ms. Burks also noted that she was very much in favor of the death penalty. (No. 36 Questionnaire, p. 29) In her questionnaire and in her voir dire responses, this juror also noted that she would not be able to consider any sentencing options other than death or LWOP. (Tr. VIII, p. 1824) Notwithstanding her unequivocal representations to

inquiring counsel that she would not even consider other sentencing options, the trial court denied the defense motion to exclude her for cause. (Tr. VIII, p. 1825-27) The defense subsequently used a peremptory challenge to exclude her from Mr. Sowell's jury. (Tr. XXIV, p. 5660)

Juror No. 46, Eve Ballas, was similarly problematic. She too had formulated an opinion that Sowell was guilty before the trial started. (Tr. IX, p. 1951) When questioned about that opinion, the juror affirmed that she still believed he was guilty - "[b]ecause no new evidence has been brought forward, you know, for my opinion to be changed." (Tr. IX, p. 1952) Ms. Ballas also characterized herself as "strongly in favor" of the death penalty. (Tr. IX, p. 1953) Regarding the appropriateness of a death sentence, Ms. Ballas wrote on her Questionnaire that, "If they murdered someone the victim didn't have the choice to make appeals. The victim isn't able to see their family anymore, even if it's behind bars. The accuser killer decided all of that for them." (No. 46 Questionnaire, p. 29) In response to a question asking whether death or LWOP was appropriate for the purposeful killing of 11 people, this juror wrote: "I strongly believe he should go straight to death row, with no chance of appeals, the only decision left to be made is the date of his execution." (No. 46 Questionnaire, p. 29-30) Although during voir dire, this juror reiterated these views, she also stated that if she were picked to serve, she would take it as her job to leave those views at the door. (Tr. IX, pp. 1960-61)

All six of these jurors should have been excused for cause. Although, with extensive prodding from the court during voir dire, they ultimately agreed to "follow the law" as an abstraction, their responses on the specifics undercut those promises. Because trial counsel was forced to use all six of their peremptory challenges on Jurors 13, 21, 22, 23, 36, and 46, he was unable to use them to exclude five additional jurors, whose exclusion he had also sought for cause. (VII, p. 1622; VIII, p. 1769; IX, p. 2127; XVII, p. 4124; XIX, p. 4445) Those five, who remained

on Mr. Sowell's jury and decided his fate, however, harbored similar biases.

Juror No. 24, Diane Papay, had followed the case in the news. (Juror 24, Questionnaire, p. 10) On her questionnaire, Ms. Papay indicated that she was "strongly in favor" of the death penalty and would be unable to consider parole options in the case, though the law requires it. (Juror 24 Questionnaire, pp. 30-31) During voir dire, the juror made it clear that she was loath to consider any sentencing option that contemplated parole. (Tr. VII, pp. 1605-1606) Even after further questioning, this juror expressed considerable reluctance to follow the applicable sentencing law. (Tr. VII, p. 1612, 13, 19)

Juror No. 34, Ronald Barbieri, indicated that he was "strongly in favor" of the death penalty and would not be able to consider any sentencing options that involved parole. (Juror 34 Questionnaire, pp. 29-31) During voir dire, this juror expressed the opinion that Mr. Sowell was guilty and that Sowell would have to demonstrate that he was not guilty. (Tr. VIII, p. 1758) On further questioning, the juror noted that he would probably be able to weigh "everything" and consider sentences with parole options. However, when counsel followed up, asking, "What would be important for you in that weighing process, what would be important for you to understand?" The court sustained the prosecution's objection and instructed the juror not to answer. (Tr. VIII, p. 1762)

Juror No. 62, Betty Hamilton, similarly professed to be "strongly in favor" of the death penalty, circling a "10" on a scale of "1 - 10." On her questionnaire, Ms. Hamilton explained, "I think it help (sic) the family to heal if there life is tak as ther loved one has been take. Its just a feeling it's right that their life be taken too." (Juror No. 62, Questionnaire, p. 29) This juror also admitted that she was more likely to impose death in a case involving 11 victims because, "I feel this person was involved. If this person had some evidence." (Juror No. 62 Questionnaire, p. 30)

During voir dire, Ms. Hamilton advised the parties that she had lived across the street from the house where the remains were located. (Tr. IX, p. 2110) When asked further about her death penalty views, this juror explained that she was in favor of the death penalty in certain circumstances, which prompted the following exchange:

MR. PARKER:	Okay.
JUROR NO. 62:	You know, there are other cases I don't think it should.
MR. PARKER:	Can you give me an example of one you think maybe it should apply to?
MR. BOMBIK:	Objection.
THE COURT:	Sustained. You don't have to answer, ma'am.
MR. PARKER:	Can you give me an example of a case where you think it should not apply?
MR. BOMBIK:	Objection.
THE COURT:	Sustained.
MR. PARKER:	All right.

(Tr. IX, p. 2114) Later during voir dire, this juror reiterated her belief that if Sowell were found guilty of the planned killing of an innocent person, at least one, maybe more, death would be the only appropriate punishment. Nevertheless, because she went on to say that she would "consider" alternative sentencing options, the court barred the defense motion for cause. (Tr. IX, pp. 2118-19, 2131)

Like so many others, Juror No. 28, Jaroslaw Romaniuk, indicated that he was "strongly in favor" of the death penalty. While he rated himself an "8" on a scale of "1-10," he explained that he did not put a "10" because there are cases where people are innocent. (Juror No. 28, Questionnaire, p. 29) Mr. Romaniuk knew details about the case and before serving as a juror,

participated in a community focus group convened in the wake of the killings to address women's safety concerns. (Juror No. 28, Questionnaire, p. 10) He also believed himself to be unable to consider sentencing options which involved parole. During voir dire, this juror admitted to feeling "scared" and experiencing "fear" when he looked at Mr. Sowell. (Tr. XVII, p. 4107) This juror also seemed to have difficulty accepting what his roll would be in the penalty phase. The Court concluded that counsel's reasons were sufficient to justify this juror's removal for cause. (Tr. XVII, p. 4124)

In Juror No. 60 - Thomas Desalu's questionnaire, he repeatedly professed himself to be neutral. He also claimed to have very little knowledge about the case going in. (Tr. XIX, p. 4413) This juror also stressed that he could approach the case with a clean slate and he would not consider evidence about the accused's background that was irrelevant. (Tr. XIX, p. 4439) When counsel tried to explore the specifics of this remark further, the court sustained the prosecution's objections. In seeking Mr. Desalu's dismissal for cause, trial counsel again challenged the trial court's restrictions on voir dire with respect to mitigation, which led to this discussion -

MR. PARKER: Judge, you know, I think this is very intelligent juror. And you know, I think he understands the basic concepts. My challenge for cause with respect to this juror goes directly to our continuing objection. And I think this juror illustrates the point I've been trying to make throughout this process in that, you know, he will consider in mitigation only what he considers to be relevant. I think he made that very clear. And we are entitled to know whether a juror will consider -- not necessarily that they will accept it, but whether they will consider various categories of mitigation that we may present. And this, you know, this gentleman would not consider -- I'm sorry, you sustained the objection, I think, on good work history -

THE COURT: Yes.

MR. PARKER: -- if I'm not mistaken. But I noticed he was shaking his head in a negative manner. And it brings great concern to me that he would not consider such an item. And, you know, I didn't get into the other categories that's subject to our continuing objection, because

> of your rulings, but I think this is a classic juror that may just discount, because he personally doesn't consider it relevant, various mitigation categories that we may introduce. And if he's not willing to fairly consider those categories, then he can't be a juror on this particular case.
>
> And with that, Judge, I would move for cause.

. (Tr. XIX, p. 4441-42) The trial court disregarded this argument, labeling it an exercise in "semantics" and denied the motion for cause. . (Tr. XIX, p. 4445)

Jurors 13, 24, 28, 34, 60 and 62 were all empanelled, notwithstanding the defense motion to exclude them for cause, because the court only permitted six peremptory challenges. Under the circumstances, Mr. Sowell was left with a jury that could not be fair. This is true even though after numerous follow up questions, one or the other of these jurors might concede that he could "follow the law," "consider sentencing alternatives under *certain* circumstances." Given the restrictions on voir dire that the court imposed, it was impossible to ascertain what "certain circumstances" that juror envisioned. Moreover, the court was under no obligation to simply accept the juror's assurances at face value, particularly in this case where the record reflects so many inconsistencies in their responses. See, *Wolfe v. Brigano*, 232 F.3d 499, 502 (6th Cir. 2000) (A court's refusal to excuse a juror will not be upheld simply because the court ultimately elicits from the prospective juror a promise that he will be fair and impartial.).

Because the trial court failed to excuse for cause jurors who could not be impartial, Mr. Sowell was denied a jury that was impartial, and that could fairly give to all the evidence the attention it deserved. Consequently his rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United State Constitution, and Sections 9, 10 and 16, Article I, of the Ohio Constitution were thereby violated.

Proposition of Law IV:

When the State charges the accused with an indictment that fails to distinguish between multiple allegations of the same wrongful conduct, it violates the defendant's rights to due process, notice, a unanimous jury verdict, and creates the potential for double jeopardy.

Mr. Sowell was charged with identical counts of rape in counts 72, 73, 78 and 79. The only differences between the allegations was that Counts 72 and 73 alleged sexual conduct with Jane Doe II on September 22, 2009; and Counts 78 and 79 alleged sexual conduct with Jane Doe III on October 20, 2009. The bill of particulars provided no additional details about these allegations. Accordingly, Mr. Sowell went to trial not knowing what he was alleged to have done, where he was alleged to have done it, or with whom.

More importantly, even looking to the complainants' testimony at trial, it is far from clear that such testimony supports multiple charges or convictions for rape. (Tr. XXXI, p. 7125, 7205) Moreover, at least two other witnesses testified that Mr. Sowell sexually assaulted them. (Tr. XXVIII, p. 6519; XXIX, p. 6839) Given that evidence it is unclear what testimony the jury relied on in reaching its verdicts.

Notice/Due Process

No principle of procedural due process is more clearly established than the one requiring the prosecution to give notice of the specific charge and a chance to be heard in a trial on that charge. *Cole v. Arkansas* (1948), 333 U.S. 196, 201. Notice is provided by way of an indictment. The Fifth Amendment to the United States Constitution and Section 10, Article I, Ohio Constitution state no person can be held to answer to a felony unless he is first presented with an indictment from a grand jury.

An indictment's sufficiency is tested on the following criteria: (1) "whether the indictment contains the elements of the offense intended to be charged," (2) "and sufficiently apprises the

defendant of what he must be prepared to meet," and, (3), "in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *Russell v. United States* (1962), 369 U.S. 749, 763-764." The due process rights announced in *Russell* apply to both state and federal charges. *Valentine v. Konteh* (C.A. 6, 2005), 395 F.3d 626, 631. The identical rape counts charged in Mr. Sowell's indictment failed to meet these well-established criteria.

In *Valentine*, the defendant was charged with 20 carbon-copy rape counts, "each identically worded so that there was no differentiation among the charges." *Valentine,* at 628. The court noted each rape count, "charged that Valentine unlawfully engaged in sexual conduct with [the stepdaughter] not his spouse by purposefully compelling her to submit by the use of force or threat of force," *Id* at 629. The indictment charged Valentine with a "generic pattern of abuse rather than forty separate abusive incidents." Id at 643. Ultimately, the court ruled that the State could not properly convict Valentine of perpetrating a pattern of abuse, concluding that there was only enough evidence to justify one count each of rape and felonious sexual penetration. Accordingly, under *Valentine*, it was improper to convict Mr. Sowell of multiple rapes where the underlying charges are undifferentiated and identical.

Double Jeopardy

The Double Jeopardy Clause prevents successive prosecutions for the same offense. *United States v. Dixon* (1993), 509 U.S. 688, 696. Accordingly, "[o]nce a tribunal has decided an issue of ultimate fact in the defendant's favor, the double jeopardy doctrine also precludes a second jury from ever considering that same or identical issue in a later trial." *Isaac v. Grider* (6th Cir. 2000), 211 F.3d 1269, *5 (published in full at 2000 U.S. App. LEXIS 9629).

Because the four rape counts are charged identically, there is a risk, in the event the jury

had hung or acquitted on any of those counts, that retrial on the remaining ones would be prohibited under the double jeopardy clause. *See Valentine, supra* at 636; at ¶23. Since the conduct is charged identically, it would be impossible to determine on which counts the jury disagreed or decided.

Juror Unanimity

The right to a jury is guaranteed by both the Sixth Amendment to the United States Constitution and Section 10, Article I, Ohio Constitution. It is well-settled that if a single count can be divided into two or more "distinct, conceptual groupings," as the counts could have been in Mr. Sowell's case, the jury must be instructed specifically that it must reach a unanimous verdict with respect to at least one of those groupings before it can find the defendant guilty. *State v. Johnson,* 46 Ohio St. 3d 96, 104 (1989).

The United States Supreme Court has agreed, repeatedly holding that a jury instruction will not withstand scrutiny if it submits alternative theories for conviction and the reviewing court cannot determine whether the jury relied on the unconstitutional instruction. *Zant v. Stephens* (1983), 462 U.S. 862, 881-83; *Bachellar v. Maryland* (1970), 397 U.S. 564, 571.

In Mr. Sowell's case the court instructed the jury generally that each of its verdicts needed to be unanimous. But since Counts 72, 73, 78, and 79 are identical, it is not clear whether the jury reached a unanimous agreement about the nature, date and location of the conduct involved.

Proposition of Law No. V:

When the evidence is overwhelming that a capital defendant committed a series of particularly heinous aggravated murders and it is clear that the jury will find a capital defendant guilty of aggravated murder and death specifications, a defendant receives constitutionally ineffective assistance of counsel and is denied rights guaranteed by the constitutions of the United States and of Ohio when trial counsel pursue a counterproductive and altogether implausible reasonable-doubt defense in the trial phase when they had at least a moderately compelling mitigation case.

Over a period of several days, beginning the night of October 29, 2009, the partially decomposed remains of 11 women were discovered inside and in the back yard of Anthony Sowell's house. All the women had been murdered. Many of the bodies had their hands or arms or legs bound together. From their state of undress, it is likely that they had been raped. After the bodies were identified, it turned out that all had disappeared between June 2007 and September 2009.

Other women claimed that Sowell had attacked them, raped or attempted to rape them, perhaps attempted to murder them. See, generally, testimony of Vanessa Gay, Gladys Wade, Tanja Doss, Latundra Billups, and Shawn Morris. (TR Vol. XXVIII, pp. 6519-6580; Vol. XXIX, pp. 6610-6707, 6839-6894; Vol. XXXI, pp. 7112-7175, 7202-Vol. XXXII, p. 7304.) Their descriptions of what Sowell did to them were consistent and, frankly, consistent with what seems the likely sequence of events involving the murdered women. The central difference, of course, is that these women survived.

When he was arrested, at a time when not all the bodies had yet been discovered, Sowell underwent a lengthy interrogation. He denied raping anyone. He said that he had no actual memory of murdering the women, but he had vague memories of being angry with them, dreamed of choking them, and conceded that he must have killed them. (Court Exhibits 2-7.)

Sowell was, at the relevant times, the only person actually living in the house, mostly on the

third floor – where several of the bodies were recovered. There is no indication that anyone else had sufficient access to the property to have killed these women. Nor is there any reason to believe that anyone joined with Sowell in what he did to the women.

The grand jury returned a 94-page indictment. Sowell was charged with 22 Counts of Aggravated Murder, and dozens of additional counts of rape and kidnapping and tampering with evidence. Each of the aggravated murder counts was accompanied by some 15 separate death specifications: 2 charging felony murder based on different theories of kidnapping, R.C. 2929.04(A)(7), and 13 charging that the killing was part of a course of conduct involving the purposeful killing or intent to kill two or more persons, R.C. 2929.04(A)(5).

Appointed counsel were given what is, for Ohio, unprecedented financial resources to investigate the facts of the crimes and to investigate possible mitigation. Yet come the morning of June 3, 2011, when the venire was brought to court for orientation and to fill out questionnaires which would be used during the six weeks of jury selection, it had long been clear that there was only one meaningful question: Which sentence of death in prison would Anthony Sowell receive? Would it be death at the hands of the state or death of natural causes? Sowell had understood as much for some time, as revealed by his counsel's acknowledgment that morning that for over a year he had been willing to plead guilty to every count and specification, to accept maximum consecutive sentences, and to waive any rights to seek post-trial relief. (TR Vol. VI, pp. 1192-1194.)

The jury, any jury, would find Sowell guilty of the 22 counts of aggravated murder. The jury, any jury, would find Sowell guilty of at least one Course of Conduct specification for each aggravated murder.[7] There would be a mitigation phase to the trial, and the jury would either

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[7] More than a year before trial, counsel had moved that the course-of-conduct specifications should

recommend death or life without the possibility of parole. And whatever non-death sentences Sowell received, whether for aggravated murder or for the other offenses, would be made to run consecutively to each other. Sowell's earliest conceivable parole eligibility date, on the unlikely chance he had one at all, would be, quite literally, centuries in the future.

Faced with these facts, and forced to trial because the prosecutor would not accept Sowell's plea offer, the only rational choice was to plead guilty and focus all efforts toward convincing the jury to spare his life. But Ohio law will not allow that option. A guilty plea in a capital case cannot be made before a jury but only before a three-judge panel. Crim.R. 11(C)(3); and see Proposition of Law No. XIII. Still, if a capital defendant cannot plead guilty before a jury, he can concede guilt.

> Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. At the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt. And, of course, even when there is a bona fide defense, counsel may still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances.

United States v. Cronic, 466 U.S. 648, 656 fn. 19, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)(citations omitted).

Conceding guilt when going to trial in a non-capital case makes little sense. If the defendant chooses trial, conceding guilt is little different than pleading guilty. The judge will sentence, perhaps with some leniency given the acceptance of responsibility. But that happens no differently, and with less cost in time and money to the court, on a guilty plea. The defendant who

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be dismissed as duplicative. See *State v. Mitts*, 81 Ohio St.3d 223, 231, 690 N.E.2d 522 (1998), citing *State v. Jenkins*, 15 Ohio t.3d 164, 194-200, 473 N.E.2d 264 (1984), and *State v. Spisak*, 36 Ohio St.3d 80, 84, 521 N.E.2d 800 (1998). The motion was denied, and the successor judge refused to reconsider the question.

chooses to go to trial deserves, and it is counsel's job to provide, a defense. Challenge the unchallengeable. As Justice White explained in *United States v. Wade*, 388 U.S. 218, 257-258, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (White, J., dissenting in part and concurring in part)(footnotes omitted),

> The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying.

In *State v. Scott*, 101 Ohio St.3d 31, 2004-Ohio-10, ¶ 57, this Court wrote,

> "'Concessions of guilt, in any form, are among the most troublesome actions a defense counsel can [t]ake * * *.' *State v. Goodwin* (1999), 84 Ohio St.3d 331, 336, 703 N.E.2d 1251, 1258. Nevertheless, such concessions are not *per se* ineffective but must be analyzed under *Strickland* for deficiency and prejudice." *State v. Campbell* (2000), 90 Ohio St.3d 320, 337, 738 N.E.2d 1178.

But capital cases are different. In a capital case where the evidence of guilt is overwhelming, the tactical retreat may be the only way to demonstrate an acceptance of responsibility. Rather than attempting the "useless charade" of a defense, *Cronic*, supra, counsel can gain credibility and focus attention on the thing that matters, the sentence. So in *Scott*, supra, ¶¶ 58-61:

> Here, prior to trial, defense counsel moved to have the Green and Stoffer murders tried separately, but the court denied the motion. Having lost that position, defense counsel stated during his opening statement:
>
> "We would tell you that there is no question in this case that the evidence will support findings of guilty to the charges in the indictment. We do not intend to contest that evidence. Mr. Scott confessed to these matters almost immediately upon being contacted by police. The evidence of guilt is quite clear. We don't

> intend to take issue with the elements of the offenses except for one of the specifications, and that is the course of conduct."
>
> With these concessions, counsel focused the jury's attention on Scott's most plausible defense: the state's inability to prove the course-of-conduct specification. Had Scott succeeded in obtaining an acquittal on that specification, he would have strengthened his appellate challenge to the court's denial of his request to have the Green and Stoffer cases tried separately.
>
> Additionally, by conceding Scott's guilt to those charges for which the state had overwhelming evidence of guilt, including Scott's confession, counsel enhanced his credibility with the jury to plead for Scott's life. See, generally, *Goodwin*, 84 Ohio St.3d at 337, 703 N.E.2d 1251. Based on the foregoing, we cannot say that defense counsel's decision to concede guilt to all but the course-of-conduct specification was not a rational trial strategy.

The United States Supreme Court has explicitly held that conceding guilt in a capital case where sentencing will occur at a separate proceeding can be the only reasonable strategy when counsel does so in the attempt to avoid a useless charade and in hopes of avoiding a death sentence.

> On the record thus far developed, Corin's concession of Nixon's guilt does not rank as a "fail[ure] to function in any meaningful sense as the Government's adversary." *Id.*, at 666. Although such a concession in a run-of-the-mine trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 329 (1983). In such cases, "avoiding execution [may be] the best and *only realistic result* possible." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.1, Commentary (rev. ed. 2003), reprinted in 31 Hofstra L.Rev. 913, 1040 (2003).

Florida v. Nixon, 543 U.S. 175, 190-191, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004) (emphasis added).

It is, then, beyond question that in an appropriate case counsel can properly concede guilt at the culpability phase of the trial in order to maintain credibility, avoid annoying the jury, and

focus attention where it must be - on mitigation. Indeed, in some cases there is no other reasonable alternative. And where there is but one reasonable strategy, the failure of counsel to pursue that strategy violates the right of a criminal defendant to the effective assistance of counsel. U.S. Constitution, Sixth and Fourteenth Amendments; Ohio Constitution, Article I, Section 10.

The basic parameters of effective assistance of counsel were laid out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Trial counsel fail to provide constitutionally effective assistance when their representation falls below an objective standard of reasonableness and when there is a reasonable probability that had counsel's representation been at least objectively reasonable, the outcome would have differed. This Court adopted essentially the same test in *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

In this case, no rational lawyer could reasonably have imagined that a jury would not find Anthony Sowell guilty of *at least 11 counts of aggravated murder* and *at least 1death specification for each count.* Necessarily, then, if the case was to be tried, it would proceed to a mitigation phase. That much was obvious. Defense counsel, however, were apparently in the dark.

Oh, they didn't deny that there were all these murdered women. They just maintained that the state couldn't prove who did it. There was, they claimed, reasonable doubt about just who killed them.

> But keep in mind, folks, that the State of Ohio bears the burden at all times in this particular case; that the homicides are separate from the charges with these various women that will come in and testify, that there was no planning here. And with respect to the homicides, the State has the burden of *proving who committed these murders.* And that they have no physical evidence, no eyewitnesses, no fingerprints, no DNA.
>
> And at the end of the day, you will find Mr. Sowell not guilty of the aggravated murders, as well as the kidnappings and these various other charges. Quite frankly, I think you'll find him not guilty of many of those as well.

(TR Vol. XXVI, p. 5968)(emphasis added.)

There was no physical evidence, no eyewitness, no fingerprint, no DNA. Perhaps. There was, nevertheless, overwhelming evidence that it was Sowell who killed those women, including of course, his near confession. (Court Exhibits 2-7; Vol. XL-XLI, pp. 8796, 8839-8861.)

Counsel's opening statement wasn't entirely devoted to suggesting there was reasonable doubt that Sowell was guilty. Counsel also offered an explanation of how he came to commit these crimes.

> I think you will see that his physical health and his wellbeing went downhill dramatically after that heart attack, that his behavior changed. And you will see the evidence as it relates to that.

(TR Vol. XXVI, p. 5968.)

Of course, these themes are incompatible. If the investigation is so shoddy that the state cannot prove the defendant guilty, which counsel maintained, then the explanation for how he came to commit the crimes is both irrelevant and confusing. One or the other has to go. And since Sowell would surely be found guilty no matter what, it was the frankly silly reasonable doubt argument that needed to be jettisoned. It was not merely a "useless charade," it was a dangerous one.

The main theme was the absence of forensic evidence tying Sowell to the victims. His DNA wasn't found on their bodies. His fingerprints weren't found on the plastic bags or sheets with which many of them were covered or on the tape or ligatures that bound them. But Sowell worked to emphasize that the crime scene may have been compromised, that there was potential evidence left uncollected, and that the trace evidence technicians did not even attempt to test numerous pieces of evidence recovered from the bodies or the graves for fingerprints or DNA or whatever else might have been found. To do that, of course, they had to direct the jury's attention to those things. Yet those were the things that also focused the jury's attention on the particularly

macabre nature of the crimes.

One example makes the point. During his cross-examination of Curtiss Jones, supervisor of the trace evidence department of the county coroner's office,[8] counsel Parker had Jones go through his reports of several of the victims item by item to describe what testing or examination was or was not done. He began with the report on trace evidence associated with the body of Michelle Mason (State's Exhibit 285, see generally TR Vol. XXXVIII, pp. 8463-8483), having Jones describe each of the plastic bags and sheets in which her body had been wrapped, discussing every fiber found on those bags and sheets, and then turned to items directly attached to the body itself. He began with the ligature from tied around her neck, reminding the jury that the body had been strangled with a cord and that the cord had been left in place as the body decomposed under it.

> Q. All right. Item 15 now. Important item here, you would agree with me? Page 12?
> A. Yes.
> Q. That's the ligature from Ms. Mason?
> A. Correct.
> Q. And as I understand it, that ligature was removed, correct?
> A. It was.
> Q. Did you remove that?
> A. I did.
> Q. All right. And you observed decomposition material, obviously?
> A. Yes.
> Q. And there was absolutely no further testing?
> A. Nothing beyond that, no.
> Q. Nothing beyond you saw it, you removed it, no testing, correct?
> A. Correct.

(TR Vol. XXXVIII, pp. 8481-8482)

Counsel did the same thing, body by body, throughout his cross examination of both Jones and the other trace evidence analyst, Kristopher Kern.

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[8] See Vol. XXXVII, pp. 8326-8327. The Cuyahoga County Coroner's office is now known as

Again, during closing argument at the culpability phase, defense counsel urged the jury to look carefully at all the photographs of the scene, of the bodies, of the graves, of the bags and sheets and tapes and ligatures.

> I am not going to go through each and every exhibit that was admitted or that was discussed. You folks will have all the exhibits back in the jury room. You need to go through them. You need to understand them. You will take the time that you deem necessary to understand them. I know you've paid close attention. I know that you've -- many of you have taken notes, so I'm not going to go through each and every item because I know that you've paid close attention but you should individually and as a group go through the photographs, go through the trace evidence reports, go through the various exhibits that you need to go through so you have a full, complete understanding of the evidence that was presented in this case.

(TR Vol. XLIII, p. 9301.)

If all those exhibits had revealed nothing, and if a not guilty verdict were plausible, then there might have been some sense to this. But a not guilty verdict was not plausible and the exhibits did reveal something. They revealed that Sowell presided over a chamber of horrors and that the jurors should fear this madman. Counsel's decision to focus the juror's attention on them was not only pointless, it had the counterproductive effect of encouraging their hostility and negativity toward his client. Rather than preparing them to accept the mitigation evidence, counsel was preparing them to reject it.

With all respect, this is what defense counsel should have done in the culpability phase. Opening statement should have been something like this:

> Ladies and Gentlemen of the jury, Anthony Sowell murdered these women. We're not going to insult your intelligence or waste your time trying to convince you that it might not be true. In fact, we could stop right now, because we'd stipulate to that.

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the Cuyahoga County Medical Examiner's office (Vol. XXXVI, p. 7939).

> The state won't agree. Why? Because they want you to be disgusted. They want you to see pictures. They want you to be horrified. They want you to believe that Anthony Sowell is a monster, not a human being. But that's not why we're here today. We're here to determine if he did these things. It doesn't take horror stories and photographs and mourning family members to do that. The state wants to put that so-called evidence before you to sway your emotions. Don't let them do it.

Then, witness after witness, counsel should have offered to stipulate and raised objections based on Evid.R. 403(A) and 403(B), letting the jurors understand how their time was being wasted and how the prosecution was attempting to manipulate their emotions. And there should, mostly, have been no cross-examination at all. The only questions to have asked would have been designed to help establish the mitigation themes they wanted to present.

Had counsel presented that defense, the only objectively reasonable defense, Sowell would, of course, have been found guilty of all or nearly all counts and specifications. But that was going to happen, and did in fact happen, anyway. The guilty verdicts do not end the prejudice inquiry however. In a death penalty case, prejudice is shown when there is a reasonable probability that, but for counsel's unreasonable representation, the jury might not have returned a sentence of death.

Attorneys certified for the trial of capital cases under Sup.R. 20 attend seminars where they are taught not just the mechanics of capital representation but its purpose. Ultimately, it is the purpose of all legal representation. Do the best, within the bounds of the law, to achieve the client's goal. See Prof. Conduct R. 3.1. In this case, as was evident from Sowell's plea offer, his goal was to avoid a death sentence. Absent a plea bargain, and by the time of trial when the general

motion work was done and the investigation completed, counsel knew or should have known what the evidence would be and how it would come in at trial. Counsel knew or should have known that the jury would, beyond any reasonable doubt, find Sowell guilty. As the Court said in *Florida v. Nixon*, supra, at 191, "In such cases, 'avoiding execution [may be] the best and only reaslistic result possible'" (citation omitted).

There was but one objectively reasonable approach to the culpability phase of Anthony Sowell's trial, but one approach that might have avoided a death sentence. His counsel rejected it.

A jury made properly wary of the prosecutor's efforts to manipulate its emotions and respectful of Sowell's acceptance of responsibility for what he had done and of counsel's integrity in not putting them through a distracting, time consuming, and useless charade of a frivolous defense, would have been more open to the mitigation that was presented and to the mitigation themes counsel tried to present. Counsel's integrity would have inured to the benefit of their expert witnesses. There is, in those circumstances, a more than reasonable probability that the jury would have recognized that the aggravating circumstances, weighty as they were, did not outweigh the mitigating factors beyond a reasonable doubt.

Proposition of Law No. VI:

> The admission of victim impact evidence at Mr. Sowell's trial deprived him of due process and a fair trial as guaranteed under the State and Federal Constitutions. U.S. Const. Amend. XIV, Ohio Const. Art. I, § 16

Victim-impact evidence is excluded from Ohio capital trials "because it is irrelevant and immaterial to the guilt or innocence of the accused and the penalty to be imposed. The evidence is prejudicial because it serves to inflame the passions of the jury, even though it is wholly collateral to the principal issue at bar." *State v. White*, 15 Ohio St. 2d 146, 151, 239 N.E.2d 65 (1968). Although *White* was decided before the General Assembly created bifurcated culpability and

sentencing phases, its pronouncements on the perils of victim-impact evidence at the trial phase apply equally today. See *State v. Tyler,* 50 Ohio St. 3d 24, 35 N.E.2d 576, 591 (1990).

In *State v. Fautenberry,* 72 Ohio St. 3d 435 (1995) this Court acknowledged that on occasion, so called victim impact evidence may be relevant and admissible, but only where it relates directly to the circumstances of the crime. *Fautenberry,* 72 Ohio St. 3d at 440. It may, nevertheless, be excluded notwithstanding any relevance, if its probative value is outweighed by the danger of unfair prejudice. Ohio R. Evid. 403(A). See, e.g., *Conover v. Oklahoma,* 933 P.2d 904, 919-920 (Okla. 1997) (victim-impact evidence must be relevant and not outweighed by unfair prejudice); *Smith v. State,* 919 S.W.2d 96, 102 (Tex. Crim. App. 1996) (Victim-impact evidence not related to the circumstances of the offense or necessary for rebuttal, was irrelevant and ought to have been barred). As Justice Souter stated: "[I]n each case there is a traditional guard against the inflammatory risk, in the trial judge's authority and responsibility to control the proceedings consistently with due process, on which ground defendant's may object and, if necessary appeal." *Payne v. Tennessee,* 501 U.S. 808, 836 (1991) (Souter, J. concurring).

But not all courts have embraced the idea that victim impact evidence should be introduced without restriction, even at sentencing. The following observation made by a trial court, post sentencing, highlights, the most disturbing aspects of such evidence:

> I cannot help but wonder if *Payne* . . . would have been decided in the same way if the Supreme Court Justices in the majority had ever sat as trial judges in a federal death penalty case and had observed first hand, rather than through review of a cold record, the unsurpassed emotional power of victim impact testimony on a jury. It has now been over four months since I heard this testimony [in a codefendant's case] and the juror's sobbing during the victim impact testimony still rings in my ears. This is true even though the federal prosecutors in [the case] used admirable restraint in terms of the scope, amount, and length of victim impact testimony.

United States v. (Angela) Johnson, 362 F.Supp.2d 1043, 1107 (ND IA 2005). Along similar lines, the court in *Andrews v. Commonwealth*, 699 S.E. 2d 237 (VA 2010), reversed and remanded for new sentencing hearing due to the improper introduction of victim impact evidence, where survivors characterized the crime and defendant as "a senseless, selfish act of nothing but wickedness and evil."

During the adjudicatory phase of Mr. Sowell's trial, the prosecution called 21 survivors to testify about their loved ones. The testimony covered some nine volumes of transcript and about 800 pages of testimony. (Tr. XXIII - XXXI) In this testimony family members - mothers, sons, daughters, fathers, and former boyfriends - told the jury about the victims' hopeful childhoods, their gradual decent into addiction, their painful struggles with drug abuse, and the families' sometime frantic efforts to locate them after their disappearances. The love, sadness and loss expressed in these various accounts are truly moving, even viewed through a cold record. Live testimony from these witnesses had to have left a powerful and emotional impression on Mr. Sowell's jury. All of it, obviously, reflected negatively on Sowell. None of the testimony, however, was relevant to any aspect of this case. The decedents, their personal battles, and the families' sorrow after their disappearance, had no actual relevance to the questions of Mr. Sowell's guilt.

The introduction of victim-impact evidence during Anthony Sowell's trial only served to inflame the jury and expose him to unfair prejudice in the determination of guilt or innocence. Moreover, the effect of this evidence prejudicially carried over into the penalty phase. As this Court stated in reversing a death sentence, "we are aware, of course, that the statutory scheme for the trial of aggravated capital cases is one of bifurcation. We would be naive not to recognize that those matters which occur in the guilt phase carry over and become part and parcel of the entire proceeding as the penalty phase is entered. The type and magnitude of any error then becomes the

issue." *State v. Thompson*, 33 Ohio St. 3d 1, 41, 514 N.E.2d 407 (1987). See also, *Strickler v. Greene*, 527 U.S. 263, 305 (1999) (Souter, J. and Kennedy, J., dissenting) ("What is more important, common experience, supported by at least one empirical study,...tells us that the evidence and arguments presented during the guilt phase of a capital trial will often have a significant effect on the jurors' choice of sentence[,]" citing *Bowers, Sandys, & Steiner.* Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making, 83 Cornell L. Rev. 1476, 1486-1496 (1998)); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1096-1098 (6th Cir. 1990) (use of inadmissible confession at trial phase may have prevented jurors from considering mitigating evidence).

Proposition of Law No. VII:

> A death sentence is inappropriate and must be vacated when it serves no necessary function, when the defendant has indicated some willingness to accept responsibility for his actions, and when there is substantial (even if disputed) mitigation evidence.

Section 2929.05(A) of the Revised Code requires this Court, on direct appeal of a death sentence to conduct a multi-part review.

- It must independently evaluate and weigh the evidence adduced at trial to determine whether the aggravating circumstance or circumstances were proved beyond a reasonable doubt and whether the circumstance or circumstances outweigh, beyond a reasonable doubt, any mitigating factors proved by a preponderance of the evidence.
- It must determine whether the death sentence is "excessive or disproportionate to the penalty imposed in similar cases."
- It must determine whether the death sentence is appropriate.

In conducting the appropriateness analysis, the Court is required to consider whether the death sentence is "excessive or disproportionate," but that cannot be the sole consideration because, if it were, the would be no need for the legislature to have required a determination of whether "the sentence of death is the appropriate sentence in the case." If it were proportionate, it

would be appropriate.[9] Thus, when the Court examines the appropriateness of a death sentence, it must do more than merely conclude that death has been imposed in cases less extreme than this one.

Mr. Sowell submits that his death sentence is inappropriate.

Initially, it is clear that Ohio law favors life. A death sentence may not be imposed unless a jury of twelve unanimously agrees that the state provided proof beyond a reasonable doubt that the aggravating circumstance or circumstances charged in the indictment - and only that circumstance or circumstances - outweighs beyond a reasonable doubt any mitigation adduced by the defendant. It is a heavy burden. And even when it is met, that is not sufficient for a death sentence.

The trial court is then to perform its own, independent, weighing of aggravation against mitigation. Unless the trial court, too, is convinced beyond a reasonable doubt that aggravation weighs more, it must impose a life sentence regardless of what the jury may have concluded. On the other hand, if the jury determined that aggravation did not outweigh mitigation, then the trial court may not impose a death sentence. Moreover, if the trial court does determine to impose a death sentence, it must explain, in a written opinion, why it is that aggravation outweighs mitigation. See, generally, 2929.03.

Still, that is not sufficient. Every death sentence in Ohio is subject to mandatory appellate review. When the capital crime occurred before January 1, 1995, there are two mandatory levels of appellate review - first in the district court of appeals and then, in an appeal of right, in this Court. When the capital crime occurred on or after January 1, 1995, this Court alone will conduct that review. And the review is not cursory. Along with any other issues raised (as in any criminal

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[9] In Proposition of Law No. XV, Sowell argues that this Court's proportionality review is

case), the reviewing courts shall independently review the jury's determination that the state proved the aggravating circumstance or circumstances charged and also shall independently determine whether the proved aggravation outweighs the mitigation beyond a reasonable doubt. R.C. 2929.05(A).

Even that is not sufficient. For the reviewing court or courts must also determine whether the death sentence in the particular case is "excessive or disproportionate to the penalty imposed in similar cases." Finally, the review must include a determination of whether the death sentence in the case at hand is appropriate. R.C. 2929.05(A).

At any point along the way, if the jury or the trial court or an appellate court or this Court should conclude that the state has not made its case by proof beyond a reasonable doubt, there can be no death sentence. Equipoise results in a life sentence. Proof by a preponderance of the evidence results in a life sentence. Proof by clear and convincing evidence results in a life sentence. Life is, plainly and simply, the default option.[10]

The question, then, is why, in face of Ohio's strong presumption in favor of life, this Court should find Mr. Sowell's death sentence appropriate. The answer is that it should not.

A. <u>There is no need to kill Anthony Sowell</u>

1. He is not dangerous.

To begin with, it is not necessary that Sowell be put to death.

Future dangerousness is not a statutory aggravator in Ohio as it is in some states, see, e.g.,

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improperly and unconstitutionally restrictive.

[10] Other states with the death penalty do not provide all the protections Ohio does. In Alabama, for instance, a judge may overrule a jury's life recommendation and impose a death sentence anyway. *E.g., Ex Parte Taylor*, 808 So.2d 1215 (Ala. 2001). And in Kansas, the presumption is in favor of death with the jury to return a life sentence only if mitigation outweighs aggravation. The default is death. Kansas Stat. Ann. § 21-6617; see also *Kansas v. Marsh*, 548 U.S. 163, 126 S.CT. 2516, 165 L.Ed.2d 429 (2006).

Tex.CodeCrim.P., Art. 37.071, § 2(b)(1) ("probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"). Thus, predictions of future dangerousness are not germane to the question of whether a death sentence should be imposed in this State. It is reasonable, however, to consider future dangerousness when determining whether a death sentence otherwise imposed should be deemed appropriate.

At a glance, it seems easy to fear Sowell. He was convicted of a series of horrific crimes over a period of time. It is not difficult to imagine (as the prosecution certainly did) that his 1989 conviction was an early precursor. Serial killers terrify because it seems they can't be stopped. And certainly there is a macabre quality to his case. But Sowell is not some supernatural or mythical creature. He is not the Golem. Nor is he a character in a series of horror films. He is not Freddie Krueger, not Hannibal Lecter.[11] It is important to get past the first glance and look at the evidence.

On the evidence, it seems clear that Sowell is not a danger as long as he is in prison. We know that Sowell can be a good prisoner, because he has demonstrated it. He spent 15 years in the custody of the Department of Rehabilitation and Correction, and his record was, if not quite perfect, remarkably good.

Roosevelt Lloyd was Sowell's cellmate for some 10 of those years, when both were serving time in minimum security at Grafton C.I. Lloyd testified that they both worked in the kitchen (TR Vol. XLVIII, pp. 10,145-10,147, 10,195). Lloyd was a dishwasher, but Sowell was a "food handler" responsible for ensuring that every day there was enough food and a sufficient number of proper meals for people with special concerns such as diabetes or food allergies so that every one of the 1,600 or so inmates would get fed breakfast, lunch, and dinner. It was, Lloyd said, "[a] very

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[11] See, generally, Wikipedia, *Horror Film*, http://en.wikipedia.org/wiki/Horror_film (accessed Oct.

responsible position." And Sowell was good at it. He was "well trusted," a "trusted employee" in the prosecutor's words. (TR Vol. XLVIII, pp. 10,154-10,156, 10,158, 10,196). There were quarterly evaluations of the workers. Lloyd explained.

> Q. And when you're at the institution as an inmate working a job, there are evaluations that take place, isn't that right?
> A. Yes, sir.
> Q. And that's done by the staff members?
> A. By the staff.
> Q. And they fill out forms for each inmate, and their job is to make notations as to whether they're doing a good job or not?
> A. Yes, sir.
> Q. And do you know -- do you remember how often those evaluations take place?
> A. They come on around every 90 days and they would evaluate you. And ten is the highest on the score sheet that you can get. About 60 points is the most you can get, but they call them perfect or excellent. They don't want an inmate to be excellent or perfect more than them, but Sowell always received at least 50, 55.

(TR Vol. XLVIII, p. 10,159.)

On cross-examination, the State tried to challenge Lloyd's credibility, getting him to admit to being a convicted child rapist. And it had Lloyd acknowledge that when Sowell's belongings were touched he would become furious and go into "military mode" and decide whether to attack someone. Lloyd also conceded that his time with Lloyd was in minimum security where privileges could be taken away rather than in maximum security where nothing could be done as punishment for misconduct. (TR Vol. XLVIII, pp. 10,191-10,192, 10,195, 10204-205.)

None of that, of course, altered the basic point, that Sowell was a trusted inmate. He was in minimum security. He did hold a responsible position. He did not have significant infractions for which he was severely punished or lost his position or was removed from minimum security.

Sowell's prison records, demonstrating that he was a responsible inmate who rarely got in trouble and avoided any serious infractions, were admitted into evidence as Defendant's Mitigation

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17, 2012).

Exhibits C -1 though C - 13.

As Sowell was a good inmate during his 15 years in the custody of the Department of Rehabilitation and Correction, so he was a good inmate while in the Cuyahoga County jail awaiting trial. Sowell was kept in administrative segregation, not because he was being punished or was a troublemaker but because his was a high profile case. Delmar Henderson, a corrections officer and member of the Special Response Team ("SRT") which supervises the prisoners in administrative segregation explained that Sowell wasn't there for violating rules or fighting or causing trouble but because

> He's a high-profile class inmate, and he's in an administrative segregation where we have to keep him away from other inmates. . . . For his life's safety. That's the first number one important thing being a correction officer is life safety of the inmates.

(TR Vol. XLVIII, pp. 10,113-114.) SRT officer Anthony Pietro Pinto made the same point.

> Since Mr. Sowell is so high profile, for his safety from the other inmates in the jail, the warden decided to put him on admin segregation.
> Q. Based on Mr. Sowell's being in the newspaper and stuff, right?
> A. Yes, sir.

(TR Vol. XLIX, p. 269).

Henderson testified that SRT does a cell search of Sowell's cell at least once a day. Sowell has never been found with contraband. (TR Vol. XLVIII, p. 10,114.) SRT officer Dwain May added that Sowell is also strip searched, and agreed that he has never been found with contraband. (TR Vol. XLIX, pp. 10,291-292.) Sowell has been, in fact, a "model inmate." (TR Vol. XLVIII, p.10,118, 132; Vol. XLIX, pp. 10,276-277.)

The State adduced a similar conclusion from Associate Warden Victor McArthur. McArthur said that the Cuyahoga County Jail is a short-term facility where an "average stay is about two to three months," but that Sowell had been there far longer.

Q. And he's exceeded that by at least ten times?
A. Right.
Q. And yet during that, in an environment which is not the most pleasant environment because of the restrictions involved, he's done quite well?
A. Yes, sir.

(TR Vol. XLIX, p. 10,325.)

On cross-examination of these witnesses, the State attempted to emphasize the comparative comforts of Sowell's treatment as a high profile inmate in administrative segregation/protective custody. The floor was quieter; he was single-celled, he had his own television, he had a "private" toilet. (E.g., Vol. XLVIII, pp. 10,125-127; XLIX, p. 10,300.) And the State established that Sowell was no trouble, didn't complain, seemed to adapt well to the setting. (Vol. XLVIII, pp. 10,132, 140; Vol. XLIX, pp. 10,279-280, 283, 303.)

Sowell's records from the county jail, Defendant's Mitigation Exhibits B-1 and B-4, confirm the basic point: Sowell was a good inmate who caused no problems and did not get in trouble.

Of course, jails and prisons are highly controlled environments. That is precisely the point. A determination that death is not the appropriate sentence in this case will not have Sowell released from custody and returned to the streets. The point is that in the highly controlled environment of a prison or jail, Sowell poses no risk. "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing." *Skipper v. South Carolina*, 478 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). If past behavior is a useful (even if not the best) predictor of future behavior, then Sowell's prison and jail record provides compelling evidence that he can serve a life sentence without risk of danger to others.

But there is more. State custody is not the only controlled environment in which Sowell has demonstrated that he can be trusted.

For seven years, Sowell served honorably, even with distinction, as a Marine. He was 18 when he first reported for duty at Parris Island in South Carolina. At the time, basic training lasted ten weeks. And at the end of those 10 weeks, Sowell was promoted to private first class. Walter Bansley, himself a former Marine and an expert in military records (TR Vol. LII, p. 10,841-849), described that promotion as "an extreme distinction." (TR Vol. LII, P. 10,854.)

> Under normal circumstances only one Marine out of a platoon -- and Mr. Sowell's platoon had *55* Marines, only one is meritoriously promoted so you have to serve with extreme distinction.
>
> The problem is there's no way really for any -- any way to kind of characterize what he did to distinguish himself because they don't make a record of that recruit training. The mere fact that he graduated and walked out with a stripe on his arm just means that he graduated with distinction.
>
> It's not unusual for the platoon to graduate and to have no honormen. That's what it's called, an honorman. It's very out of the ordinary for a platoon to graduate and have two.
>
> In Mr. Sowell's case there was one honorman and that was him. That means he distinguished himself to the extreme.

(TR Vol. LII, pp. 10,854-855.)

After boot camp, Sowell was assigned duty as an electrician, and was trained for that at Camp Lejeune in North Carolina. At that point he returned to Cleveland where the Marines had him on recruiting duty. He was then assigned as an electrician in Cherry Point, North Carolina. Then he was sent overseas, to serve as an electrician with a combat support unit in Okinawa. (TR Vol. LII, pp. 10,859, 863-865.)

Sowell advanced appropriately through the ranks. From his rapid meritorious promotion to private first class, his next promotions to lance corporal and then corporal "were right on time as you would expect. . . . Ultimately he was promoted to sergeant, and that's a big promotion for a young Marine." (TR Vol. LII, p. 10,870-871.)

Sowell's original enlistment obligation was three years. As that term ended, he determined to reenlist. But you cannot simply reenlist in the Marines. Bansley explained the requirements.

> Well, I guess the best way to explain that is while you're a young Marine, you get assigned what we call proficiency and conduct marks. It's referred to as pro and conduct, pro and con marks. You have to maintain at least a 4.0/4.0, 5.0 being the highest, so you have at least have that level.
>
> You have to be disciplinary free, although you could certainly be reenlisted if you had some minor disciplinary problems. I think it's really important, the Marine Corps really, as to this day, certainly has very, very high standards of conduct and what we expect of Marines and how they comport themselves.
>
> With that said, we have the phrase boys will be boys, and we train them to fight. The life is pretty difficult so minor things do come up, fist-fights, things of that sort. That's not out of the ordinary. And you certainly would not flush some Marine down the toilet because he's been in a fight here or there. That's kind of what we're training them to do.
>
> So, I mean, you can certainly reenlist with some disciplinary problems. If you committed real crimes, you're not getting reenlisted.
>
> Certainly if you're convicted of a court-martial or a summary court-martial, you'll not be able to be reenlisted. On top of that, you have to have recommendations of your supervisors.

(TR Vol. LII, pp. 10,866-867.)

Sowell reenlisted for another four years.

Throughout his time in the Marines, Sowell was evaluated. When he received his honorable discharge, his average grades, on a scale of 5.0 were 4.5 for "proficiency, that is your job" and 4.5 for conduct. Bansley said those marks are "pretty high and pretty good." (TR Vol. 10,871-872.)

Sowell wasn't perfect. He returned three weeks late from a Christmas leave. He resisted or more likely interfered with a military policeman in an "alcohol related" incident. Either of those events could have had dire consequences for his career. He could have been subject to court martial and booted out of the Marines. Instead, he received "nonjudicial punishments." Bansley's

evaluation of the records makes clear that Sowell's supervisors did not think either of these events was terribly serious and that, as he says of the unauthorized absence, "It's pretty obvious they went easy on him." The reason, clearly, wasn't that the Marines aren't tough. It was that Sowell was respected as a good Marine. The fact that he received an honorable discharge confirms that. (TR Vol. LII, pp. 10,876-878.)

Bansley was asked for his general evaluation.

> I would say he was above average. I wouldn't say he was excellent or outstanding, but he did his duty and he did it quite well. He obviously was thought very well by his supervisors. It was quite clear that they thought he had a lot of potential.
>
> He certainly could have reenlisted. There's no impediment of him reenlisting in terms of what's in his record books and the records.

(TR Vol. LII, 10,878-879.)

Sowell's time in the Marines, including his numerous performance reviews and fitness reports are itemized, summarized, and analyzed in numerous exhibits including especially Sowell's Military Personnel File and Marine Service Record Book and Bansley's report. Defendant's Mitigation Exhibits A-1, A-3, and ZZZZZ-2.

Although the State made efforts on cross-examination to challenge Bansley's view of Sowell's disciplinary record (TR Vol. LII, 10,903-906), the bottom line remained.

> Q. And a Marine's job is to follow his orders, correct?
> A. Yes.
> Q. So Mr. Sowell performed well within this structured, disciplined environment, didn't he?
> A. Yes.

(TR Vol. LII, p. 10,916.)

In the Marines, as in jail and prison, Sowell demonstrated that in a controlled environment he is not dangerous. Indeed, he can be responsible and productive, a positive figure.

The choice, now, is whether Sowell is to be executed or to die in prison of natural causes. There is no question of releasing him. Whatever this Court decides, he will not be returned to the streets. He will not be in a position again to commit the sorts of crimes of which he stands convicted. Insofar as he might be thought dangerous, he will be in exactly the sort of environment where there will be no danger. Insofar as it might be thought important that he be executed so the public, or prison guards, or other inmates will be safe, it is not necessary.

There is no need to kill Anthony Sowell.

2. Those who have done worse have been allowed to live.

Sowell was convicted of a terrible series of crimes. He does not dispute that others, some of whom were determined to have killed fewer people or to have caused less grief, have been sentenced to die and executed. Others, though, even others convicted of horrific homicides, mass murders, large numbers of serial killings, have been allowed to live.

Justice, it seems, does not necessarily demand death.

It is telling that shortly before jury selection began, relatives of a number of the murdered women made a written appeal to then-Cuyahoga County Prosecutor William Mason to resolve the case with a plea bargain. See TR Vol. VI, pp. 1193, 1197; Sheeran, Associated Press, *Relatives of Cleveland victims seek plea deal in Sowell case* (June 7, 2011), available at http://www.dispatch.com/content/stories/local/2011/06/07/relatives-of-cleveland-victims-seek-plea-deal.html (accessed Oct. 17, 2012). Those relatives, at least, understood that justice could be served without a death sentence. Because Sowell was willing to plead guilty to every count and specification, to accept maximum stacked sentences, and to waive appellate and post-conviction rights, that resolution was readily attainable.

Sowell could fill dozens of pages with cases of serial killers and mass murderers. He could

recount at length stories of people whose behavior was monstrous, some who challenged our very sense of what kind of people Americans are and what kind of country this is, yet who were spared death sentences by plea bargain or by jury. As a practical matter, a limited number of such cases should suffice to make the point.

- Zacarias Moussaoui, the so-called "20th Hijacker," received six sentences of life without parole as a conspirator in the 9-11 terrorist attacks that killed thousands. The jury in his case refused to impose a death sentence. See, *United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010).
- Jared Lee Loughner entered a guilty plea and avoided a death sentence for shootings outside a Supermarket in Arizona where Congressman Gabrielle Giffords was holding a rally. Loughner pled guilty to the murders of 6 people, including Chief U.S. District Court Judge John Roll and 9-year-old Christina-Taylor Green, and to the attempted murder of 13 others, including Representative Giffords. *United States v. Loughner*, D. Ariz., No. 4:11-cr-00187, Document 457 (Aug. 7, 2012) (attached as Appendix A-76-89).
- Ted Kaczynski, the Unabomber, over a period of some 20 years planted or mailed numerous home made bombs killing three and injuring 23. He entered a guilty plea to life sentences. *United States v. Kaczynski*, 239 F.3d 1108, rehearing and rehearing *en banc* denied, 262 F.3d 1034 (9th Cir. 2001).
- Angelo Buono and Kenneth Bianchi together were the Hillside Strangler kidnapping, raping, torturing, and killing 9 or perhaps 10 girls and women ranging from 12 to 28 years old in Los Angeles and Glendale, California. Bianchi, who murdered two more women in Washington State, entered a guilty plea there to what is effectively a life sentence in exchange for testifying against Buono. A jury in California convicted Buono of 9 murders

but refused to impose a death sentence. Hager, *Buono Challenge to Void Murder Conviction Falls*, Los Angeles Times (Feb. 24, 1989).

- Lee Boyd Malvo, at the direction of John Allen Muhammad, he shot 13 people at random and from a distance over some 21 days in 2002, terrorizing the greater Washington D.C. area. In fact, it seems likely he killed at least a few others elsewhere in the country. Muhammad was sentenced to death. A jury gave Malvo life. Malvo told the Washington Post recently that he was a "monster. If you look up the definition, that's what monster is. I was a ghoul. I was a thief. I stole people's lives." White, *Lee Boyd Malvo, 10 years after D.C. area sniper shootings: "I was a monster,"* Washington Post (Sept. 29, 2012); Kovaleski, *Many Victims, Families Dismayed; Malvo's Relatives Relieved*, Washington Post (Dec. 23, 2002), A 7.

- Kevin Gray and Rodney Moore were charged with running a major drug gang in the District of Columbia. Along with four co-defendants (viewed as their lieutenants), they were charged and convicted by a jury of numerous offenses. Gray was convicted of 19 murders, Moore of 10. The jury could not reach a unanimous verdict on sentencing, so they each received multiple consecutive sentences of life without parole. See Leonnig, *2 Top Bosses of 'Murder Inc.' Get Life Terms*, Washington Post (Mar. 10, 2005, B 01; *United States v. Gray*, D.D.C. No. 1:00-cr-00157 -1, Doc. 2181-1 (May 11, 2005) (attached as Appendix A-69, A-90); *United States v. Moore*, D.D.C. No. 1:00-cr-00157-2, Doc. 2250 (Oct. 5, 2005)(attached as Appendix __); *United States v. Moore*, 651 F.3d 30 (D,C.Cir. 2011), cert. denied, ___ U.S. ___, 132 S.Ct. 2772, 183 L.Ed.2d 642 (2012).

- Brian Nichols murdered a judge, court reporter, and sheriff's deputy, and then killed a federal agent, all after severely beating another deputy and stealing her gun while escaping

from an Atlanta courthouse where he was on trial for rape. He faced multiple death sentences, but the jury could not reach a unanimous verdict on death, so he was sentenced to maximum consecutive terms in prison, including multiple life sentences. Associated Press, *Multiple Life Terms for Courthouse Killings in Atlanta*, New York Times (Dec. 14, 2008), A 37.

- Charles Cullen, a nurse, was allowed to enter guilty pleas to the murders of 29 of his patients and acknowledged that he may have killed many more. In exchange for his plea, he avoided possible death sentences. He was given 11 consecutive life terms and will first be eligible for parole in just under 400 years. Gettleman, *Nurse Who Killed 29 is Sentenced to 11 Life Terms*, New York Times (Mar. 3, 2006), B 1.
- Gary Ridgway, the "Green River Killer," is serving 48 consecutive sentences of life without the possibility of parole for his plea to the murders of 48 women over the course of some 16 years in and around Seattle, Washington. When Ridgway was charged with seven of the murders, the prosecutor swore there would be no deal that would take death off the table. He eventually changed his mind. Preusch, *Families Speak as Green River Killer Gets 48 Life Terms*, New York Times (Dec. 19, 2003).

This Court has limited Ohio's mandated proportionality review only to cases in which a death sentence was given and examined by the same court. *State v. Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383 (1987). Sowell believe that limitation is improper, see Proposition of Law No. . Regardless, as part of appropriateness review, examination of other cases to determine whether justice always requires death for the extreme case must be proper. And the lesson of the cases described above and the many more that could have been presented is that even where death is a sentencing option, it is not always appropriate. Judges have so found, prosecutors have so found,

and perhaps most significantly jurors have so found.

Once again, it is simply not necessary to kill Anthony Sowell.

B. Anthony Sowell tried to accept responsibility.

In *State v. Dixon*, 101 Ohio St.3d 328, 340, 805 N.E.2d. 1042 (2004), this Court held without explanation that "a defendant's offer to plead guilty, never accepted by the prosecutor, is not relevant to the issue of whether the defendant should be sentenced to death." Sowell believes that holding to be wrong, see Proposition of Law No. VIII. Regardless, the question here is not whether aggravating circumstances outweigh mitigating factors but whether death is an appropriate sentence. Sowell's willingness to accept responsibility for his crimes, to spare the families of the victims the anguish and brutality and uncertainty of a trial and years and years of ensuing appeals, and not incidentally to save the taxpayers of Ohio tens of thousands of dollars, is surely relevant to the question of whether it is appropriate that he should be put to death.

The record is clear. On June 3, 2011, the first day of actual trial proceedings in this case, and before the venire was brought into the courtroom for an orientation session, the court and counsel for the state and for Mr. Sowell discussed plea offers.

> MR. PARKER: On behalf of my client, Mr. Sims and I on behalf of Mr. Sowell, judge, you know, throughout the pendency of this case, and for well over a year we have had - I guess it would be more informal plea negotiation with the Prosecutor's Office, which have never amounted to anything. We have always been in a position, at least for more than a year, willing to resolve this case short of the death penalty.
>
> . . .
>
> And it's our position, Judge, that our client is willing to plead guilty to every single charge in the indictment, as long as the death specifications are removed from the pertinent counts.
>
> It is further our client's position that he is willing to agree to a sentence of life without the possibility of parole on every aggravated murder charge, and the maximum possible sentence on all other charges, including those, to be served consecutively.

> It is further our client's position that he is willing to waive his statutory right to appeal, and to any post conviction process as part of the negotiated plea agreement.
>
> This has basically been our position for at least a year, and we've communicated that to the Prosecutor's Office informally over time. We thought it was in our client's best interest to put it in writing, on the record. And that's our position.

(TR Vol. VI, pp. 1192-1194.)

The assistant prosecutors in court agreed to take the offer to the elected prosecuting attorney for decision. While no formal answer appears in the record, the fact of the trial and then this proceeding reveals that the offer was not accepted.

It is certainly possible to view the plea offer as purely self-serving on Sowell's part, to conclude that he would do anything to avoid a death sentence. He submits that is not so. It should have been evident to counsel by the time of trial that Sowell had no plausible chance of any outcome except guilty on the 22 counts of aggravated murder and accompanying death specifications. Similarly, by then, it should have been equally clear that any sentences for those aggravated murders other than execution would be sentences of life without the possibility of parole.[12]

But the offer to concede everything, accept maximum sentences, and waive all post-trial processes had been live, as counsel said, "for well over a year." And in the early days of the case, the outcome was far from certain. Mitigation had yet to be investigated fully. The crime itself had yet to be investigated fully. Sowell's mental health had yet to be investigated fully.

Yet he was prepared to plead, to accept responsibility. Indeed, Sowell never denied responsibility. During hours and hours of interrogation following his arrest on October 31, 2009

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[12] Based on how they approached voir dire and trial, however, it is far from clear that counsel actually did understand those things.

Sowell denied any clear recollection of what he had done and failed to give the police the sort of details they wanted. But he never said he hadn't murdered. He acknowledged repeatedly that he must have done those things. Court Exhibits 2-7.

Does it matter? Should it be irrelevant that Sowell was willing to admit everything and waive everything if death was taken off the table? He submits that it is not irrelevant.

In *State v. Ashworth*, 85 Ohio St.3d 56, 706 N.E.2d 1231 (1999), this Court said that Ashworth's willingness to plead guilty "without any offer of leniency by the state" indicated that he was remorseful. *Id.* at 72. This Court quoted *Ashworth* when it gave Mink "some weight under (B)(7) for his plea, again indicating that it indicated remorse (though apparently taking it back because he did not show remorse otherwise). *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1589, 805 N.E.2d 1064, ¶¶ 125, 126.

Accepting responsibility by pleading guilty, then, has the mitigating weight of remorse if there is no benefit to be derived from it. (Although as *Ashworth*, supra, acknowledges, in a capital case a guilty plea permits the trial court to dismiss the death specifications in the interest of justice, which is surely a benefit albeit not one resulting from a plea bargain.[13]) Sowell submits that there are other ways of accepting responsibility, including the offer to plead even in exchange for a benefit and confessing even if not thoroughly but only to the extent memory permits. And he suggests further that acceptance of responsibility – even a limited acceptance of responsibility – is in itself worthy of some consideration in the determination of whether it is appropriate that he should be executed.

Ohio courts regularly cite a refusal to accept responsibility as a basis for or at least a factor in imposing various sorts of sanctions or declining to imposer lesser ones. E.g., *State v. Cosme*, 6th

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[13] And see Proposition of Law No. X.

dist. No. L-09-1117, 2010-Ohio-1365 (affirming sentence greater than co-defendants); *State v. Cornwell*, 8th Dist. No. 85119, 2005-Ohio-3019 (affirming sexual predator classification); *In re Application of Burch*, Slip op. No. 2012-0439, ___ Ohio St.3d ___, 2012-Ohio-3935, , 2012 WL 3848573 (disapproving application to take bar examination); *In re R.G.*, 9th Dist. Nos. 24834 & 24850, 2009-Ohio-6284 (terminating parental rights); *Disciplinary Counsel v. Watson*, 95 Ohio St.3d 364, 2002-Ohio-2222, 768 N.E.2d 617 (imposing one year suspension from practice of law). If a failure to accept responsibility can be even a partial justification for enhancing sanctions, then acceptance of responsibility should be at least relevant to reducing them. And that is so even if the acceptance is incomplete or grudging. It is, of course, no accident that the Federal Sentencing Guidelines provide for a 2 or 3 level reduction in offense level for a defendant who "demonstrates acceptance of responsibility for his offense." Federal Sentencing Guidelines Manual, § 3E1.1 (2011).

Once he was arrested, Sowell attempted, in a halting and unsatisfactory way perhaps but he attempted, to help the police. He never denied that he kidnapped, raped, and murdered the victims of the aggravated murders.[14]

He offered to plead guilty to everything, to accept maximum sentences other than death, to have those sentences run consecutively to one another, and to waive all rights to seek post-trial relief. Certainly, there was hope for some benefit in that. Equally, there was an acknowledgement that he would take responsibility for what he had done. Had the offer been accepted, it would

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[14] The trial court, in its R.C. 2929.03(F) opinion, said that Sowell

> failed to take responsibility for his crimes by adding "I don't know what happened!" "I can't explain it." If defendant was truly remorseful, he would accept responsibility for his actions.

Opinion at 26. It is difficult to imagine just what would have satisfied the court on this score other than a defendant who was fully self-aware, understanding of the motivations

have obviated the need for a trial. It would have spared the families of his victims the pain of testifying and the revisited horror of hearing and seeing photographs of what had been done to, and what remained of, their loved ones. As the relatives who tried to convince the prosecutor to accept a plea deal knew, that would help them move on with the healing process.

His offer is a consideration in determining whether it is appropriate that Sowell should be put to death.

C. There is a substantial body of mitigation in this case.

There are cases where the defense presents virtually no mitigation evidence. It may be because the defendant insists and counsel abides by the decision. See *State v. Tyler*, 50 Ohio St.3d 24, 27-29, 553 N.E.2d 576 (1990). It may be "because counsel never took the time to develop it." *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995).

This was not such a case.

The defense presented 24 witnesses. There was expert testimony from a psychologist, from a psychiatrist, from a forensic social worker, and from an expert on military records. There was testimony from Sowell's sister, from nieces and nephews, from schoolteachers. A former employer and a co-worker testified. The jury heard from re-entry workers and from corrections officers. They heard from a 10-year cellmate at Grafton CI. The defense introduced documents and records, photographs and reports, birth certificates and death certificates.

The effort was to paint a complete picture of Mr. Sowell. Pared to its essence, here's what that record shows.

Sowell grew up in chaos. When Sowell was a boy, his mother's daughter, Patricia Davis, died, and his mother took in Patricia's children. Added to her own considerable household, the

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behind his crimes and sufficiently articulate to express those motivations clearly.

effect was chaotic. Cramped for space, they moved to a bigger house and then a bigger one still on Page Avenue in East Cleveland. (TR Vol. XLV, pp. 9738-9743.) Sowell's mother, Claudia, worked multiple jobs to meet the bills, was stressed and strict. Sowell reported that his mother was seriously overprotective, and that he wasn't allowed to have kids his own age as friends. Her mother, Irene Justice, also worked and was also rigid. Because the adults were out working the brood of children were often left alone. Patricia's children were regularly beaten with switches, electric cords, Irene's cane. Claudia's children, Sowell and Tressa, were subjected to less physical abuse, but what they didn't endure, they observed. (TR Vol. XLV, pp. 9567-9570; Vol. XLVI, pp. 9754-9760, 9804-9805, 9847-9859.)

There was also much sexual abuse. Patricia's daughter Leona testified to being sexually molested beginning when she was about 10, first by Sowell, then by her brother Robin, then by another uncle. (TR Vol. XLVI, p. 9798.) Sowell said, in his unsworn statement, that when he was six or seven, he was repeatedly sexually abused by a female he referred to as "Princess." Before that, he was somehow molested by Robin. And he said that on at least one occasion he saw Robin take his sister Monica into a closet. (TR Vol. LIV, pp. 11,147-11,149).

Sowell was a diligent if academically inadequate student. He attended school regularly, participated in activities. In junior high school he joined a class chess club. Teachers who remembered him recalled a boy who was happy to be in school, attended regularly, didn't get in trouble, but also didn't perform particularly well once he was there. His records indicate that he finished twelfth grade but did not graduate, although he later obtained a GED. (TR XLV, pp. 9571, 9693-9697, 9713-9716, 9720.)

Meanwhile, at the house, Patricia's daughter Leona was routinely stripped naked and beaten in front of the other children and suffering continuing sexual abuse. She ran away on a

regular basis but when she told police about the physical abuse at home before they brought her back, Claudia beat her more, so she stopped reporting it. She set fires in the home "[b]ecause I was thinking that maybe that could get me out of the house." She was a problem at school, repeatedly exiled to the hallway or made to stand in the cloakroom and paddled a lot. The fires achieved their objective when she was 12. From the age of 13, until the time she testified as a woman of 50, she'd been in treatment of one sort or another. She was placed in a Sagamore Hills for treatment as a child, moved to Western Reserve, a mental hospital for adults, when she turned 17. She suffers from depression, describes herself as "suicidal." She "take[s] a lot of pills. I'm a cutter." And at around age 35, she shot herself in the stomach. She has, she said, no social life. She can't maintain relationships. Although never married, she has five children. (TR XLVI, pp. 9754-97561, 9764-9765, 9767-9772.)

On cross-examination, Leona added more. She was happy to be at Sagamore Hills and away from the house, but when they spoke about sending her to a foster home, she would act out – cutting, fighting, "[s]wallowing pens." It worked for her. "So the more I acted up, the more they kept me there."[15] Normally, people wouldn't go to Western Reserve until they were 18. Leona was transferred there at 17 because she was such a problem at Sagamore Hills. She stayed at Western Reserve until she became pregnant after being molested by a staffer. (TR Vol. XLVI, pp. 9811-9812, 9814-9815.)

Leona's twin sister, Ramona, confirms the general outline of Claudia's physically abusive, rigid household where Patricia's children were treated much differently than Claudia's. It was, she said, "Terrible." For all the physical abuse, Ramona she says she wasn't sexually molested there

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[15] Leona testified on direct that Sagamore Hills did release her for home visits to her godfather. But he sexually abused her. What worked at her home worked at his. She set a fire and the people at Sagamore Hills never made her go back to his home. (TR XLVI, p. 9792.)

and didn't know that Leona was. She was, though, raped by a man she was told was her father when she was 11 or 12 and sent to live with him. She ran away. By the time she was 12 or 13, she was placed in juvenile detention. From there she was sent to a few different places for help with her numerous medical and mental issues. She met up Leona when they were both at Western Reserve. Ramona had been sent there for her mental health issues, and she did receive help. When she thought they would send her back to Claudia's, she "started fighting then again. And then they thought the problems would come back up again then." (TR Vol. XLVI, pp. 9845, 9847-9859, 9862-9864, 9867-9868, 9874-9875, 9878.)

Jesse Hatcher, the twins' younger brother, again confirms the physical abuse in the home. He says he still has scars on his legs from it, but the girls had it worse than he did. Like his sisters, he ran away repeatedly but the police kept bringing him back. However Claudia threw their older sister, Monica, out of the house while she was a teenager because she got pregnant. He doesn't remember Sowell getting beaten, though he witnessed the abuse, "[a]nd a few times my brothers and them just sat there and laughed." He never saw sexual abuse in the house, but Monica told him that Sowell was sexually abusing the twins. Jesse served time in juvenile detention, was placed in foster homes, and then at Parmadale where he received both psychiatric and physical therapy. He's had more psychological therapy since then. (TR Vol. XLVI, pp. 9894-9895, 9897-9900, 9902-9905.)

Here's what else testimony revealed. Sowell always worked. Indeed, immediately after he got out of prison he went for reentry training and got a job. When that didn't last, he got another. Then another. He worked until he was no longer physically able to work. See, generally, TR XLVII, pp. 9961-9966; Vol. XLVIX, pp. 10,219-220, 232-234, 236-251.) He was a Marine, of course, and served honorably and with some distinction.

Sowell also has a history, apparently going back to his childhood, of sexually abusing women. He apparently didn't do that in controlled settings, when he was tied to routine and rules. Nor does he do those things while in relatively committed relationships. There is no indication of sexual misconduct during his marriage, although it ended in divorce. There is no indication of sexual misconduct while he was with his girlfriends Twyla Austin or Lori Frazier.

What the record seems to reveals about these offenses, however, is that at least as an adult, Sowell's sexual abuse of women (and it follows that his kidnapping and murdering of them) wasn't a planned and calculated thing. The three women he was convicted of raping each told an essentially similar story. They went with Sowell to his home to drink and do drugs and have sex. Suddenly, he would turn on them. The clearest example is what happened with Shawn Morris.

She was on her way home from a cancelled Bible study class when she and another woman had some beers. They started drinking around eight at night, drank until around 3 in the morning at which point Morris didn't want to go right home because her husband wouldn't like her getting there so late. So they sat at a bus stop and drank. Around 5:30 in the morning, heading for a gas station to buy more beer, they meet up with Sowell, whom she didn't know. He bought them beer and cigarettes, and they sat at the bus stop drinking and smoking marijuana. Around 7 AM, Morris went with Sowell went to his house, stopping on the way for more alcohol and some crack.

Around noon, after hours of drinking and smoking crack and sitting on Sowell's bed talking, Morris said she had to get home. She testified that Sowell walked her down the stairs and they said goodbye. She'd gone just a few houses down the street when she realized she'd left her identification behind. She went back and called out. She thought he'd toss the ID to her out the window, but instead he told her to come up.

That's when everything changed. As she started up the stairs, he got behind her, put her in

a choke hold, threatened to kill her, and raped her. (TR Vol. XXXI, pp. 7209-7233.)

It is a reasonable inference, indeed, it is the only reasonable inference, that something similar happened with the women he actually killed. They were drinking, they were doing drugs, they were talking, maybe they were having sex. And then something set him off, turned him from the friendly guy with the oddly smelling home to some lunatic rapist and killer. That is, essentially, what he told the police during the hours of interrogation after his arrest.

DETECTIVE GRIFFIN:	Tone - Tone was telling me that - and it stands to reason - he said that when he has these dreams and he meets these girls, some of the girls remind him of his girlfriend.
DETECTIVE SMITH:	Uh-huh.
DETECTIVE GRIFFIN:	And I asked - I asked you was it anything that they said or anything that they did, and you said by the way they - their past, you said you asked them about why you out here on the street.
MR. SOWELL:	I talk to them.
DETECTIVE GRIFFIN:	Yeah. You talk to them.
MR. SOWELL:	YEAH.
DETECTIVE GRIFFIN:	Why you out here on the street.
MR. SOWELL:	You a nice girl. Why don't you get you some help.
DETECTIVE SMITH:	Sounds like you're trying to help them. That's cool.
DETECTIVE GRIFFIN:	And then you said you get mad and they remind you of your girlfriend and then that's what happens.
MR. SOWELL:	I know one - one thing I think always make me mad is they had kids.
DETECTIVE GRIFFIN:	And they was out on the street?
MR. SOWELL:	Yeah.

DETECTIVE GRIFFIN: Okay.

MR. SOWELL: That's a big thing in my head.

(Interrogation TR, Court Exhibit 3 at 213-214.)

Sowell's calculation and planning, such as it was, came later. It was not in the seeking out these women, luring them to his apartment, plying them with drugs and alcohol and charm, and then assaulting them. Rather, his calculation was in the obsessive-compulsive ways that he tied and wrapped and taped and buried or otherwise disposed of the bodies.

That obsessive-compulsive wrapping of bodies looks remarkably as if he was acting out the obsessive-compulsive disorder diagnosed by psychiatrist George Woods. Woods in fact made four diagnoses:

1. Obsessive-compulsive disorder, severe, chronic, the obsessions and compulsions sexual in nature;
2. Post-traumatic stress disorder;
3. Psychosis not otherwise specified;
4. Cognitive disorder not otherwise specified.

(TR Vol. LI, pp. 10,564-0568.)

The diagnoses reported by Dr. Woods are in line with the analysis and conclusions of neuropsychologist Dale Watson.

My opinion is that Mr. Sowell has indications of both left hemisphere and right hemisphere brain dysfunction, that is probably best considered to be a moderate degree of dysfunction or impairment. That he has difficulties in both motor functioning, auditory or hearing, memory, auditory processing and language related abilities. And that essentially that he has indications of brain dysfunction. (TR Vol. XLV, p. 9554.)

Sowell recognizes that the state's experts, who reviewed the reports of Drs. Woods and Watson, had serious reservations about their conclusions. That was to be expected. In fact, the prosecutor told the jury at the beginning of his closing argument that the state believed essentially none of the defense evidence.

> The only mitigating factor that is not in complete dispute is that Anthony Sowell from the age of 18 until the age of 25 served in the United States Marines. That's not in dispute. Everything else is in dispute. Whether he suffers from posttraumatic stress disorder is in dispute. Whether he was a victim of child physical abuse, emotional abuse, sexual abuse, is in dispute. Whether at the time of the offenses he had psychosis, not otherwise specified, is in dispute. Whether he had obsessive-compulsive disorder is in dispute. Whether or not his heart attack broke down his ability to control his desires or -- his obsessive-compulsive disorder with sexual obsessions is in dispute. Whether or not he had a cognitive disorder, not otherwise specified, is in dispute.
>
> In his unsworn statement Mr. Sowell stated, well, the only thing I want to say is that I'm sorry. I know that may not sound like much, but I am truly sorry from the bottom of my heart. This is not typical of me. I don't know what happened. I can't explain it. I know it's not a lot, but that's all I can give you.
>
> That statement puts the concept of remorse in dispute and it is in dispute. So these are the things, ladies and gentlemen, when we have disputes that you have to resolve.

(TR Vol. LVI, pp. 11,496-497.)

Despite the state's dismissive claim that, essentially, all the defense witnesses including its experts were either deluded or committing perjury, it's not all fantasy. Sowell grew up in chaos. Regardless of the details, and regardless of whether Sowell loves his mother, growing up in chaos has an effect. Sowell was a steady worker when he could be. He was by all accounts a loving husband and a boyfriend who generated real affection. His sister Tressa loves him and depends on him. These things count.

Sowell suffered a massive heart attack at about the same time he broke up with his girlfriend and lost the ability to do steady work. It's clear that there was a downward spiral after

those things.

And it's clear that Sowell's genetic heritage is one of mental and physical problems.

None of that is to excuse what Sowell did. There is no excuse. There is not even a meaningful explanation. What was done to these women, to those who were killed and to those who survived, is inexcusable and inexplicable. But the act is not the actor. The monstrous act does not make the actor a monster.

Conclusion

The question is whether it is appropriate that Sowell be put to death for his crimes. Should his proper sentence be the death penalty or death in prison?

Given Ohio's strong preference, by statute and policy, for life over death, given the facts and circumstances of this case, given the reality that Sowell will not pose a danger or even be a problem prisoner if removed from death row, given the facts that he accepts responsibility for what he has done (even if that acceptance is imperfect) and that there is a wealth of mitigation, the answer is that he should not be put to death.

He will die in prison. That is a given. And it is enough. There is no need to kill Anthony Sowell, and this Court should reverse his death sentence.

Proposition of Law VIII:

> Trial Court violates the defendant's right to a reliable and fair sentencing proceeding by barring the defense from advising the jury that mercy was a mitigating factor and that he offered to plead guilty in exchange for a life without parole sentence.

Under the Eighth and Fourteenth Amendment a jury must be able to consider and give effect to a capital defendant's mitigating evidence. *Tennard v. Dretke*, 542 U.S. 274, 284-85, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004). There are to be no limits placed on such evidence - anything

can be a mitigating factor. In fact, jurors are not free to deem any mitigating factor unworthy of consideration: *Eddings*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1; and *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the court, the prosecutor or the jury. *Eddings, supra*, at 113-114; accord, *Boyde v. California* (1990), 494 U.S. 370, 110 S. Ct. 1190, 1200-1201 (Prosecutors may not tell jurors that they should give no weight or consideration to mitigating evidence.)

Consistent with this constitutional principal, R.C. 2929.04(C) accords the defendant "great latitude" in the presentation of mitigating evidence. Yet in this trial, the court barred the defense from presenting and arguing the weight of significant mitigation - in particular, Mr. Sowell's pretrial offer to plead guilty; and the fact that the jury can and should treat mercy as a mitigating factor. Both were important considerations that the jury should have been required to consider.

Guilty Plea offer

Before the venire was assembled, the defense presented a written offer to plead guilty to every charge, agreed to maximum consecutive sentences and further agreed to waive or give up all appeals in exchange for a sentence of LWOP. Ohio law forbids the defendant in a capital case from pleading guilty and then submitting himself to the jury for a determination of sentence. Nevertheless, Mr. Sowell's offer to plead guilty evidences a level of cooperation and acceptance of responsibility that is mitigating. *United States v. Fell*, 372 F.Supp.2d 773, 784-785 (D.VT. 2005). In *Fell*, the District Court for the District of Vermont held that the willingness to enter into a plea of guilty was evidence of Fell's state of mind and should be presented to the jury. *Fell*, 372 F.Supp.2d at 785 (citing *United States v. Biaggi*, 909 F.2d 662, 690-92 (2d Cir. 1990)); See, also, *Colorado v. Dunlap*, 173 P.3d 1054 (Colo. 2007) (offer to enter guilty plea constitutes substantial

cooperation and is a statutory mitigator under Colorado law).

In deciding Mr. Sowell's fate, the jury should have known that the entire process they had just endured, was exclusively driven by the State's insistence on obtaining a death sentence. Cf., *Florida v. Nixon*, 543 U.S. 175, 181, 125 S. Ct. 551, 160 L. Ed.2d 565 (Supreme Court acknowledged that a defendant's trial concession of guilt is universally recognized as a potentially promising means to avert a sentence of death). Such evidence would have been critical in this case, particularly in light of the jurors post trial remarks to the press, indicating that they believed, Mr. Sowell's unsworn statement and apology had been" insincere" and "condescending." (Motions for New Trial, 8/12/2011, 8/15/2011) Had the jurors known that he seriously attempted to plead guilty and, thereby, accept responsibility for the murder before the case was ever tried, the jurors may well have viewed him differently.

Mercy as a mitigating factor

Before the end of Mr. Sowell's penalty phase, the defense asked the trial court to instruct the jury as follows:

> Mercy is a mitigating factor that weights against voting for the death penalty if, in you individual judgment, you conclude that this factor makes death an in appropriate sentence for Anthony Sowell.
>
> Mitigating factors, including mercy, are factors about an individual or an offense that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate. Mitigaint factors are factors that lessen the moral culpability or diminish the appropriateness of a death sentence. The question of whether a factor exists as mitigation in this case is up to each individual juror to decide for herself or himself. It is also up to each juror to decide for him sef or herself how much weight any particular mitigating factor deserves.
>
> Mitigating factors neither excuse not justify the underlying crimes. Rather, mitigating factors are those things, which, in fairness and mercy, weigh against sentencing Anthony Sowell to death.

(Motion for Jury Instruction, 7/25/2011) The court declined to give this instruction, opting instead

to tell the jury more generally that, "mitigating factors should be considered in fairness and mercy." (JE, 7/27/2011) That decision was an unfortunate mistake.

As noted above, mitigating factors are non-exhaustive. Literally, anything, including mercy, constitutes mitigation. This Court has held that trial counsel has a duty to plead for mercy on his client's behalf. *State v. Rogers*, 28 Ohio St.3d 427, 504 N.E.2d 52 (1986) The U.S. Supreme Court has similarly recognized the importance of mercy in *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1263, 108 L.Ed.2d 415 (1990). There, the Court held that an anti-sympathy instruction "undermined the jury's ability to consider fully the defendant's mitigating evidence." *Id.* at 514, 110 S.Ct. 1263, 108 L.Ed.2d 415. Accordingly, if counsel must argue for mercy, and the court is barred from instructing that sympathy is improper, then it is only logical to treat mercy as a concrete mitigating factor.

Conclusion

Accordingly, when it barred the defense from presenting and arguing these consideration as mitigating evidence, the court improperly nullified valid mitigating evidence, and, consequently, violated Mr. Sowell's right to a fair and reliable sentence.

Proposition of Law No. IX:

> A court commits error and violates a defendant's rights under the constitutions of the United States and of Ohio when it refuses to instruct a jury in the sentencing phase of a capital trial that there is a presumption in favor of a life verdict just as at the trial phase there was a presumption of innocence.

Mr. Sowell, through counsel, moved for an instruction telling the jury that under Ohio law there is a presumption of life in the mitigation phase of a capital trial.

The instruction is a correct statement of the law. The state bears the burden of proving that the aggravating circumstance or circumstances proved beyond a reasonable doubt at the

culpability phase of the trial outweigh any mitigating factors. Unless the state convinces all twelve jurors that it has met its burden of proof, the jury is obligated to return one of the possible life verdicts. Sowell's attorney, John Parker put it this way during the charge conference.

> Judge, I think it's just basically an extension of the presumption. It's the same idea, that the State has the burden of proof at all times. Certainly the State has the burden of proving beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. There's that presumption there. Just like in the first phase we call it the presumption of innocence. In the second phase I think it's appropriate to call it presumption of life, and the State always maintains the burden. Life is the default judgment, if I can use that phrase, unless the State meets their burden. And that's why we're asking.

(TR Vol. LV, pp. 11470-11471)

In response, the state cited to *State v. Davie*, 11th Dist. No. 2000-T-0104, 2001 WL 1647193.

> It basically says that OJI is sufficient because OJI instructions tell the jury that the State still has the burden. The State must prove it beyond a reasonable doubt, but there's no presumption of life in this case. It's different from the guilt phase where there's a presumption of innocence. Because in this case, in the mitigation phase, the State has already proven that aggravating circumstances exist. And for the judge to come in now and say, yes, jury, the State's already proven that aggravating circumstances exist, but there's still a presumption of life, actually sort of implies that the State has to fight against this presumption. And that is not an accurate statement of the

(TR Vol. LV, pp. 11471-11472)

Which is, of course, exactly wrong. *Davie* does hold (albeit in dicta which is, in that case, improper as an advisory opinion) that the specific instruction requested, "that 'he enjoys a presumption of life and the right to live,'" is not mandated by Ohio law. But *Davie* is absolutely clear that the presumption in fact exists.

> In this case, the jury was instructed during the sentencing phase that the state had the burden of proving beyond a reasonable doubt that the aggravating circumstances outweighed the factors presented in mitigation of the death sentence. If the state failed to meet either the burden at trial or the burden in the sentencing

> phase, then the death penalty could not have been imposed. Both the law and the instruction given in this case established a presumption in favor of life. But the law does not require that the specific instruction, which Davie claims should have been given, be given.

Id. at *7.

In refusing to give the requested instruction, the trial court did not cite *Davie* or any other case. Rather, it said that the prepared instructions

> sufficiently inform the jury as to their -- as to the State's obligation to prove the aggravating circumstances, that they outweigh the mitigating factor by proof beyond a reasonable doubt, puts the burden on the State where it belongs, so there is no other presumption, which I think would be confusing to the jury.

(TR Vol. LV, p. 11473)

That is, the trial court shared the state's mistaken conviction that there is no presumption in favor of life and added that it could only confuse the jury to be told there was.

But *Davie* is correct on the point. Ohio's death penalty statute contains a presumption of life which, as Sowell's counsel said, is "the default judgment." If the state wants a death sentence returned, it does indeed have "to fight against this presumption." The jurors needed to understand that, and they should have been told. It is well established that if a requested instruction is a correct statement of the law and pertinent to the case, it must be given, at least in substance. See *State v. Barron*, 170 Ohio St. 267, 164 N.E.2d 409, at the syllabus (1960).

The judge's own confusion on the matter indicates that the substance of the presumption of life was not made clear to the jury by his instruction.

Sowell notes that the presumption in favor of life is more than a statutory nicety. Ohio's presumption has constitutional dimension.

In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the Court held that Arizona's death penalty aggravating circumstances "operate as 'the functional equivalent of an

element of a greater offense.'" *Id.* at 609. And as Justice Scalia explained in *Sattazahn v. Pennsylvania*, 537 U.S. 101,123 S.Ct. 732,154 L.Ed.2d 588 (2003),

> For purposes of the Double Jeopardy Clause, then, "first-degree murder" under Pennsylvania law – the offense of which petitioner was convicted during the guilt phase of his proceedings – is properly understood to be a lesser included offense of "first-degree murder plus aggravating circumstance(s)." See *Ring, supra,* at 609. Thus, if petitioner's first sentencing jury had unanimously concluded that Pennsylvania failed to prove any aggravating circumstances, that conclusion would operate as an "acquittal" of the greater offense – which would bar Pennsylvania from retrying petitioner on that greater offense (and thus, from seeking the death penalty) on retrial.

Id. at 112 (Opinion for the Court, joined in this part by Rehnquist, C.J., and Thomas, J.)

What Justice Scalia recognized about Pennsylvania's death penalty statute applies equally to Ohio's. "'murder plus one or more aggravating circumstances' is a separate offense from 'murder' *simpliciter.*" *Id.*

For all of these reasons, the trial court should have given the requested instruction. The failure to do so violated Sowell's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and under the Ohio Constitution, Article I, Sections 9, 10, and 16.

Proposition of Law No. X:

> A capital defendant is denied his rights to a fair trial, a jury verdict, and due process, and will face cruel and unusual punishment in violation of his rights as secured by the constitutions of the United States and the State of Ohio, and Ohio statutes and rules are violated when the members of the jury are not required to sign verdict forms indicating that they find the defendant guilty of the charges and specifications against him.

Over Mr. Sowell's objection, the trial court permitted the jurors, at the trial phase of the case, to initial rather than sign their verdicts. (TR Vol. XLII, pp. 9190-9195.) Sowell's objection was well taken. The court's plan was improper. It appears, further, that it may have been unique in Ohio

The clear commands of both the Ohio Revised Code and the Ohio Rules of Criminal Procedure mandate that a verdict form must be signed by each juror.

> In all criminal cases the verdict of the jury shall be in writing and signed by each of the jurors concurring therein.

R.C. 2945.171.

> (A) Return. The verdict shall be unanimous. It shall be in writing, signed by all jurors concurring therein, and returned by the jury to the judge in open court.

Crim.R. 31(A).

The court's ostensible reason was that the jury had so many verdict forms to deal with. Signing all those forms would be onerous. Initialing, by contrast, would be quick and easy. But that is precisely the problem. The signature requirement is more than a procedural nicety. The requirement of signing one's name, in ink, serves to emphasize the seriousness of the task. Comparatively minor things can be marked with initials. When they count, when the things at issue are important, one signs. Initials may be used along the way. The bottom line is signed.

In capital cases, especially, the courts have recognized the importance of the jury fully understanding the significance of its obligation and have been wary of whatever might diminish their sense of responsibility. See, *e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); *State v. Rogers*, 28 Ohio St.3d 427, 433, 504 N.E.2d 52 (1986). Oddly, the court seems to have understood that what it permitted at the trial phase in fact carried the serious risk of leaving the jurors with a diminished sense of responsibility for their verdict. Thus, when it charged the jury at the sentencing phase, it required signatures.

> And in this case versus the first phase where there were so many forms, I allowed you to initial the forms. In this case I'm going to ask you to sign these forms, each of the forms.

(TR Vol. XLVI, pp. 11489-11490.)

Were there no substantive difference between signatures and initials, there would have been no reason for the court to require signatures on the sentencing verdicts.

In other contexts, the use of the word "signature" to mean a signature as opposed to something less is clear.

Revised Code Section 107.15, for instance, authorizes the Governor to appoint an "authenticating officer" who may be delegated with the power to sign certain documents and also specifies circumstances in which a "facsimile signature" may and may not be used.

In *State ex rel. Green v. Casey*, 51 Ohio St.3d 83, 554 N.E.2d 1288 (1990), for instance, this Court explained that the requirement set forth in R.C. 3501.38(B) of "signatures" on declarations of candidacy was a requirement of actual cursive signatures. *Id.* at 85.

And Gov.Bar R. Appx. I, Reg. 306, adopted by the this Court, itemizes things that may be understood to count as a signature.

> A signature may be any electronic symbol or process that is attached to or associated with a form or other writing required to be submitted under Rule X, Rule IV, or these regulations and that is intended to express the required verification.

If *signature* were routinely understood to include things other than cursive signature where it is required, that language would be mere surplussage.

Sowell recognizes that there are cases holding that an indictment need not actually be signed by the foreperson of the grand jury, see, *e.g.*, *State v. Payne*, 178 Ohio Spp.3d 617, 2008-Ohio-5447, 899 N.E.2d 1011, ¶ 22 (citing cases). However, the statutory requirement at issue is not a requirement of a signature. Rather, when at least 12 grand jurors agree to an indictment "the foreman shall indorse on such indictment the words 'A true bill' and *subscribe* his name as foreman." R.C. 2939.20 (emphasis added).

Similarly, Freeman's printed name rather than a cursive signature was sufficient on a

Miranda waiver, *State v. Freeman*, 11th Dist. No. 2001-T-0008, 2002 WL 408601 (Mar. 15, 2002), but there is no statutory requirement that a *Miranda* waiver be signed. Indeed, an oral waiver is sufficient.

The trial court clearly committed error by inventing a procedure flatly rejected by both the Revised Code and by the Rules of Criminal Procedures. It did so over timely objection. The effect was to diminish the jury's sense of responsibility and violate Sowell's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and the Ohio Constitution, Article I, Sections 9, 10, and 16.

Proposition of Law No. XI:

> It is error and a violation of a capital defendant's rights under the constitutions of the United States and the State of Ohio for a trial court to charge a jury on more than one Course of Conduct specification, R.C. 2929.04(A)(5) for any given count of Aggravated Murder.

On December 1, 2009, the grand jury returned an indictment charging Mr. Sowell with, among other offenses, 22 counts of aggravated murder. Each of those 22 counts was accompanied by 15 capital specifications including 13 charging that the offense was part of a course of conduct involving the killing of that count's victim and also the purposeful killing or attempt to kill another person. R.C. 2929.04(A)(5). On January 27, 2010, Sowell moved to dismiss the course-of-conduct specifications on the basis that no count of aggravated murder should be accompanied by more than a single course-of-conduct specification. The trial court denied the motion.

In *State v. Mitts*, 81 Ohio St.3d 223, 690 N.E.2d 522 (1998), this Court held that "[m]ultiple course-of-conduct specifications are duplicative . . . [and] should not even be included in an indictment." *Id.* at 231, citing *State v. Jenkins*, 15 Ohio t.3d 164, 194-200, 473 N.E.2d 264 (1984), and *State v. Spisak*, 36 Ohio St.3d 80, 84, 521 N.E.2d 800 [1998]. While the trial court

properly granted a motion to merge the duplicative specifications at sentencing, that did not cure the error.

Duplicative course-of-conduct instructions "artificially inflate[] the particular circumstances of the crime." *Godffrey v.* Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), quoted by *Jenkins* at 196, quoting *People v. Harris*, 36 Cal.3d 36, 201 Cal.Rprt.782, 679 P.2d 433 (1984). In this case, the sheer number of victims was daunting. That the jurors determined 22 separate times that there were 13 separate course-of-conduct specifications gave that enormous weight. And although the jurors were charged at the sentencing phase with only a single course-of conduct specification for each aggravated murder, they cannot but have understood that they were, in effect, dealing with a accumulation of specifications.

The prosecutor emphasized the point during closing argument at the sentencing phase:

> Now, the only thing I said is not in dispute, is the fact that he's an ex-Marine. Does that fact outweigh the aggravating circumstances of purposeful – of the purposeful killing of two women? . . . Three women? Four women? Five women? Six women? Seven women? Eight women? Nine women? Ten women? Eleven women? . . .
>
> [T]hat's the aggravating circumstance. You decide the weight against the mitigation. At what point is enough is enough? . . .
>
> These are 11 distinct matters. That's the reality of what we're dealing with here.
>
> Let's look at the aggravating circumstances here. The purposeful killing of 11 women.

(TR Vol. LVI, pp. 11497-11498.)

He went on to detail the facts and circumstances of each of the killings, concluding

> So there are 11 victims, and 11 victims have the aggravating circumstances, and the aggravating circumstances is primarily the course of conduct. These are 11 separate counts. And whatever mitigation you decide exists in this case, ask yourselves, at what point is enough is enough?

(TR Vol. LVI, pp. 11498-11502.)

Sowell acknowledges that jurors are presumed to obey their instructions, *e.g.*, *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 54. And he understands that the jurors were told that there was but one course-of-conduct specification per aggravated murder count to be part of the weighing process. But the spillover effect of having previously determined 13 course-of-conduct specifications is inescapable and necessarily tainted the weighing process.

Accordingly, the trial phase error of failing either to dismiss or to merge the course-of-conduct specifications cannot be deemed harmless. And the error violated Sowell's rights to fair trial and due process and to be free from cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and of the Ohio Constitution, Article I, Sections 9, 10, and 16.

Proposition of Law No. XII:

> The "principal offender" and "committed with prior calculation and design" alternatives in the R.C. 2929.04(A)(7) specifications are disjunctive, and if a defendant is charged with both in a single specification, there must either be an election or the jury must be required to reach a unanimous verdict as to one or the other.

The Cuyahoga County Grand Jury returned an indictment charging Anthony Sowell with, among other offenses, 22 counts of aggravated murder. Each of the aggravated murder counts was accompanied by numerous specifications including two for felony murder. The felony-murder specifications to Count 1, charge[16]

> FELONY MURDER SPECIFICATION
>
> The Grand Jurors further find and specify that the offense presented above was committed while the offender was committing or attempting to commit or

[16] The felony murder specifications to the other 21counts of aggravated murder are identical to the specifications to Count 1. The argument for this Proposition of Law, though quoting only from the specifications and jury charges as they relate to Count 1, applies equally to those specifications as appended to each of the counts of aggravated murder.

fleeing immediately after committing or attempting to commit Kidnapping, Section 2905.01(A)(3) as defined in Count 3 of the indictment, 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.

FELONY MURDER SPECIFICATION

The Grand Jurors further find and specify that the offense presented above was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit Kidnapping, Section 2905.01(A)(4) as defined in Count 4 of the indictment, 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.

At the close of the culpability phase of the trial, the court instructed the jury on the specifications:

> Now, there are specifications associated with count one. Specifications one and two involve felony murder.
>
> Before you can find the defendant guilty of one or both felony murder specifications, it must be proven beyond a reasonable doubt by the State of Ohio that the offense of aggravated murder as charged in count one was committed by the defendant Anthony Sowell while he was committing or attempting to commit or fleeing immediately after committing or attempting to commit, in specification one, kidnapping, in violation of Revised Code Section 2905.01(A(3) as it is defined in count three of the indictment and/or in specification two, kidnapping, in violation of Revised Code Section 2905.01(A)(4). And that's defined in count four.
>
> And either, A, the defendant was the principal offender in the commission of the aggravated murder, or, B, if the defendant was not the principal offender, the defendant committed the aggravated murder with prior calculation and design.

(TR Vol. XLII, pp. 9047-9048)

The court gave the jury this charge on the felony-murder specifications at the close of the sentencing phase.

> And second, the offense was committed while the defendant was committing or attempting to commit, or fleeing immediately after committing or attempting to commit the offense of kidnapping, and the defendant was either the principal offender in the commission of the aggravated murder or committed the aggravated murder with prior calculation and design.

(TR Vol. LVI, p. 11478)

In *State v. Penix*, 32 Ohio St.3d 369, 513 N.E.2d 744 (1987), this Court recognized that the language of 2929.04(A)(7) was disjunctive and that the defendant's possible roles were, by legislative determination, mutually exclusive. That is, a person charged with a felony-murder specification may be found guilty as the principal offender in the aggravated murder or as having committed the aggravated murder with prior calculation and design. It can be one or the other, but it cannot be both. *Id.* at 371-372.

On the facts of *Penix*, that was reversible error.

The issue arose again in *State v. Cook*, 65 Ohio St.3d 516, 605 N.E.2d 70 (1992).

> Appellant asserts in his second proposition of law that he suffered prejudicial error when the trial court allowed the jury to consider a duplicative specification on the first count of aggravated murder. This specification alleged that appellant committed aggravated robbery and 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. This specification tracked the language of R.C. 2929.04(A)(7). This court has held that it is error for a trial court to allow the jury to consider prior calculation and design together with principal-offender status as separate aggravating circumstances. *State v. Penix* (1987), 32 Ohio St.3d 369, 513 N.E.2d 744. The reason for this is that R.C. 2929.04(A)(7) sets these circumstances out as mutually exclusive alternatives, and a trial court may not allow the jury to cumulate both as aggravating circumstances, as the court did in *Penix*.

Cook. at 82-83.

Finally, in *State v. Moore*, 81 Ohio St.3d 22, 689 N.E.2d 1 (1998), this Court set out the rule.

> With regard to the court's instructing the jury on both principal offender and prior calculation and design, such an instruction is proper if the alternatives are given to the jury disjunctively in the same specification. *Cook, supra,* 65 Ohio St.3d at 527, 605 N.E.2d at 82–83. The court erred in not instructing the jury to be unanimous in agreeing on which alternative Moore was guilty of.

Moore at 40.

The trial court in this case did not instruct the jury that they were required to agree unanimously about whether Sowell was the principal offender or acted with prior calculation and

design. The court, then, committed error.

Sowell recognizes that the error was deemed harmless in both *Cook* and *Moore*. He submits that it cannot be considered harmless in this case. Indeed, even by the standard of plain error, which is the appropriate standard since trial counsel did not object to the instruction, it was harmful. The jury in Sowell's case reached what may well have been patchwork verdicts on the specification during the culpability phase of the trial. They reached that verdict not once but 44 times. They reached it 11 more times during the sentencing phase. An erroneous instruction given to the jury *55* times, and erroneously followed *55* times, cannot be deemed harmless.

This is not a case where there was no mitigation to speak of. While there is no way to know at this time exactly what the jury did and did not believe and how the jurors conducted the weighing process, they were presented with a wealth of mitigation evidence to consider. It defies credulity to believe that for at least some of the jurors the wrongful instruction did not matter. And as this Court has made clear,

> In Ohio, a solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors.

State v. Brooks, 75 Ohio St.3d 148, 162, 661 N.E.2d 1030 (1996).

Thus, even a single juror's erroneous sentencing verdict would have been sufficient to turn a life sentence into a death sentence. The error in this case must be understood to be outcome determinative, and the effect is a violation of Sowell's rights to fair trial, to a jury verdict, to due process, and to avoid cruel and unusual punishment, all in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and the Ohio Constitution, Article I, Sections 9, 10, and 16.

Proposition of Law No. XIII :

Ohio's death penalty statute and rules violate the Fifth, Sixth, Eighth and Fourteenth Amendments and the right to a jury trial as set forth by the United States Supreme Court in *Apprendi v. New Jersey* and its progeny because they do not permit a capital defendant who chooses to accept responsibility for his crime to plead guilty and have a sentencing determination made by a jury and because they "needlessly penalize[] the assertion of a constitutional right" *United States v. Jackson.*

The Sixth Amendment right to a jury trial, made applicable to the states through the Fourteenth Amendment, and as understood through *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and its progeny including particularly *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), means that a capital defendant has a right to a jury determination of every fact "necessary to put him to death." *Ring*, at 609. R.C. 2929.03(D) provides that a death sentence may only be imposed upon a finding by proof beyond a reasonable doubt that the aggravating circumstance or circumstances of which the defendant has been found guilty outweigh any mitigating factors proved by a preponderance of the evidence. Thus, even if a capital defendant enters a guilty plea to Aggravated Murder and the accompanying death specifications, he has a right to a jury trial to determine the existence of any mitigating factors and to determine whether the aggravating circumstance or circumstances to which he would plead guilty outweigh those factors by proof beyond a reasonable doubt.

Ohio law denies him that right. R.C. 2929.03(D)(2) implicitly and R.C. 2945.06 and Crim.R. 11(C)(3) specifically, provide that if a capitally charged defendant enters a guilty plea to the indictment, he must waive his right to a jury trial not only for the culpability phase of the trial but also for the mitigation phase. And the mitigation phase of an Ohio capital proceeding is very much a trial. See *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed. 2d 270 (1981).

Moreover the denial of a right to jury sentencing after a plea of guilty violates a capitally

charged defendant's rights to present a defense as guaranteed by the Sixth and Fourteenth Amendments and to the protection of the Cruel and Unusual Punishment Clause of the Eighth Amendment though the Fourteenth Amendment and, in this case, *Lockett v. Ohio* (1978), 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978). *Lockett* establishes that a sentencing phase capital jury must be permitted to consider all mitigating evidence. However, under Ohio's guilty plea scheme, a sentencing phase jury is necessarily and per force denied the opportunity to consider the "substantial mitigating evidence, namely acceptance of responsibility through a plea of guilty" that may only be presented to a sentencing three-judge panel. See *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 86.

A plea of guilty to a three-judge panel also permits the panel, even without hearing mitigation evidence, to "dismiss the specifications and impose sentence accordingly, in the interests of justice." The panel that is, may find simply based on the facts of accusation and plea that a death sentence is unjust. It does not matter whether the aggravating circumstance or circumstances outweigh any mitigating factors. That is the law. But Rule 11(C)(3) says that "justice" and the law are not co-terminus and "justice" may only be served by a panel of judges after a guilty plea. A case that goes to a jury must be determined exclusively by the law.[17]

In *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed. 2d 138 (1968), the Court examined the Federal Kidnaping Act which permitted a death sentence if a defendant elected to exercise his constitutional right to trial by jury but prohibited a death sentence if the defendant either entered a guilty plea or waived his right to a jury and accepted a bench trial. As Justice Stewart's opinion for the Court says,

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[17] As jurors are required to follow only the law in reaching a capital sentence, there is no provision in the Criminal Rules or in the Revised Code permitting judges, in determining whether to overrule a death recommendation and impose one of the life sentences, to effect justice. The law and the

> The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right to demand a jury trial. . . . Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right.

Id. at 582-583.

In striking down a portion of its death penalty law, the New York Court of Appeals made the same point. "[A] procedure which offers an individual a reward for waiving a fundamental constitutional right, or imposes a harsher penalty for asserting it, may not be sustained." *Matter of Hynes v. Tomei* (N.Y. 1998), 92 N.Y.2d 613, 621-622, 684 N.Y.S.2d 177, 706 N.E.2d 1201 (N.Y. 1998), quoting *People v. Michael A.C.*, 27 N.Y.2d 79, 86, 313 N.Y.S.2d 695, 261 N.E.2d 620 (N.Y. 1970), summarizing the rule of *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968).

What applied to the Federal Kidnaping Act and to New York's capital punishment law applies also to Ohio's law. Justice Blackmun acknowledged the problem in his concurring opinion in *Lockett v. Ohio*, 438 U.S. 586, 619, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (Blackmun, J., concurring in part and concurring in the judgment). The "disparity between a defendant's prospects under the two sentencing alternatives is, in my view, too great to survive under *Jackson*." *Id.* at 619.

For all these reasons, Ohio's death penalty statutes and rules violate a capital defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and are unconstitutional.

Proposition of Law No. XIV:

A capital indictment which does not include a determination by the Grand Jury that

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law alone applies in a jury trial.

there is probable cause to find that the statutory aggravating circumstance or circumstances in the offense outweigh the mitigating factors cannot be used to obtain a death sentence.

As defined by the United States Supreme Court, an element of a case is, in essence, any finding necessary to extend the possible maximum sentence. *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed,2d 556 (2002); *Blakely v. Washington* , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). A criminal defendant has a Sixth and Fourteenth Amendment right to have that finding alleged in the charging instrument (in Ohio an indictment) and supported by probable cause.

Ohio defendants are not eligible for the death penalty unless the state proves beyond a reasonable doubt that any statutory aggravators proved outweigh the mitigating factos. Absent that specific finding, the maximum statutory sentence is life without parole. See, R.C. 2929.03(D). Thus, the finding by jury that *as a matter of fact* the aggravating circumstance or circumstances outweigh any mitigating factors is an element necessary to extend the possible sentence to death. As such, probable cause of the element must be found by the grand jury and included in the indictment.

In assessing whether the indictment charges an offense under the statutory provision alleged, "it is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'" *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), quoting *United States v. Carll*, 105 U.S. 611, 612, (1881). Mere recitation of the statutory language is acceptable only if all elements of the charged crimes are subsumed in the language. U*nited States. v. Yefsky*, 994 F.2d 885 (1st Cir. 1993); *United States. v. Foley*, 73 F.3d 484, 488 (2d Cir. 1996).

Not one of the 22 counts of Aggravated Murder charged in the indictment in this case sets forth the final and specific element necessary for a death sentence: That the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

Apprendi and Its Progeny

In *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000), the Court held that the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and jury trial guarantees require that any fact other than prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. *Id.* at 476, citing *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). The Fourteenth Amendment commands the same answer when a state statute is involved. The historical foundation for these principles extends down centuries. While judges in this country have long exercised discretion in sentencing, their discretion is bound by the range of sentences prescribed by the legislature. *Apprendi,* supra.

In *Ring,* the Court examined what constitutes an element. The Court struck down that portion of Arizona's capital sentencing procedure that allowed the judge rather than the jury to determine the existence of aggravating factors. Those factors, the Court said, were the "functional equivalent of an element of a greater offense," so only a jury could determine their existence. *Id.* at 605, quoting *Apprendi* at 494 n.19.

In *Harris v. United* States, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), decided the same day as *Ring,* the Court noted that "read together, *McMillan v. Pennsylvania,* 477 U.S. 79, (1986) and *Apprendi* mean that those facts setting the outer limits of a sentence and of the judicial power to impose it are elements of the crime for constitutional analysis." *Harris* at 567.[18]

[18] On October 5, 2012, the Court issued a writ of certiorari in *Alleyne v. United States* to decide

In *Harris*, the Court again considered the distinction between elements of a crime and factors that influence a criminal sentence. Legislatures define crimes in terms of the facts that are their essential elements, and constitutional guarantees attach to these facts. The Court again noted that:

> A crime was not alleged, and a criminal prosecution not complete, unless the indictment and the jury verdict included all of the facts to which the legislature had attached the maximum punishment. Any "fact that . . . exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone" the Court concluded, would have been, under the prevailing historical practice, an element of an aggravated offense.

Id. quoting *Apprendi*, at 483. (emphasis added)

The *Harris* Court explained:

> *If the grand jury has alleged*, and the trial jury has found, all the facts necessary to impose the maximum, the barriers between government and defendant fall. The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury -- even if those facts are specified by the legislature, and even if they persuade the judge to choose a much higher sentence than he or she otherwise would have imposed. That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element.

Id. 543-544 (emphasis added).

Ohio law authorizes death as a maximum penalty for an aggravated murder conviction pursuant to R.C. 2929.03 and 2929.04(A). But the authorization applies only if the grand jury has alleged "all the facts necessary to impose the maximum sentence." *Id.* The jury or court may not choose the death penalty here unless there is a factual finding that the statutory aggravators found

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whether the rule of *Apprendi* should be extended to require jury determination of any fact that would increase a sentence beyond the statutory *minimum*. The specific question presented is *Alleyne* is "Whether this Court's decision in *Harris v. United States*, holding that the Constitution does not require facts which increase a mandatory minimum sentence to be determined by a jury, should be overruled." The outcome of *Alleyene* will not affect this analysis except, perhaps, to make even more compelling the point that a grand jury must determine that there is probable cause to find that any aggravating circumstances outweigh mitigation.

pursuant to R.C. §2929.04(A) outweigh the mitigators beyond a reasonable doubt. The prosecution must prove that the aggravating factor beyond a reasonable doubt to render the defendant death eligible. However, the statutory maximum penalty on this finding alone is life. To raise the maximum penalty under the statute to death, the outweighing must be proven beyond a reasonable doubt. That makes the finding an element. And, as an element, it must be first found by the grand jury and included in the indictment under state and federal law.

The point is that the mere presence of the R.C. 2929.04(A) aggravators does not allow a death sentence. The maximum sentence where death aggravators are proved is a life sentence. Death requires an additional factual determination: That the proven aggravators outweigh the available mitigators beyond a reasonable doubt. With that finding, the statutory maximum is raised to death. And that finding can be establish only after what is, in effect, an additional trial. See *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed. 2d 270.

The mere fact that a statutory aggravator has been found by the jury to have been proven by the state renders the defendant death eligible is irrelevant. The Supreme Court specifically addressed such scenarios in a non-capital scenario in *Blakely*, supra. It did not matter, the Court explained, that Blakely's sentence, though outside the standard range, was within the 10-year maximum for that class of felonies:

> "Our precedents make clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* . . . . In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . and the judge exceeds his proper authority." *Id.*, at 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (emphasis *sic*) quoting 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872).

Id. at 303, cited with approval in *Cunningham v. California*, 549 U.S. 270, 274, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007).

The Revised Code requires that a jury recommend a sentence of death if it finds beyond a reasonable doubt that proved aggravating circumstances outweigh the mitigating factors. This finding is mandatory. Because that finding raises the potential penalty from life to death, it is, under United States Supreme Court law, an element. As an element, it must be presented to the grand jury and included in the indictment before it can be legally presented to the jury for sentencing consideration. *Ring*, supra.

Right to Grand Jury

The Fifth Amendment has long guaranteed a defendant the right to be tried on only those offenses presented to the grand jury. A substantive amendment to the indictment renders a conviction void. *Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); *United States v. Ford*, 872 F2d 1231 (6th Cir. 1989), cert. denied, 495 U.S. 918 (1990).

Ohio law has been uniformly strict on its adherence to the grand jury right. An omission of an essential element from the indictment has long divested the trial court the power to cure the deficiency. *State v. Cimpritz*, 158 Ohio St. 490, 493, 110 N.E.2d 416 (1953) citing *Fouts v. State*, 8 Ohio St. 98, 114 (1857).

Ohio case law is unequivocal that the trial court may not amend an indictment to supply essential elements of the crime. *State v. Ahedo*, 14 Ohio App.3d 254, 470 N.E. 2d 904 (1984). Where an essential element of the offense is not set forth in the indictment, the remedy is to go back to the grand jury and re-indict if possible. *State v. Dilley*, 47 Ohio St.3d 20, 546 N.E. 2d 937 (1989). In *Dilley*, the trial court had amended the indictment with a sentencing specification pursuant to R.C. 2941.143, a specification that was not determined by the grand jury. Although,

the failure to include this specification did not alter the possible defenses to the charge, this Court held that:

> [t]he state may not avoid the clear mandates of R.C. §2941.143 and circumvent the grand jury process, as was done in this case.

Id. at 22-23.

It is also unarguable that this Court requires strict adherence to the grand jury review requirement where the subject matter in question is a material element of the offense. In *State v. Headley*, 6 Ohio St.3d 475, 453 N.E.2d 716 (1983), this Court made the point clearly.

> Section 10 of Article I of the Ohio Constitution provides that "...no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury..." This provision guarantees the accused that the *essential facts* constituting the offense for which he is tried will be found in the indictment of the grand jury. (Citations omitted)

Id. at 477 (emphasis added)

Headley cites the general precedent from its earlier reasoning in *State v. Wozniak*, 172 Ohio St. 515, 178 N.E.2d 800 (1961).

> Where one of the vital elements identifying the crime is omitted from the indictment, it is defective and cannot be cured by the court as such procedure would permit the court to convict the accused on a charge essentially different from that found by the grand jury.

Id. at 520. The court concluded that the prosecutor was not permitted to perfect the defective indictment by amendment, because "the grand jury and not the prosecutor, even with the approval of the court, must charge the defendant with each essential element of that crime." *Id.* See also *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917.

Once a state has established a liberty interest, as Ohio has with its constitutional grand jury protections, that interest cannot be ignored. In *Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S.Ct. 2227, 65 L.Ed. 2d 175 (1980), the Court held as much. Specifically, *Hicks* found that where a

state has provided for the imposition of criminal punishment in the discretion of the trial jury, the defendant's interest in the exercise of that discretion is not merely a matter of state procedural law.

Ohio must, and always has, honored and followed the grand jury requirement that the indictment specify each and every element of the offense.

Conclusion

A capital indictment must include all elements that allow for the imposition of the death penalty by the courts if death is to be a possible sentence. Those elements include not only the grand jury finding of probable cause to believe that statutory aggravators are present but also that the statutory aggravators outweigh any mitigating circumstances beyond a reasonable doubt. Consequently, that factor must be presented to the grand jury and included in the indictment. See *Jones v. United States*, 526 U.S. at 229, n.6 (1999). Because the indictment in this case did not make that allegation, because the grand jury did not find probable cause to believe that the statutory aggravating circumstances it found outweighed any mitigating factors, Anthony Sowell was never eligible for the death penalty and its imposition violates his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and under the Ohio Constitution, Article I, Sections 9, 10, and 16.

Proposition of Law No. XV:

The universe of cases to be examined for the proportionality review required by R.C. 2929.05(A) must include at a minimum all cases in which a grand jury indictment included a death specification under R.C. 2929.04(A) in order to comport with the clear language of the statute and with due process, the right to meaningful appeal, and the right to avoid cruel and unusual punishment, as those rights are protected by the Constitutions of the United States and the State of Ohio

Mr. Sowell asks this Court to revisit the question of the universe of cases to be considered for proportionality review. Appellant is aware that in the syllabus of *State v. Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383 (1987), this Court held that only those cases where a death sentence is actually imposed are "similar" for purposes of the review required by R.C. 2929.05(A).

That decision was wrong. It was wrong on its face, and it is wrong as this Court has repeatedly applied it.

The principle underlying proportionality review is uniformity. The idea is to insure that capital decision-making around the state will be, at least in a general terms, consistent. The problem is twofold.

First, by limiting the universe of cases to be considered to only those cases where death has been imposed, the courts of this State are able only to examine the least common denominator question. The issue becomes not whether one defendant's sentence is in "proportion" (whatever that might mean) to the sentence received by other defendants' but whether there has been some other defendant who is no more deserving of death but has been sentenced to die. Excluded from consideration are those who have been sentenced to live although they may be far more deserving of death. Where is the proportion? Where is the fundamental equity, consistency, uniformity, fairness?

Second, limiting the universe of cases for consideration to only those where death has been

imposed necessitates rewriting the statute. R.C. 29239.05(A) requires consideration of "whether the sentence [in the case under review] is excessive or disproportionate to the penalty imposed in similar cases." It is definitionally impossible for a court to perform the full analysis with the limited universe of cases. A given death sentence might or might not be "disproportionate" to others (depending on how "proportion" is measured), but it belies common understanding of the terms to imagine that any death sentence can be "excessive" when compared to other death sentences. It is, after all, identical. As death sentence can only be *excessive* when measured against something less, *i.e.*, a non-death sentence.

Limiting the universe of cases for proportionality review to those where death was imposed deletes the word "excessive" from the statute. Of course, it is a cardinal rule of construction, codified in R.C. 1.47 (B), that "[t]he entire statute is intended to be effective." And as this Court has repeatedly observed, it is the province of the General Assembly, not the courts, to write legislation, and courts may neither insert nor delete words where a statute is clear and unambiguous.

> Under Ohio law, it is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly. *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105-106, 65 O.O.2d 296, 298, 304 N.E.2d 378, 381. Courts are directed to give effect to the words of a statute and not to modify an unambiguous statute by deleting words used or inserting words not used. *Bernardini v. Bd. of Edn.* (1979), 58 Ohio St.2d 1, 4, 12 O.O.3d 1, 3, 387 N.E.2d 1222, 1224; see *Gulf Oil Corp. v. Kosydar* (1975), 44 Ohio St.2d 208, 215-216, 73 O.O.2d 507, 511, 339 N.E.2d 820, 824.

Shover v. Cordis Corp., 61 Ohio St.3d 213, 218, 574 N.E.2d 457 (1991), overruled on other grounds, *Collins v. Sotka*, 81 Ohio St.3d 506, 692 N.E.2d 581 (1998).

Third, what emerges is too often a question of jurisdiction rather than proportion. The analysis often takes the form seen in, *e.g.*, *State v. McGuire*, 80 Ohio St.3d 390, 404, 686 N.E.2d

1112 (1997):

> This court has upheld the death sentence in a number of cases where only a single felony-murder specification was present. *State v. Phillips* (1995), 74 Ohio St.3d 72, 656 N.E.2d 643; *State v. Fox* (1994), 69 Ohio St.3d 183, 631 N.E.2d 124; *State v. Simko* (1994), 71 Ohio St.3d 483, 644 N.E.2d 345. Thus, appellant's death sentence in this case is neither excessive nor disproportionate.

The problem with this sort of analysis is that it is not analytical. It does not compare the facts and circumstances of the offense and the offender. It merely asks whether the court has previously encountered a case with no fewer specifications or with the same specifications. But what emerges is simply a test of whether the defendant was actually charged with something like a death specification. If he were not, then the death sentence would, one assumes, be held disproportionate. But that finding would also be unnecessary, for a trial court clearly has no jurisdiction to sentence to death one not so charged. If there is a death specification, however, if, that is, there is subject matter jurisdiction to sentence to death, then death is proportionate.

The futility of this approach to serious analysis is evident from the fact that, so far as Mr. Sowell can determine, of the hundreds of proportionality reviews performed by the courts of appeals and the this Court, none has found a death sentence under Ohio's current death penalty law not to be proportionate. Not one. With due respect, the result is nonsensical. Prosecutors, defense counsel, trial courts, and juries cannot be that precise. It is not possible.

The clear conclusion is that proportionality review, as conducted in Ohio, is so inadequate as to make a mockery of the principle of consistency. And, what follows, is that the death penalty in this state is arbitrarily and capriciously implied, in violation of the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

Proposition of Law No. XVI:

> Cumulative errors may deprive a criminal defendant and criminal appellant of a fair trial and due process and subject him to cruel and unusual punishment in violation of his rights under the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

In *State v. DeMarco* (1987), 31 Ohio St.3d 191, this Court recognized the existence of cumulative error. *Id.* at paragraph two of the syllabus ("conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial"). This Court cited *DeMarco* in *State v. Garner* (1995), 74 Ohio St.3d 49, 64, recognizing that the aggregate effect of multiple errors, which may individually be harmless, may be prejudicial.

In this case, should this Court conclude that the errors complained of in the various propositions of law were not individually prejudicial, it should nevertheless find that their combined effect was prejudicial.

Proposition of Law No. XVII:

> When a criminal defendant's trial counsel is deemed to have waived or failed to preserve issues he is denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth amendments to the United States Constitution and Section 10, Article I of the Ohio Constitution.

A criminal defendant is entitled to the effective assistance of counsel. Sixth and Fourteenth Amendments, United States Constitution; Section 10, Article I, Ohio Constitution; *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Bradley* (1989), 43 Ohio St.3d 136. While a licensed attorney is presumed competent, *State v. Smith* (1985), 17 Ohio St.3d 97, the presumption is not without limits.

Counsel will be found ineffective only upon a twofold showing. First, counsel's acts or failures to act must be objectively unreasonable. Second, counsel's acts or failures to act must be

prejudicial.

Where, in a capital case at which multiple levels of review are likely, the defendant's life is literally at stake, and trial counsel have received special training as mandated by Sup.R. 20, the failure to preserve error must be deemed inherently deficient, and the deficiency will necessarily have prejudiced the defendant as it precludes his receiving the level of review to which he would otherwise be entitled.

In this case, trial counsel failed to object to the felony-murder death specifications that charged Sowell with being the principal offender in the aggravated murders or with committing the aggravated murders with prior calculation and design. Counsel also failed to ask that if the jury was to be so charged, it must specifically and unanimously find one or the other of those possibilities. See Proposition of Law No. IX.

Trial counsel also failed to object to the duplicate counts 72, 73, 78, and 79 in the indictment. As set forth in Proposition of Law No. IV, the identically charged counts violated Sowell's rights to due process, notice, and a unanimous jury verdict and also created the potential for double jeopardy. Counsels' failure to object to improper counts was objectively unreasonable and prejudicial, violating Sowell's rights under the U.S. Constitution and the Ohio Constitution.

Finally, trial counsel failed to object to the prosecution's introduction of impermissible and unfairly prejudicial victim impact evidence at the case's trial phase. As set forth in Proposition of Law No. VI, this evidence was irrelevant and highly improper, and, in its abundance, it violated Mr. Sowell's rights to due process and a fair trial.

Proposition of Law No. XVIII:

Ohio's death penalty law violates the U.S. Constitution and international law.

In various ways, Ohio's capital statutes violate the bedrock principles governing capital

jurisprudence. The Eighth Amendment to the U.S. Constitution and Ohio Constitution, Article I, Section 9 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, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Punishment that is "excessive" constitutes cruel and unusual punishment. *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). The underlying principle of governmental respect for human dignity is the Court's guideline to determine whether this statute is constitutional. See *Rhodes v. Chapman*, 452 U.S. 337, 361, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); *Furman v. Georgia*, 408 U.S. 238, 282, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring); *Trop v. Dulles*, 356 U.S. 86, 100-101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958).

1. Arbitrary and Unequal Punishment.

The Fourteenth Amendment's guarantee of equal protection requires similar treatment of similarly situated persons. This right extends to the protection against cruel and unusual punishment. *Furman*, at 249 (Douglas, J., concurring). Ohio's capital punishment scheme allows imposition of the death penalty in an arbitrary and discriminatory manner.

Prosecutors' virtually uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death penalty. Mandatory death penalty statutes were deemed fatally flawed because they lacked standards for imposition of a death sentence and therefore were removed from judicial review. *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Prosecutors' uncontrolled discretion violates this requirement.

Ohio's system imposes death in a racially discriminatory manner. Blacks and those who kill white victims are much more likely to get the death penalty. While African-Americans are less than 12% of Ohio's population, 76 or 50.3% of Ohio's death row inmates are African-American.

See http://quickfacts.census.gov/qfd/states/39000.html visited April 15, 2008; Ohio Public Defender Commission Statistics, July 2012, available at http://www.opd.ohio.gov/dp_Residentinfo/dp_Proportionality.pdf; see also The Report of the Ohio Commission on Racial Fairness, 1999. See generally The American Bar Association Report, submitted Sept. 2007, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report*, pp. 351-67. While 4 Caucasians were sentenced to death for killing African-Americans (or an African-American), 3 African-Americans sit on Ohio's death row for killing a Caucasian. Ohio Public Defender Commission Statistics, July 2012, supra

2. Unreliable Sentencing Procedures.

The Due Process and Equal Protection Clauses prohibit arbitrary and capricious procedures in the State's application of capital punishment. *Gregg v. Georgia*, 428 U.S. 153, 188, 193-95, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Furman*, 408 U.S. at 255, 274. Ohio's scheme does not meet those requirements. The statute does not require the State to prove the absence of any mitigating factors or that death is the only appropriate penalty.

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

Additionally, the aggravating circumstances are vague. The jury must be given "specific and detailed guidance" and be provided with "clear and objective standards" for their sentencing

discretion to be adequately channeled. *Gregg*, 428 U.S. 153; *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (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 (1994). Giving so much discretion to juries inevitably leads to arbitrary and capricious judgments. The Ohio open-discretion scheme further risks that constitutionally relevant mitigating factors that must be considered as mitigating; Youth or childhood abuse (*Eddings v. Oklahoma*, 455 U.S. 104, 116, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)), mental disease or defect (Penry v. Lynaugh, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) rev'd on other grounds *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001)), level of involvement in the crime (*Enmund v. Florida*, 458 U.S. 782, 798, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982)), or lack of criminal history (*Delo v. Lashley*, 507 U.S. 272, 279, 113 S.Ct. 1222, 122 L.Ed. 2d 620 (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, 113 S.Ct. 2658, 125 L.Ed.2d 290 (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, 549-57 (1994); *Free v. Peters*, 12 F.3d 700 (7th Cir. 1993). This confusion violates the federal and state constitutions. Because of these deficiencies, Ohio's statutory scheme does not meet the requirements of *Furman* and its progeny.

3. Mandatory Submission of Reports and Evaluations.

Ohio's capital statutes are unconstitutional because they require submission of the pre-sentence investigation report and the mental evaluation to the jury or judge once requested by a capital defendant. 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.

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

"[T]o avoid [the] constitutional flaw of vagueness and over breadth under the Eighth Amendment, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence of a defendant as compared to others found guilty of (aggravated) murder." *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Ohio's statutory scheme fails to meet this constitutional requirement because R.C. 2929.04(A)(7) fails to genuinely narrow the class of individuals eligible for the death penalty.

Revised Code section 2903.01(B) defines the category of felony-murderers. When, as in this case, the indictment specifies any factor listed in R.C. 2929.04(A) and it is proved beyond a reasonable doubt, the defendant becomes eligible for the death penalty. R.C. 2929.02(A), 2929.03.

The scheme is unconstitutional because the R.C. 2929.04(A)(7) aggravating circumstance merely repeats, as an aggravating circumstance, factors that distinguish aggravated felony-murder from murder. Revised Code section 2929.04(A)(7) repeats the definition of felony-murder as alleged, which automatically qualifies the defendant for the death penalty. Revised Code 2929.04(A)(7) does not reasonably justify the imposition of a more severe sentence on felony-

murderers. But, the statute gives the prosecuting attorney and the sentencing body unbounded discretion that maximizes the risk of arbitrary and capricious action and deprivation of a defendant's life without substantial justification. The aggravating circumstance must therefore fail. *Zant*, 462 U.S. at 877.

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

A person who kills with prior calculation and design, but does so without falling into one of Ohio's aggravating-circumstance situations, is treated less severely, which is also nonsensical because his blameworthiness or moral guilt is higher, and the argued ability to deter him is less. From a retributive stance, this is the most culpable of mental states. Comment, The Constitutionality of Imposing the Death Penalty for Felony Murder, 15 Hous. L. Rev. 356, 375 (1978).

Felony-murder also fails to reasonably justify the death sentence because this Court has interpreted R.C. 2929.04(A)(7) as not requiring that intent to commit a felony precede the murder. *State v. Williams*, 74 Ohio St. 3d 569, 660 N.E.2d 724, paragraph 2 of the syllabus (1996). The asserted State interest in treating felony-murder as deserving of greater punishment is to deter the commission of felonies in which individuals may die. Generally courts have required that the killing result from an act done in furtherance of the felonious purpose. *Id.* (referencing the Model Penal Code). Without such a limitation, no State interest justifies a stiffer punishment. This Court

has discarded the only arguable reasonable justification for imposition of the death sentence on such individuals, a position that engenders constitutional violations. *Zant*, 462 U.S. 862. Further, the Ohio Supreme Court's current position is inconsistent with previous cases, thus creating the likelihood of arbitrary and inconsistent applications of the death penalty. See, e.g., *State v. Rojas*, 64 Ohio St. 3d 131, 139, 592 N.E.2d 1376, 1384 (1992).

Equal protection of the law requires that legislative classifications be supported by, at least, a reasonable relationship to legitimate state interests. *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942). The State has arbitrarily selected one class of murderers who may be subjected to the death penalty automatically. This statutory scheme is inconsistent with the purported State interests. There is no rational basis or any State interest for this distinction and its application is arbitrary and capricious.

5. Revised Code Sections 2929.03(D)(1) and 2929.04 are Unconstitutionally Vague.

Revised Code Section 2929.03(D)(1)'s reference to "the nature and circumstances of the aggravating circumstance" incorporates the nature and circumstances of the offense into the factors weighed in favor of death. The nature and circumstances of an offense are, however, statutory mitigating factors under R.C. § 2929.04(B), that may only be weighed on the side of mitigation. *State v. Wogenstahl*, 75 Ohio St.3d 344, 662 N.E.2d 311 (1996). Revised Code Section 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, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). A vague aggravating circumstance fails to give that guidance. *Walton v. Arizona*, 497 U.S. 639, 653, 110 S.Ct. 3047,

111 L.Ed.2d 511 (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, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). The aggravating circumstances in R.C. 2929.04(A)(1)-(8) are both.

Ohio Revised Code § 2929.04(B) tells the sentencer that the nature and circumstances of the offense are selection factors in mitigation. Moreover, because the nature and circumstances of the offense are listed only in O.R.C. § 2929.04(B), the sentencer must weigh them only as selection factors in mitigation. See *Wogenstahl*, 75 Ohio St. 3d 344 at 356. However, R.C. 2929.03(D)(1) eviscerates the clarity and specificity of R.C. 2929.04(B); selection factors that are strictly mitigating become part and parcel of the aggravating circumstance.

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

Section 2929.03(D)(1) therefore makes O.R.C. § 2929.04(B) unconstitutionally arbitrary.

Revised Code Section 2929.03(D)(1) is also unconstitutional on its face because it makes the selection factors in aggravation in R.C. 2929.04(A)(1)-(8) "too vague." See *Walton*, 497 U.S. at 654. Revised Code Section 2929.04(A)(1)-(8) gives clear guidance as to the selection factors that the sentencer may weigh against the defendant's mitigation. However, R.C. 2929.03(D)(1) eviscerates the narrowing achieved. By referring to the "nature and circumstances of the

aggravating circumstance," R.C. 2929.03(D)(1) gives the sentencer "open-ended discretion" to impose the death penalty. See *Maynard,* 486 U.S. at 362. That reference allows the sentencer to impose death based on (A)(1)-(8) plus any other fact in evidence arising from the nature and circumstances of the offense that the sentencer considers aggravating. This eliminates the guided discretion provided by R.C. 2929.04(A). See *Stringer v. Black,* 503 U.S. 222, 232, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992).

6. Proportionality and Appropriateness Review.

Revised Code Sections 2929.021 and 2929.03 require trial courts to report data to the courts of appeals and to the this 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. Revised Code Section 2929.021 requires only minimal information on these cases. Additional data is necessary to make an adequate comparison in these cases. This prevents adequate appellate review.

Adequate appellate review is a precondition to the constitutionality of a state death penalty system. *Zant,* 462 U.S. at 879; *Pulley v. Harris,* 465 U.S. 37, 50, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). The standard for review is one of careful scrutiny. *Zant,* 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 (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 constitutionally flawed. Review of cases where the death penalty was imposed satisfies the proportionality review required by R.C. 2929.05(A). *State v. Steffen*, 31 Ohio St. 3d 111, 509 N.E.2d 383, paragraph one of the syllabus (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. Revised Code Section 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. It's 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, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

The General Assembly provided capital appellants with the statutory right of proportionality and appropriateness 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, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). The review currently used violates this constitutional mandate. An insufficient proportionality review violates Defendant's due process, liberty interest in R.C. 2929.05.

7. 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, Defendant's capital specifications must be dismissed.

A. International Law Binds the State of Ohio.

"International law is a part of our law[.]" *The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 44 L. Ed. 320 (1900). A treaty made by the United States is the supreme law of the land. U.S. Constitution, Article VI. Where state law conflicts with international law, it is the state law that must yield. See *Zschernig v. Miller*, 389 U.S. 429, 440, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968); *Clark v. Allen*, 331 U.S. 503, 508, 67 S. Ct. 1431, 91 L. Ed. 1633 (1947); *United States v. Pink*, 315 U.S. 203, 230, 62 S. Ct. 552, 86 L. Ed. 796 (1942); *Asakura v. Seattle*, 265 U.S. 332, 341, 44 S. Ct. 515, 68 L. Ed. 1041 (1924); *Kansas v. Colorado*, 206 U.S. 46, 48, 27 S. Ct. 655, 51 L. Ed. 956 (1907); *The Paquete Habana*, 175 U.S. at 700; *The Nereide*, 13 U.S. (9 Cranch) 388, 422, 3 L. Ed. 2d 769 (1815). International law creates remediable rights for United States citizens. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980); *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal. 1987). *Medellin v. Texas*, 552 US 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008), does not address this issue. In *Medellin*, the Supreme Court simply found that the President did not have the authority to order the State of Texas to ignore state procedural bars in order to enforce an international court ruling.

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

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

of the individual when it became a member of the OAS. OAS Charter, Art. 3.

The U.N. has sought to achieve its goal of promoting human rights and fundamental freedoms through the creation of numerous treaties and conventions. The United States has ratified several of these including: the International Covenant on Civil and Political Rights (ICCPR) ratified in 1992, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ratified in 1994, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) ratified in 1994. Ratification of these treaties by the United States expressed its willingness to be bound by these treaties. Under the Supremacy Clause, the ICCPR, the ICERD, and the CAT are the supreme laws of the land. As such, the United States must fulfill the obligations incurred through ratification. 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 Subsections 1-7).

B(1) Ohio's Statutory Scheme Violates the ICCPR's and ICERD's Guarantees of Equal Protection and Due Process.

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

Ohio's statutory scheme denies equal protection and due process in several ways. It allows for arbitrary and unequal treatment in punishment. (See § 1.) Ohio's sentencing procedures are unreliable. (See § 2.) Ohio's statutory scheme fails to provide individualized sentencing. (See § 1, 2.) Ohio's statutory scheme burdens a defendant's right to a jury. (See Proposition of Law No. __.) Ohio's requirement of mandatory submission of reports and evaluations precludes effective assistance of counsel. (See § 3.) Revised Code Section 2929.04(B)(7) arbitrarily selects certain defendants who may be automatically eligible for death upon conviction. (See § 4.) Ohio's proportionality and appropriateness review is wholly inadequate. (See § 6.) As a result, Ohio's statutory scheme violates the ICCPR's and the ICERD's guarantees of equal protection and due process. This is a direct violation of international law and of the Supremacy Clause of the Constitution.

B(2). Ohio's Statutory Scheme Violates the ICCPR's Protection against Arbitrary Execution.

The ICCPR speaks explicitly to the use of the death penalty. The ICCPR guarantees the right to life and provides that there shall be no arbitrary deprivation of life. Art. 6(1). It allows the imposition of the death penalty only for the most serious offenses. Art. 6(2). Juveniles and pregnant women are protected from the death penalty. Art. 6(5). Moreover, the ICCPR contemplates the abolition of the death penalty. Art. 6(6). For the reasons set forth above, executions in Ohio result in the arbitrary deprivation of life and thus violate the ICCPR's death penalty protections. This is a direct violation of international law and a violation of the Supremacy Clause.

B(3). 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 § 1.) A scheme that sentences blacks and those who kill white victims more frequently and that disproportionately places African-Americans on death row is in violation of the ICERD. Ohio's failure to rectify this discrimination is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

B(4) Ohio's Statutory Scheme Violates the ICCPR's and the CAT's Prohibitions against Cruel, Inhuman, or Degrading Punishment.

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

B(5). Ohio's Obligations Under the ICCPR, the ICERD, and the CAT are not Limited by the Reservations and Conditions Placed on These Conventions by the Senate.

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

Thus, the Senate's inclusion of conditions and reservations in treaties goes beyond that role. The Senate picks and chooses which items of a treaty will bind the United States. This is the equivalent of the line item veto, which is unconstitutional. *Clinton v. City of New York*, 524 U.S. 417, 438, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (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. If it is not listed, then the President lacks the power to do it. 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. Therefore, any conditions or reservations made by the Senate are unconstitutional.

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 life and any reservation inconsistent with that purpose violates the Vienna Convention. Thus, the United States' reservations cannot stand under the Vienna Convention as well.

B(6). Ohio's Obligations Under the ICCPR are not Limited by the Senate's Declaration that it is not Self-Executing.

The Senate indicated that the ICCPR is not self-executing. However, the question of whether a treaty is self-executing is left to the judiciary. *Frolova v. Union of Soviet Socialist Republics*, 761 F. 2d 370 (7th Cir. 1985), citing 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, 2 L.Ed. 60 (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 is not self-executing gives power to the House of Representatives not contemplated by the United States Constitution. Thus, any declaration that a treaty is not self-executing is unconstitutional. See Clinton, 524 U.S. at 438.

8.3 Ohio's Obligations under Customary International Law.

International law is not merely discerned in treaties, conventions, and covenants. International law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61, 5 L.Ed. 57 (1820). Regardless of the source "international law is a part of our law[.]" *The Paquete Habana*, 75 U.S. at 700.

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

The DHR guarantees equal protection and due process (Art. 1, 2, 7, 11), recognizes the right to life (Art. 3), prohibits the use of torture or cruel, inhuman, or degrading punishment (Art. 5) and is largely reminiscent of the ICCPR. As demonstrated by the arguments above, 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. Included among these are:

1. The American Convention on Human Rights, drafted by the OAS and entered into force in 1978. It provides numerous human rights guarantees, including: equal protection (Art. 1, 24), the right to life, (Art. 4(1)), prohibition against arbitrary deprivation of life (Art. 4(1)), imposition of the death penalty only for the most serious crimes (Art. 4(2)), no re-establishment of the death penalty once abolished (Art. 4(3)), prohibits torture, cruel, inhuman, or degrading punishment (Art. 5(2)), and guarantees the right to a fair trial (Art. 8).

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

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

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

5. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty adopted by the U.N. Economic and Social Council in Resolution 1984/50 in 1984. It provides numerous protections to those facing the death penalty, including: permitting capital punishment for only the most serious crimes, with the scope not going beyond intentional crimes with lethal or other extremely grave consequences (1), requiring that guilt be proved so as to leave no room for an alternative explanation of the facts (4), due process, and the carrying out of the death penalty so as to inflict the minimum possible suffering (9).

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

These documents are drafted by the people Smith contemplates and are subscribed to by a substantial segment of the world. As such they are binding on the United States as customary international law. The flaws in Ohio's capital scheme described above clearly demonstrate that Ohio's statutory scheme is in violation of customary international law.

For all of these reasons, and as set forth above, Ohio's death penalty law violates the U.S. Constitution, the Ohio Constitution, and binding international law.

CONCLUSION

Pursuant to the preceding Propositions of Law the defendant-appellant, Anthony Sowell, respectfully requests that this Honorable Court reverse the judgment and death sentence imposed in this case and grant him a new trial or sentencing hearing.

Respectfully submitted,

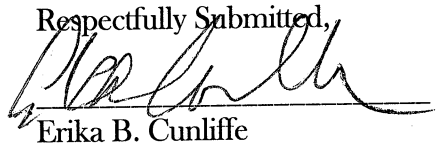
Jeffrey Gamso/EC
JEFFREY M. GAMSO, ESQ.
Counsel of Record, #0043869
1119 Adams St 2nd Flr
Toledo, OH 43604
Office Phone: 419.243.3800

ERIKA CUNLIFFE, # 0074480
310 Lakeside Avenue, Suite 200
216-443-7583

SERVICE

A copy of the foregoing Appellant's Brief and Assignment of Errors was hand delivered upon Timothy J. McGinty, Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 22ND day of October 2012.

Respectfully Submitted,



Erika B. Cunliffe
Assistant Public Defender

APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE NO. 11-1921

THE STATE OF OHIO, Appellee, vs. ANTHONY SOWELL, Appellant.	)	DEATH PENALTY CASE On appeal from the Cuyahoga County Court of Common Pleas, Case No. CR-09-530885

NOTICE OF APPEAL

Jeffry F. Kelleher (0007784)
526 Superior Avenue, Ste. 1540
Cleveland, Ohio 44114
(216) 241-0520
(216) 241-6961 Fax

Thomas Rein (041571)
526 Superior Avenue, Ste. 940
Cleveland, Ohio 44114
(216) 687-0400
(216) 696-4522

COUNSEL FOR APPELLANT

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SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT ANTHONY SOWELL

Appellant Anthony Sowell hereby gives notice that he will appeal, on questions of law and fact, to the Supreme Court of Ohio from the judgment and sentence of the Cuyahoga County Court of Common Pleas, entered and journalized in Case No. CR-09-530885, in entries dated August 31, 2011, and October 5, 2011.

This is a death penalty case.

Respectfully submitted,

Jeffry F. Kelleher (0007784)
526 Superior Avenue, Ste. 1540
Cleveland, Ohio 44114
(216) 241-0520
(216) 241-6961 Facimile

Thomas Rein (041571)
526 Superior Avenue, Ste. 940
Cleveland, Ohio 44114
(216) 687-0400
(216) 696-4522 Facimile

Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal was sent by regular U.S. Mail to William D. Mason, Esq., Cuyahoga County Prosecutor, Justice Center - 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, on November 7, 2011

Jeffry F. Kelleher (0007784)
Counsel for Appellant

70104865

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

ANTHONY SOWELL
Defendant

Case No: CR-09-530885-A

Judge: DICK AMBROSE

INDICT: 2903.01 AGGRAVATED MURDER /FMS /CCS /SMS /SVPS /NPC /RVOS
2903.01 AGGRAVATED MURDER /FMS /CCS /SMS /SVPS /NPC /RVOS
2905.01 KIDNAPPING /NPC /RVOS /SMS /SVPS
ADDITIONAL COUNTS...

JOURNAL ENTRY

SENTENCING HEARING HELD ON 8/12/11 WITH MODIFICATION OF SENTENCE AS TO COUNTS 69,72,73,74,76,78,79,80,82 AND 84 OCCURRING ON 8/30/11. THIS JOURNAL REPRESENTS THE COURT'S FINAL ENTRY OF CONVICTION.

DEFENDANT IN COURT. COUNSEL JOHN P PARKER AND RUFUS SIMS PRESENT. PROSECUTING ATTORNEY(S) RICHARD BOMBICK, PINKEY CARR AND LAUREN BELL PRESENT. COURT REPORTER TRACY VARGO PRESENT.

ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF AGGRAVATED MURDER 2903.01 A, WITH FELONY MURDER SPECIFICATIONS (1-2)(2929.04(A)(7)), COURSE OF CONDUCT SPECIFICATIONS (3-15)(2929.04(A)(5)), AND SEXUAL MOTIVATION SPECIFICATION (16) (2941.147), AS CHARGED IN COUNT(S) 1, 7, 13, 19, 25, 31, 43, 49, 55, 61 OF THE INDICTMENT. THE COURT FOUND THE DEFENDANT GUILTY OF SEXUAL VIOLENT PREDATOR SPECIFICATIONS (2941.148), NOTICE OF PRIOR CONVICTION, AND REPEAT VIOLENT OFFENDER SPECIFICATIONS (2941.149), AS CHARGED IN COUNT(S) 1, 7, 13, 19, 25, 31, 43, 49, 55, 61 OF THE INDICTMENT.

ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF AGGRAVATED MURDER 2903.01 B, WITH FELONY MURDER SPECIFICATIONS (1-2)(2929.04(A)(7)), COURSE OF CONDUCT SPECIFICATIONS (3-15)(2929.04(A)(5)), AND SEXUAL MOTIVATION SPECIFICATION (16) (2941.147), AS CHARGED IN COUNT(S) 2, 8, 14, 20, 26, 32, 44, 50, 56, 62 OF THE INDICTMENT. THE COURT FOUND THE DEFENDANT GUILTY OF SEXUAL VIOLENT PREDATOR SPECIFICATIONS (2941.148), NOTICE OF PRIOR CONVICTION, AND REPEAT VIOLENT OFFENDER SPECIFICATIONS (2941.149), AS CHARGED IN COUNT(S) 2, 8, 14, 20, 26, 32, 44, 50, 56, 62 OF THE INDICTMENT.

ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF KIDNAPPING 2905.01 A(3) F1, WITH SEXUAL MOTIVATION SPECIFICATION (2941.147), IN COUNT(S) 3, 9, 15, 21, 27, 33, 45, 51, 57, 63, 68, 74, 81 OF THE INDICTMENT. THE COURT FOUND THE DEFENDANT GUILTY OF SEXUAL VIOLENT PREDATOR SPECIFICATIONS (2941.148), NOTICE OF PRIOR CONVICTION, AND REPEAT VIOLENT OFFENDER SPECIFICATIONS (2941.149), AS CHARGED IN COUNT(S) 3, 9, 15, 21, 27, 33, 45, 51, 57, 63, 68, 74, 81 OF THE INDICTMENT.

ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF KIDNAPPING 2905.01 A(4) F1, WITH SEXUAL MOTIVATION SPECIFICATION (2941.147), AS CHARGED IN COUNT(S) 4, 10, 16, 22, 28, 34, 46, 52, 58, 64, 67, 75, 80 OF THE INDICTMENT. THE COURT FOUND THE DEFENDANT GUILTY OF SEXUAL VIOLENT PREDATOR SPECIFICATIONS (2941.148), NOTICE OF PRIOR CONVICTION, AND REPEAT VIOLENT OFFENDER SPECIFICATIONS (2941.149), AS CHARGED IN COUNT(S) 4, 10, 16, 22, 28, 34, 46, 52, 58, 64, 67, 75, 80 OF THE INDICTMENT.

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ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF OFFENSES AGAINST HUMAN CORPSE 2927.01 B F5, AS CHARGED IN COUNT(S) 5, 11, 17, 23, 29, 35, 41, 47, 53, 59, 65 OF THE INDICTMENT.

ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF TAMPERING WITH EVIDENCE 2921.12 A(1) F3, AS CHARGED IN COUNT(S) 6, 12, 18, 24, 30, 36, 42, 48, 54, 60, 66 OF THE INDICTMENT.

ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF AGGRAVATED MURDER 2903.01 A, WITH COURSE OF CONDUCT SPECIFICATIONS (3-15)(2929.04(A)(5)), UNDER COUNT(S) 37 OF THE INDICTMENT. PURSUANT TO CRIMINAL RULE 29, THE COURT DISMISSED FELONY MURDER SPECIFICATIONS (1-2) AND SEXUAL MOTIVATION SPECIFICATION (16)(2941.147), AS CHARGED ON COUNT(S) 37 OF THE INDICTMENT.

THE COURT FOUND THE DEFENDANT GUILTY OF SEXUAL VIOLENT PREDATOR SPECIFICATION (2941.148), NOTICE OF PRIOR CONVICTION, AND REPEAT VIOLENT OFFENDER SPECIFICATION (2941.149), AS CHARGED IN COUNT(S) 37 OF THE INDICTMENT.

ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF ATTEMPTED, MURDER 2923.02/2903.02 A F1, WITH SEXUAL MOTIVATION SPECIFICATION (2941.147), IN COUNT(S) 69, 76, 82 OF THE INDICTMENT.
THE COURT FOUND THE DEFENDANT GUILTY OF SEXUAL VIOLENT PREDATOR SPECIFICATIONS (2941.148), NOTICE OF PRIOR CONVICTION, AND REPEAT VIOLENT OFFENDER SPECIFICATIONS (2941.149), AS CHARGED IN COUNT(S) 69, 76, 82 OF THE INDICTMENT.

ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF FELONIOUS ASSAULT 2903.11 A(1) F1, WITH SEXUAL MOTIVATION SPECIFICATION (2941.147), IN COUNT(S) 70, 77, 83 OF THE INDICTMENT.
THE COURT FOUND THE DEFENDANT GUILTY OF SEXUAL VIOLENT PREDATOR SPECIFICATIONS (2941.148), NOTICE OF PRIOR CONVICTION, AND REPEAT VIOLENT OFFENDER SPECIFICATIONS (2941.149), AS CHARGED IN COUNT(S) 70, 77, 83 OF THE INDICTMENT.

ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF FELONIOUS ASSAULT 2903.11 A(2) F1, WITH SEXUAL MOTIVATION SPECIFICATION (2941.147), IN COUNT(S) 71 OF THE INDICTMENT.
THE COURT FOUND THE DEFENDANT GUILTY OF SEXUAL VIOLENT PREDATOR SPECIFICATION (2941.148), NOTICE OF PRIOR CONVICTION, AND REPEAT VIOLENT OFFENDER SPECIFICATION (2941.149), AS CHARGED IN COUNT(S) 71 OF THE INDICTMENT.

ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF RAPE 2907.02 A(2) F1, IN COUNT(S) 72, 73, 78, 79 OF THE INDICTMENT.
THE COURT FOUND THE DEFENDANT GUILTY OF SEXUAL VIOLENT PREDATOR SPECIFICATIONS (2941.148), NOTICE OF PRIOR CONVICTION, AND REPEAT VIOLENT OFFENDER SPECIFICATIONS (2941.149), AS CHARGED IN COUNT(S) 72, 73, 78, 79 OF THE INDICTMENT.

ON A FORMER DAY OF COURT THE JURY RETURNED A VERDICT OF GUILTY OF ATTEMPTED, RAPE 2923.02/2907.02 A(2) F2, IN COUNT(S) 84 OF THE INDICTMENT. THE COURT FOUND THE DEFENDANT GUILTY OF SEXUAL VIOLENT PREDATOR SPECIFICATION (2941.148), NOTICE OF PRIOR CONVICTION, AND REPEAT VIOLENT OFFENDER SPECIFICATION (2941.149), AS CHARGED IN COUNT(S) 84 OF THE INDICTMENT.

THE JURY RETURNED A VERDICT OF NOT GUILTY OF AGGRAVATED ROBBERY 2911.01 A(3), IN COUNT(S) 85 OF THE INDICTMENT.

RULE 29 WAS GRANTED AS TO COUNT(S) 38, 39, 40.

IN ACCORDANCE WITH R.C. 2941.25(A), THE STATE ELECTED TO PROCEED AT SENTENCING ON THOSE COUNTS OF

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AGGRAVATED MURDER CHARGED UNDER 2903.01(A). THEREFORE, THE COURT MERGES THE AGGRAVATED MURDER CHARGES UNDER 2903.01(B), SET FORTH IN COUNTS 2,8,14,20,26, 32,44,50,56 AND 62, INTO COUNTS 1,7,13,19,25,31,43,49,55 AND 61.

THE COURT MERGES KIDNAPPING COUNTS, 3,4,9,10,15,16,21,22,27,28,33,34, 45,46,51,52,57,58,63 AND 64, INTO CORRESPONDING AGGRAVATED MURDER CHARGES, 1,7,13,19,25,31,37,43,49,55 AND 61, FINDING THEM TO BE ALLIED OFFENSES OF SIMILAR IMPORT. THE COURT MERGES THE KIDNAPPING CHARGES IN COUNTS 67 AND 68, AND THE FELONIOUS ASSAULT CHARGES IN COUNTS 70 AND 71, WITH THE CHARGE OF ATTEMPTED MURDER IN COUNT 69, FINDING THEM TO BE ALLIED OFFENSES OF SIMILAR IMPORT. THE COURT MERGES THE KIDNAPPING CHARGE IN COUNT 75 WITH THE KIDNAPPING CHARGE IN COUNT 74; THE FELONIOUS ASSAULT IN COUNT 77 WITH THE ATTEMPTED MURDER IN COUNT 76; THE KIDNAPPING IN COUNT 81 WITH THE KIDNAPPING IN COUNT 80; AND THE FELONIOUS ASSAULT IN COUNT 83 WITH THE ATTEMPTED MURDER IN COUNT 82, FINDING THEM TO BE ALLIED OFFENSES OF SIMILAR IMPORT.

DEFENSE COUNSEL JOHN PARKER ADDRESSES THE COURT.
PROSECUTORS RICHARD BOMBICK AND PINKEY CARR ADDRESS THE COURT, THE FOLLOWING VICTIMS/REPRESENTATIVES ADDRESS THE COURT:
SHAWN MORRIS; GLADYS WADE; DONNITA CARMICHAEL; KYANA HUNT; JIM ALLEN; FLORENCE BRAY; DEBORAH WILLIAMS; DENISE HUNTER; YVONNE WILLIAMS; ADALEEN ATTERBERRY; DON SMITH; SHANISHA COLLINS; AND DOROTHY POLLARD.
THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.
THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSES AND PRINCIPLES OF R.C. 2929.11 AND, IN ACCORDANCE WITH R.C. 2929.03 (C)(2), R.C. 2929.14 AND R.C. 2971.03(A), THE COURT IMPOSES THE FOLLOWING PRISON SENTENCES:

COUNT 1-THE COURT IMPOSES THE SENTENCE OF DEATH.
COUNTS 2, 3, & 4 MERGE INTO COUNT 1.
COUNT 5-12MOS.
COUNT 6-5YRS.
COUNT 7-THE COURT IMPOSES THE SENTENCE OF DEATH.
COUNTS 8, 9, & 10 MERGE INTO COUNT 7.
COUNT 11-12 MOS.
COUNT 12-5YRS.
COUNT 13-THE COURT IMPOSES THE SENTENCE OF DEATH.
COUNTS 14, 15 & 16 MERGE INTO COUNT 13.
COUNT 17-12MOS.
COUNT 18-5YRS.
COUNT 19-THE COURT IMPOSES THE SENTENCE OF DEATH.
COUNTS 20, 21, & 22 MERGE INTO COUNT 19.
COUNT 23-12MOS.
COUNT 24-5YRS.
COUNT 25-THE COURT IMPOSES THE SENTENCE OF DEATH.
COUNTS 26, 27 & 28 MERGE INTO COUNT 25.
COUNT 29-12MOS.
COUNT 30-5YS.
COUNT 31-THE COURT IMPOSES THE SENTENCE OF DEATH.
COUNTS 32, 33 & 34 MERGE INTO COUNT 31.
COUNT 35-12MOS.
COUNT 36-5YRS.
COUNT 37-THE COURT IMPOSES THE SENTENCE OF DEATH.
COUNT 41-12MOS.
COUNT 42-5YRS.

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COUNT 43-THE COURT IMPOSES THE SENTENCE OF DEATH.
COUNTS 44, 45 & 46 MERGE INTO COUNT 43.
COUNT 47-12MOS.
COUNT 48-5YRS.
COUNT 49-THE COURT IMPOSES THE SENTENCE OF DEATH.
COUNTS 50, 52 & 52 MERGE INTO COUNT 49.
COUNT 53-12MOS.
COUNT 54-5YRS.
COUNT 55-THE COURT IMPOSES THE SENTENCE OF DEATH.
COUNTS 56, 57 & 58 MERGE INTO COUNT 55.
COUNT 59-12MOS.
COUNT 60-5YRS.
COUNT 61-THE COURT IMPOSES THE SENTENCE OF DEATH.
COUNTS 62, 63 & 64 MERGE INTO COUNT 61.
COUNT 65-12MOS.
COUNT 66-5YRS.
COUNT 69-10YRS TO LIFE
COUNTS 67, 68 & 70, 71 MERGE INTO COUNT 69.
COUNT 72-10YRS. TO LIFE
COUNT 73-10YRS. TO LIFE
COUNT 74-10YRS. TO LIFE
COUNT 75-MERGES INTO COUNT 74
COUNT 76-10YRS. TO LIFE
COUNT 77-MERGES INTO COUNT 76
COUNT 78-10YRS. TO LIFE
COUNT 79-10YRS. TO LIFE
COUNT 80-10YRS. TO LIFE
COUNT 81-MERGES INTO COUNT 80
COUNT 82-10YRS. TO LIFE
COUNT 83-MERGES INTO COUNT 82
COUNT 84-8 YRS. TO LIFE

COUNTS 1, 7, 13, 19, 25, 31, 43, 49, 55, 61 ARE TO RUN CONCURRENT TO ONE ANOTHER. ALL REMAINING COUNTS ARE TO RUN CONSECUTIVE AS THE COURT FINDS THAT CONSECUTIVE SENTENCES ARE NECESSARY TO PROTECT THE PUBLIC AND TO PUNISH THE OFFENDER, GIVEN THE FACT THAT MULTIPLE OFFENSES WERE COMMITTED AS PART OF A COURSE OF CONDUCT. THE COURT ALSO FINDS THAT THE HARM CAUSED WAS SO GREAT THAT NO SINGLE PRISON TERM FOR THE OFFENSES WOULD ADEQUATELY PUNISH THE OFFENDER.

POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR 3YEARS, AT THE DISCRETION OF THE ADULT PAROLE AUTHORITY, FOR COUNTS 5,6,11,12,17,18,23,24,29,30,35,36,41,42,47,48,53,54,59,60,65 AND 66 UNDER R.C.2967.28. DEFENDANT ADVISED THAT IF POST RELEASE CONTROL SUPERVISION IS IMPOSED FOLLOWING HIS RELEASE FROM PRISON AND IF HE VIOLATES THAT SUPERVISION OR CONDITION OF POST RELEASE CONTROL, THE PAROLE BOARD MAY IMPOSE A PRISON TERM OF UP TO ONE-HALF OF THE STATED PRISON TERM ORIGINALLY IMPOSED UPON THE OFFENDER.

FOR ALL REMAINING COUNTS FOR WHICH DEFENDANT WAS SENTENCED TO A TERM OF LIFE IMPRISONMENT, DEFENDANT IS SUBJECT TO PAROLE AS PROVIDED UNDER R.C. 2967.13.

THE COURT SETS 10/29/2012 AS THE DATE OF EXECUTION ON COUNTS 1,7,13,19,25,31,37,43,49,55 AND 61.

DEFENDANT TO RECEIVE 650 DAYS JAIL CREDIT TO DATE.
DEFENDANT DECLARED INDIGENT.

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COSTS WAIVED.
DEFENDANT ADVISED OF APPEAL RIGHTS.
DEFENDANT INDIGENT, COURT APPOINTS THOMAS REIN AND JEFFRY KELLEHER AS COUNSEL ON APPEAL.
TRANSCRIPT AT STATE'S EXPENSE.
DEFENDANT REMANDED.
SHERIFF ORDERED TO TRANSPORT DEFENDANT ANTHONY SOWELL, DOB: 08/19/1959, GENDER: MALE, RACE: BLACK.

08/30/2011
CPDA1 08/30/2011 16:30:07

Judge Signature 08/30/2011

THE STATE OF OHIO } SS. I, GERALD E. FUERST, CLERK OF
Cuyahoga County } 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 CRIMINAL
Journal Entry CR-530865
NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT THIS 31
DAY OF August A.D. 20 11
GERALD E. FUERST, Clerk
By Candace McCaffety Deputy

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	)	CASE NO. 530885
	)	
	)	Judge DICK AMBROSE
vs.	)	
	)	
	)	
ANTHONY SOWELL	)	SENTENCING OPINION
	)	(Pursuant to O.R.C. § 2929.03(F))

August 24, 2011

PROCEDURAL BACKGROUND

{¶1} On July 22, 2011 the jury in this capital murder case returned verdicts finding the defendant, **Anthony Sowell**, guilty beyond a reasonable doubt of all but one of the 82 counts of the Indictment along with multiple specifications that were submitted to them.[1] Of those verdicts, twenty-one were for Aggravated Murder.[2] For those counts, the jury found the defendant guilty of purposely causing the deaths of Tonia Carmichael, Nancy Cobbs, Tishana Culver, Crystal Dozier, Telacia Fortson, Amelda Hunter, Leshanda Long, Michelle

1. The jury acquitted the defendant of the charge in Count 85 - Aggravated Robbery. Prior to submission of the case to the jury, the Court dismissed counts 38, 39 and 40 pursuant to Crim. R. 29.
2. Defendant was charged under both sections (A) and (B) of R.C. 2903.01 for each of the 11 victims of Aggravated Murder and the jury found him guilty on all 21 counts.(Count 38 was dismissed under Crim. R. 29, as noted above). Prior to the mitigation phase, the State elected and the Court merged the counts charged under R.C. 2903.01(B) into the counts charged under R.C. 2903.01(A).

Mason, Kim Yvettee Smith, Janice Webb, and Diane Turner, with prior calculation and design (R.C. §2903.01(A)). The jury also found the defendant guilty of the Felony Murder (R.C. §2929.04(A)(7)), Course of Conduct (R.C. §2929.04(A)(5)), and Sexual Motivation Specifications (R.C. §2941.147) accompanying each count of Aggravated Murder.[3] The jury also found that the defendant purposely attempted to kill Latundra Billups, Shawn Morris and Gladys Wade.

{¶2} The other charges on which the jury found the defendant guilty were: Kidnapping in Counts 3,4,9,10,15,16,21,22, 27,28,33,34,45,46,51,52,57,58,63,64,67,68,74,75,80 and 81 (R.C. §2905.01(A)(4) and R.C. §2905.01(A)(3)); Abuse of a Corpse in Counts 5,11,17,23,29,35,41,47,53,59,and 65 (R.C. §2927.01(B); Tampering with Evidence in Counts 6,12,18,24,30,36,42,48,54,60, and 66 (R.C. §2921.12); Attempted Murder in Counts 69,76 and 82 (R.C. §2923.02/2903.02(A)); Felonious Assault in Counts 70,71,77 and 83 (R.C. §2903.11(A)(1) and (2)); Rape in Counts 72, 73,78 and 79 (R.C. §2907.02(A)(2)); and Attempted Rape in Count 84 (R.C. §2923.02/2907.02(A)(2)).[4]

{¶3} On July 27, 2011, after a bifurcated trial to the Court on remaining specifications for Repeat Violent Offender and Sexually Violent Offender, and Notice of Prior Conviction, the Court found the defendant guilty on all counts. Having been advised of his rights to an

3. With the exception of Count 37, where the Court dismissed the Sexual Motivation Specifications pursuant to defendant's Crim. R. 29 motion.

4. For sentencing purposes, the Court merged Kidnapping Counts, 3,4,9,10,15,16,21,22,27,28,33,34, 45,46,51,52,57,58,63 and 64, into corresponding Aggravated Murder charges, 1,7,13,19,25,31,37,43,49,55 and 61, finding them to be allied offenses of similar import. For the same reason, the Court merged the Kidnapping charges in Counts 67 and 68, and the Felonious Assault charges in Counts 70 and 71 with the charge of Attempted Murder in Count 69. The Court also merged the Kidnapping charge in Count 75 with the Kidnapping charge in Count 74; the Felonious Assault in Count 77 with the Attempted Murder in Count 76; the Kidnapping in Count 81 with the Kidnapping in Count 80; and the Felonious Assault in Count 83 with the Attempted Murder in Count 82.

appeal, pre-sentence investigation, mental health examination and right to make an unsworn statement, the case then proceeded to the sentencing phase before the jury on August 1, 2011. In the sentencing phase, the jury was instructed to consider only two aggravating circumstances: felony murder and course of conduct[5] for each victim of Aggravated Murder and to weigh those aggravating circumstances against the mitigating factors presented during the case.

{¶4} During the trial phase, The State submitted evidence regarding the disappearance and murder of eleven women in the Mt. Pleasant neighborhood of Cleveland (and the attempted murders of three other women). The women were all African American and were involved in varying degrees of drug and alcohol abuse and/or addiction. Most had children. Some were married or were in relationships. In accordance with the jury's verdict, the Aggravating Circumstances of Felony Murder and Course of Conduct were established by proof beyond a reasonable doubt.

{¶5} During the Sentencing Phase, the State re-introduced evidence regarding the Aggravating Circumstances that it introduced during the Trial Phase and then rested. The defense called 25 witnesses to the stand, including the defendant who gave an unsworn statement elicited by counsel in question and answer format. The State called two witnesses in rebuttal. The parties submitted more than 500 exhibits to the jury at the close of all the evidence. The case was given to the jury for deliberation on August 9, 2011.

5. The Felony Murder (1-2) and Course of Conduct (3-15) Specifications for each count of Aggravated Murder in the Indictment were merged for the jury's consideration during the Sentencing phase, so only one Aggravating Circumstance of Felony Murder and one Aggravating Circumstance of Course of Conduct applied for each of the 11 victims.

{¶6} On August 10, 2011, the jury found that the Aggravating Circumstances of the Felony Murder and Course of Conduct Specifications outweighed the mitigating factors by proof beyond a reasonable doubt and returned a verdict recommending that the sentence of death be imposed upon Anthony Sowell. Pursuant to R.C. § 2929.03(F) this Court must conduct an independent review of the facts and weigh the Aggravating Circumstances of Felony Murder and Course of Conduct against the mitigating factors from all the evidence in the case.

AGGRAVATING CIRCUMSTANCES

{¶7} The aggravating circumstances to be weighed against the mitigating factors are:

> THAT THE OFFENSE OF AGGRAVATED MURDER WAS COMMITTED WHILE THE OFFENDER WAS COMMITTING OR ATTEMPTING TO COMMIT OR FLEEING IMMEDIATELY AFTER COMMITTING OR ATTEMPTING TO COMMIT KIDNAPPING AND EITHER THE OFFENDER WAS THE PRINCIPLE OFFENDER IN THE COMMISSION OF THE AGGRAVATED MURDER OR, IF NOT THE PRINCIPLE OFFENDER, COMMITTED THE AGGRAVATED MURDER WITH PRIOR CALCULATION AND DESIGN; AND
>
> THAT THE OFFENSE WAS PART OF A COURSE OF CONDUCT INVOLVING THE PURPOSEFUL KILLING OR ATTEMPT TO KILL TWO OR MORE PERSONS BY THE DEFENDANT

{¶8} Regarding the Aggravating Circumstances, the State's evidence, introduced during the Trial phase and re-introduced in the Mitigation Phase, proved, beyond a reasonable doubt, that the defendant, Anthony Sowell, purposefully caused the death of 11 women over approximately two and one-half years. The State's evidence also established that, except for one victim (Leshanda Long), the defendant committed each Aggravated Murder while committing or attempting to commit Kidnapping. The testimony of Cuyahoga County Medical Examiners Dr. Krista Pekarski, Dr. Frank Miller and Dr. Elizabeth Balraj clearly

established that the deaths of all 11 victims were homicides and all but three[6] were caused by asphyxia due to cervical compression. Trace Evidence Analysts Kristopher Kern and Curtiss Jones testified as to the various ligatures and bindings found around the bodies of nine[7] of the eleven victims, establishing the restraint element of Kidnapping by direct evidence. The Aggravating Circumstances, proven beyond a reasonable doubt, and the nature and circumstances of those Aggravating Circumstances are significant factors and are entitled to great weight in the process of weighing them against factors in Mitigation.

MITIGATING FACTORS

{¶9} Mitigating factors considered by the Court, include the evidence presented at trial, arguments of counsel, the statement of the defendant, the relevant factors identified in O.R.C. § 2929.04(B), and any and all other information and reports that are relevant to the nature and circumstances surrounding the Aggravating Circumstance, including, but not limited to, the history, character, and background of the defendant.

{¶10} During the Mitigation Phase, and in addition to various witnesses testifying as to his history, character and background, defendant introduced the testimony of Dr. Dale Watson, a neuro-psychologist, and Dr. George Woods, a neuro-psychiatrist. Defendant's experts focused their testimony on the specific mitigating factor referenced in R.C. 2929.04(B)(3), i.e., whether at the time of the offenses, the defendant, due to mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Defendant also offered in mitigation, the testimony of George Bansley, a military records expert and former Marine, to describe

6 The deaths of Leshanda Long, Kim Smith and Diane Turner were all due to homicidal violence.
7 There were no ligatures or restraints found on the remains of Leshanda Long or Diane Turner.

the defendant's performance and career in the United States Marine Corps. Defendant's mitigation expert, Lori James-Townes, also testified about the defendant's social history and background. As will be discussed below, defendant's mitigation evidence is entitled to some weight in determining whether the Aggravating Circumstances outweigh the Mitigating factors.

NATURE AND CIRCUMSTANCES OF THE OFFENSE

{¶11} The Court reviews the circumstances surrounding each of the Aggravated Murders of the eleven victims solely to determine the presence of any mitigating circumstances. The Aggravated Murder of a particular victim is not considered part of the Aggravating Circumstances for that victim. Therefore, the Court does not give individual Aggravated Murders any weight against mitigating factors presented in the case.

{¶12} The first person to disappear in this case was Crystal Dozier, a 35 year-old mother of seven children who struggled with drug addiction. She was last heard from on May 17, 2007. The body of Crystal Dozier was found almost two and one-half years later buried in a shallow grave in the backyard of 12205 Imperial Ave. Testimony from the Cuyahoga County Coroner and members of the Coroner's Trace Evidence Department described how the body was elaborately wrapped in multiple layers of heavy duty plastic sheets which were held in place with duct tape and electric cable. There was a cloth fabric ligature wrapped tightly around the neck. The hands were bound at the wrists and held above the head. The ankles were bound with wire cables. The body was nude from the waist down. The Coroner determined the cause of death as asphyxia by cervical compression due to ligature strangulation. Crystal Dozier's death was ruled a homicide.

{¶13} In 2007, Tishana Culver lived on Imperial Avenue about five houses down from defendant's house at 12205 Imperial. She was last seen sometime in March 2008. She had a problem with addiction to crack cocaine and had been incarcerated as a result of a Domestic Violence conviction. She was 29 years old and had five children. She also had mental health issues. At the time of her disappearance, she was in a relationship with Carl Johnson and family members believed she was in Akron with Mr. Johnson during part of the time she was missing. Her body was found in the crawl space next to the south bedroom of the third floor of 12205 Imperial Avenue on October 30, 2009. The body was wrapped in multiple black plastic bags secured with gray tape in the center and was covered with dirt. The body was clothed in a tee shirt, dress, pants and socks. Autopsy revealed a knotted rope binding the wrists and a fractured hyoid bone in the neck. The Coroner ruled the death a homicide caused by asphyxia due to strangulation.

{¶14} Leshanda Long disappeared in the summer of 2008. She was 25 years old and was a mother of three children who battled with drugs most of her adult life. She had been in and out of the Juvenile Court system and had been incarcerated before. She lived on E. 123rd St., near Kinsman. She was 4 foot, 7 inches tall and weighed about 110 lbs. Her body was never found. The only remains of Leshanda Long that were recovered was her skull, which was found in a bucket in the basement of 12205 Imperial Ave. The cause of death was determined to be homicidal violence.

{¶15} Michelle Mason was battling a drug problem at the time she went missing in October of 2008. At that time, she was 39 years old and was living on E. 121st St. and Buckeye, in the vicinity of 12205 Imperial Ave. She had two children, had a prior criminal record, had

been diagnosed with AIDS and was bi-polar. Her body was found buried in a shallow grave in the backyard of 12205 imperial Ave. The body was wrapped in two black plastic bags, a black comforter, a discolored orange blanket, and additional black plastic bags with grey tape in the center. There was a cloth ligature secured with a loop and a knot around the neck and the body was nude from the waist down. The Coroner ruled Michelle Mason's death a homicide with the cause of death asphyxia due to cervical compression caused by ligature strangulation.

{¶16} Tonia Carmichael was a mother of three children who became addicted to crack cocaine at approximately age 42. She frequented the area of 116th and Kinsman for drugs and the last time she was seen alive was November 10, 2008. She was 52 at that time. Her body was found in a shallow grave next to a bush in the backyard of 12205 Imperial Ave. It was wrapped in clear, plastic material. The body was nude. An electrical cord, believed to be the charging cord for a cell phone or camera, was wrapped tightly around the neck. The wrists were tied behind the body with a cloth ligature. The death was ruled a homicide and the cause of death was asphyxia by cervical compression due to ligature strangulation.

{¶17} Gladys Wade testified that on December 8, 2008, she was visiting her sister at 149th St. and Milverton, but left the house after an argument. She was walking towards 116th and Kinsman to catch a bus when she stopped at a beverage store at E.123rd St. and Imperial Ave. As she left the store, a person she identified as the defendant said Merry Christmas to her and began to follow her, attempting to strike up a conversation. She was continuing her walk towards the bus stop when the person trying to strike up a conversation, the defendant, grabbed her from behind and began choking her as he dragged her up the

driveway and into 12205 Imperial Ave. Ms. Wade testified that she passed out due to the choking and woke up on the third floor of the defendant's house in a room with a Christmas tree. She began to scream and the defendant then punched her and said "bitch, take your clothes off!" A struggle ensued between Ms. Wade and the defendant, which eventually led to their tumbling down the hallway and into a glass door which shattered, cutting Ms. Wade's thumb. Ms. Wade escaped from the defendant's house are ran across the street to a nearby store to have someone call 911, the store owner told her to make the call herself from a payphone outside. However, the outside payphone had been removed from its station. Defendant followed her to the store and threw her the sweater that she had left at his house. Ms. Wade then left the area and flagged down a Cleveland Police cruiser. She explained to officers what had happened and they took her to the hospital to attend to her injured thumb. Police investigated and collected evidence from 12205 Imperial corroborating Ms. Wade's story. They then placed defendant under arrest and took him into custody. However, defendant was later released and with no charges filed because a prosecutor for the city of Cleveland found there to be no credible evidence.

{¶18} Kim Smith disappeared in January of 2009. She was almost 44 years old. She did not have any children and had a substance abuse problem since her last year of high school. Her drug of choice was crack cocaine and it led to involvement with the criminal justice system. She was last seen on January 17, 2009 when she went shopping with her sister, just before her birthday on January 20th. Her body was found in the backyard of 12205 Imperial Ave., buried in a shallow grave and wrapped in two sheets of translucent plastic and three black plastic bags. No ligatures were found around the neck, but the body had fabric twine bindings around the wrists, tied in front of the body, and the ankles. The

body was nude from the waist down. The death was ruled a homicide and the cause of death was homicidal violence, type undetermined.

{¶19} Amelda Hunter was last seen sometime during the middle of April 2009. She had four children and, like the other victims, had an addiction to crack cocaine. She had been involved with attempts at drug treatment and was 46 years old at the time of her disappearance. Testimony from Ms. Hunter's sister revealed that Ms. Hunter had lived on Imperial Avenue for a time and that she was familiar with the defendant and had gone to his house in 2007 to buy drugs. Amelda Hunter's body was found in a shallow grave in the backyard of 12205 Imperial Avenue wrapped in multiple, heavy duty, plastic garbage bags. There was a ligature, in the form of a shoulder strap from a handbag or carrying case wrapped tightly around the neck. The body was nude from the waist down. The death was ruled a homicide and the cause of death was asphyxia by cervical compression due to ligature strangulation.

{¶20} Nancy Cobbs also had a drug problem. She lived on Cleveland's west side, but would frequent the area of E. 116th St. and Kinsman in order to get drugs. She was last seen by her daughter, Audrey Williams, on April 24, 2009. Her body was found wrapped inside six black plastic bags and a white blanket and was lying on the floor of the south bedroom on the third floor of 12205 Imperial Ave. The body was nude from the waist up and had a 36-inch long shoelace wrapped two times around the neck. There was also a sock tied around the neck. The wrists were bound by an 18-inch long shoestring. The death was ruled a homicide, with the cause of death asphyxia by cervical compression due to ligature strangulation.

{¶21} Janice Webb was 48 years old at the time of her death. She struggled with drugs for many years of her life and was in and out of drug treatment programs. She was last seen by her son Larmarr on June 21, 2009. According to her sister, Joanne Moore, Ms. Webb had occasion to be in the Mt. Pleasant area of Cleveland, as she visited her 93 year-old grandmother, who lived at E. 93rd St. and Kinsman, nearly every day. Janice Webb's body was found in the basement of 12205 Imperial Ave. under a pile of dirt located under the basement steps. The body was found in a plastic bag, nude, with a belt tied tightly around the neck, wrists bound in front by shoelaces and a shirt tied around the mouth as a gag. The Coroner ruled the death a homicide and the cause of death asphyxia by cervical compression due to ligature strangulation.

{¶22} Telecia Fortson was 31 years old and was the mother of three children. She also had a long-term addiction to crack cocaine. She disappeared in June of 2009 and was last seen by her daughter on June 3, 2009. Her body was found lying on the floor in the south bedroom of the third floor of 12205 Imperial Ave. She was nude from the waist down and there was a shirt tied around her neck as a ligature. Her death was ruled homicide by the Coroner and the cause of death was asphyxia by cervical compression due to ligature strangulation.

{¶23} Diane Turner was 38 years old and was the mother to Denise Martin. Diane Turner was addicted to drugs and, according to James Martin, the father of Denise Martin, Ms. Turner's problems with drugs began in 2002, when she lost custody of her child due to seizures she (Ms. Turner) suffered. Ms. Turner worked part-time at Dailey's, a Jamaican restaurant in the Mt. Pleasant area. She was last seen in late August, early September

2009. Her body was found lying on the floor of the south bedroom on the third floor of 12205 Imperial Ave., nude from the waist down and with a black, plastic bag around her legs. There were two robes and a pair of black pants laying over the body. The Coroner ruled her death a result of homicidal violence of undetermined means.

{¶24} Latundra Billups testified that she moved to Imperial Avenue in 2007 and knew the defendant from the neighborhood. She also testified that she would smoke crack cocaine with the defendant and his ex-girlfriend, Lori Frazier. On September 22, 2009, she went back to the house at 12205 Imperial Ave. to drink and get high with defendant. They went to the second floor of the house and, after smoking and drinking, defendant told her to stand up and turn around. Ms. Billups testified that the defendant then put his hand on the back of her neck, kind of forceful, and she turned around and pushed him. She testified that, at that point, he hit her hard on the side of her face and told her to take off her clothes. She took off her pants and he forced her to lie down on a blanket spread on the floor. Defendant performed oral sex on her. Ms. Billups testified that she was crying. Defendant then made her turn onto her stomach and he penetrated her vagina with his penis from behind. As he was penetrating her, he put an extension cord around her neck and began to squeeze it until she could not breathe. She tried to struggle, but eventually passed out. When she woke up she testified that she felt wet and smelled feces in the room. She said that she started looking for her pants and shoes. Defendant told her that she wasn't going anywhere. She testified that the defendant looked shocked that she woke up. He then told her that he was going to kill her and then himself because he knew he was going to jail. Ms. Billups told him that he wasn't going to jail and turned the focus on her ripped sweater. He told her to come back tomorrow and that he would pay her for the

sweater and that they could get high and drunk again together. Ms. Billups sought treatment at the hospital for injuries to her neck and then reported it to the police. After delays due to poor communication between Ms. Billups and police, a warrant was obtained for the arrest of Anthony Sowell. While attempting to serve this warrant on October 29, 2009, police began the discovery of bodies at 12205 Imperial Ave.

{¶25} Shawn Morris testified that after overcoming a drug problem, which had been an issue for most of her life, she relapsed on October 19, 2009, when she stayed out all night drinking and looking to get high. She met the defendant at a bus stop near his house on Imperial Ave. After having a conversation with him, she accompanied the defendant back to his house on October 20th. After drinking and smoking crack cocaine with defendant for several hours, Ms. Morris left to return to her family. A short distance from defendant's house, she realized that she had left her I.D. in the defendant's bedroom, so she returned to the house, called up to the defendant, expecting him to just toss her I.D. out to her from the window. However, he told her to come get it herself. Defendant let her in the house and was behind her as she began walking up the stairs to the third floor. Ms. Morris testified that the defendant then grabbed her from behind, put her in a military chokehold and dragged her upstairs to his bedroom on the third floor. Once in the bedroom, defendant told her to take off her clothes and get on the bed. He told her to lay on her stomach and then proceeded to violently rape her. While he was raping her, the defendant was talking about how he hated you bitches. He said: "look at you, you've got a husband at home and you out here in the streets." According to Ms. Morris, defendant was saying "that's why I hate bitches." Ms. Morris testified that defendant tried to penetrate her anus with his penis and she screamed. Defendant then started closing windows. When he left the room to

close other windows, Ms. Morris began to climb out of the bedroom window to escape, believing she could hang drop and perhaps only break a leg or twist an ankle. When he came back into the room and saw Ms. Morris hanging from the windowsill, defendant tried to pull her back into the house. However, when the defendant realized that he could not pull Ms. Morris back in, he shoved her down as hard as he could. Ms. Morris fell to the ground below and broke both hands, eight ribs, fractured her skull and experienced an aneurysm. The fall also rendered her unconscious. Testimony of other witnesses at the scene described how the defendant tried to move Ms. Morris despite their warnings that she would be injured if moved. Defendant eventually moved Ms. Morris back into the house and dropped her on the floor when firefighters and EMS arrived. Defendant rode with Ms. Morris in the ambulance to the hospital and told hospital and EMS personnel that he was her husband. Ms. Morris told hospital personnel that she was hit by a car. She did not report the incident to police because the defendant had told her that he had people that would come after her and kill her.

{¶26} Following up on the rape allegations by Latundra Billups against the defendant, members of the Cleveland Police SWAT unit entered the home at 12205 Imperial Avenue on October 29, 2009, searching for Anthony Sowell. Instead they found two decomposing bodies in the south bedroom of the third floor of the house. The bodies were later identified to be Telecia Fortson and Diane Turner. On October, 31, 2009, in response to a tip from a citizen concerning the whereabouts of Anthony Sowell, the defendant was arrested by Cleveland Police while walking down Mt. Auburn Avenue, a few blocks from Imperial Ave. At first the defendant gave police a false name and indicated that he had been stopped the day before and cleared. However, when it was suggested that police would run his

fingerprints through their computer system, defendant admitted he was Anthony Sowell, the person they were looking for.

{¶27} During an extensive interrogation by Cleveland Police Homicide Detectives, the defendant could not identify any of the six bodies that had been recovered from his house at that time. He described dreams where he was "hurting" people with his hands, and that he choked them. According to the defendant, he did this in his dreams "to punish them." However, he provided few details of the murders or explanation as to how the bodies that were recovered ended up in the places and in the condition in which they were found. Defendant blamed much of his problems on his former girl friend, Lori Frazier, who broke up with him in 2007. He told detectives that he had a breakdown after that. He also indicated hostility towards the victims, stating that: "they had kids and were out on the street." He also referred to them as "bad ones" and admitted that he had sex with all of them.

{¶28} There was evidence from the nature and circumstances of the Aggravated Circumstances that lends support to defendant's mitigation theory. Dr. George Woods, Defendant's expert neuro-psychiatrist, testified that defendant suffered from Obsessive-Compulsive Disorder (OCD), severe, chronic, with sexual obsession; Post Traumatic Stress Disorder (PTSD); Psychosis, Not Otherwise Specified (NOS); Cognitive Disorder – NOS; and Cocaine Dependence and Cannabis Abuse. There was also testimony from family members of the defendant and, most notably, his cellmate for ten years, Roosevelt Lloyd, that defendant was very protective about his "stuff" and that he would organize all of his belongings and constantly count them to assure himself that nothing was missing.

Evidence from the crime scene, autopsy and trace evidence reports regarding some of the elaborate wrappings surrounding the bodies uncovered from Imperial Avenue goes towards the argument in mitigation that defendant suffered from OCD. Also, the fact that all but one of the eleven victims were either nude or partially clothed, in addition to the more graphic testimony of Gladys Wade, Latundra Billups and Shawn Morris, is evidence in support of Dr. Woods' diagnosis of the defendant as suffering from a sexual obsession. The look in the defendant's eyes that preceded the attacks, as described by some of the surviving victims, also supports defendant's theory of Psychosis, or defendant's detachment from reality.

{¶29} Further support of Dr. Woods' diagnosis can be developed from the testimony of Debbie Madison, a neighbor of the defendant. Mrs. Madison testified that when police were discovering the bodies at 12205 Imperial, she thought one of them was the defendant, Anthony Sowell. She went to tell defendant's sister, Tressa Garrison, who lived nearby. Ms. Madison found the defendant at his sister's house playing video games. She told defendant that the police had found two bodies at his house. In response, defendant said: "Yeah, I know. That girl made me do it." This statement offers some support to the defense mitigation theory that the defendant was emotionally devastated by his break up with Lori Frazier in 2007 and that event, coupled with his heart attack that same year may have caused changes to his brain that contributed to psychosis and a cognitive disorder that left him unable to control his compulsions.

{¶30} The State introduced the rebuttal testimony of Dr. Diana Goldstein and Dr. James Knoll in opposition to much of the testimony of defendant's expert witnesses. Dr. Goldstein

differed in her interpretation of the results of neuropsychological testing performed by Dr. Dale Watson. Dr. Goldstein concluded that: malingering of cognitive impairment can not be ruled out; that defendant is not suffering from any significant cognitive impairment; and that his 2007 heart attack did not lead to any significant neurocognitive change that would account for changes in personality or lead to illegal conduct. Dr. Knoll disagreed with Dr. Woods' conclusion that the defendant did not have the capacity to conform his behavior to the law or that his conduct was uncontrollable and found Dr. Wood's diagnosis on that issue to be unsubstantiated. Dr. Knoll noted that brain dysfunction is not associated with the type of complex criminal behavior that took place in this case and that the level of planning and decisions made by the defendant in order to carry out these crimes was evidence of a planned rather than an impulsive act. Dr. Knoll testified concerning his research regarding serial killers and likened the defendant's behavior to that of individuals who engage in repeated criminal behavior and who are classified as suffering from Anti-Social Personality Disorder. Based on this testimony, the Court finds that the mitigating factors evident in the nature and circumstances of the Aggravated Circumstances are counter-balanced by the evidence in opposition and therefore, affords them no weight.

HISTORY, CHARACTER AND BACKGROUND OF ANTHONY SOWELL

{¶31} In the Sentencing Phase, defendant introduced the testimony of family members, schoolteachers, employment counselors/social workers, employers, jail personnel, a military records expert, and defendant's mitigation specialist. This testimony established that defendant had a troubled, unstable upbringing characterized by abuse, neglect and sexual abuse.

{¶32} Defendant was born in Cleveland, Ohio on August 19, 1959 to Thomas Sowell and Claudia Garrison. Thomas Sowell was married to another woman at the time. Thomas Sowell is described as a womanizer who also suffered from alcoholism. Thomas Sowell died on March 11, 2003. Claudia Garrison was primarily responsible for defendant during his childhood. She worked at a local steel mill, as well as other odd jobs. After the death of Claudia's daughter, Patricia Davis, Claudia assumed custody of Patricia's seven children and they moved into Claudia Garrison's home on Page Avenue in Cleveland, along with her other children: Anthony (defendant), Tressa, and Owen.

{¶33} Defendant's sister Tressa described what it was like growing up in the family home on Page Avenue, once the Davis children moved in. She said that her mother was working most of the time, so her grandmother, Irene Justice, handled much of the disciplining of children. According to Tressa, Irene Justice would "whoop" the Davis kids with a belt, extension cord, "switch", or cane. Some of the beatings were severe and would draw blood. Most of the beatings were of the Davis children, although both Tressa and the defendant could recall one incident where they were beaten. Tressa also testified that she ran away from home because she was neglected by her mother.

{¶34} Leona Davis testified that both she and her twin sister Ramona were beaten by both Irene Justice and Claudia Garrison at the Page Avenue home. She testified that they would be told to strip down to their underwear and were tied to the banister and then beaten with extension cords or "switches". She said that they were beaten almost every day and that the Sowell children: Anthony, Tressa and Owen, were not beaten and that they watched from other rooms. Leona testified that she continued to run away from the Page Avenue

home, but would be returned to the home by police. She began to set fires in order to escape the home and finally was incarcerated at a juvenile facility. She reported being raped by the defendant on more than one occasion when he was 12 and she was approximately 10 years old. She also reported that she was raped by the defendant's brother Owen, who she referred to as "Junior".

{¶35} Defendant's Mitigation Expert, Dr. Lori James-Townes, reported that there were incidents of defendant being sexually abused in the Page Avenue home by Robin, Patricia Davis' oldest son, as well as Jesse Hatcher's daughter, Princess. Defendant also reported being sexually abused by the mother of his girlfriend, Valencia. With respect to defendant's schooling, Ms. James-Townes reports that defendant was a below-average student with little or no incidents and a great attendance record. However, he dropped out of school to join the Marines in 1977. According to Dr. James-Townes, and the defendant during his unsworn statement, he joined the Marines to get away from his mother. Defendant said that he chose the Marines because his mother said he wasn't capable of getting into the Army. Defendant did well in the military. He graduated at the top of his class for basic training and was promoted to the rank of Private First Class. Defendant received further promotions during a nearly eight-year career in the Marines. He was honorably discharged in 1985 with the rank of Corporal.

{¶36} While serving in the Marines, defendant met Kim Lawson, a fellow Marine. They began dating and were married in September 1981. They eventually separated and Kim later died in 1998 as a result of an accident. After being discharged from the Marines, defendant moved back into his mother's home on Page Avenue with Twyla Austin, the

mother of his daughter. Ms. Austin found out she was pregnant with defendant's child after he entered the Marines. The child was born in September of 1978.

{¶37} In July of 1989, defendant was arrested at the Page Avenue house on Rape charges. Police responded to a report of a woman, naked on the roof of the house calling for help. When they arrived on scene, police found a woman with her hands tied behind her back with a necktie. She accused defendant of raping her. Defendant pled to a reduced charge of Attempted Rape and served a prison term of 15 years. Defendant adjusted to prison life and, according to his cellmate of 10 year, Roosevelt Lloyd, who testified that defendant was so loved by the staff at the Grafton Correctional Institution that they hugged him upon his release. Mr. Lloyd also described defendant as going into "military mode" when he was threatened. That he would get a glare in his eyes, would rub his face and play with his eyebrows as he was deciding: "should I attack or not attack?" He said that defendant's eyes would be in a daze when he was in this state.

{¶38} After being released from prison, defendant sought assistance in obtaining a job and used the services of Networks for Success and Towards Employment. He obtained blue-collar jobs at North American Packaging and then Custom Rubber on E. 55th St. in Cleveland. He was also able to obtain seasonal work at Jacobs Field where he worked in the kitchen during Cleveland Indians games. In part, due to a heart attack he suffered in February 2007, defendant could no longer be employed at Custom Rubber. Thereafter, he had difficulty finding work and started "scraping" (selling scrap metal) to make money.

{¶39} As described above, the evidence of defendant's history, character and background is worthy of some weight in mitigation. During the Sentencing Phase, defendant

established that he had a somewhat dysfunctional background and was raised in a family structure that was often violent, non-nurturing and abusive at times. Predictably, this formula led to defendant's problems with substance abuse, relationships and eventual criminal behavior. However, the weight given to this mitigating element is not sufficient on its own to overcome the Aggravating Circumstance as there was also testimony concerning aspects of the defendant's family life that were normal. Defendant even stated in his unsworn statement, that despite all their faults, he loved his mother and his father and he loved his sisters. By all reports, defendant loved the daughter he fathered with Twyla Austin and was able to live in a committed relationship - his marriage to Kim Lawson. He was able to succeed and even excel in the U.S. Marines. He was able to hold down jobs after being released from prison, and he had a somewhat normal relationship with Lori Frazier (the caveat being that the relationship involved the use of drugs). In addition, a majority of the children who were subject to the same, or worse environment that defendant grew up in, did not develop the same propensity towards violence as the defendant. Therefore, the weight to be given to mitigating factors found within the nature, background and history of the defendant is minimal.

The Court next considers specific, relevant mitigating factors listed in R.C. 2929.04(B).

R.C. 2929.04(B)(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

{¶40} Dr. George Woods testified that the defendant suffered from: Obsessive-Compulsive Disorder – severe, chronic (with sexual obsession)[8]; Post-Traumatic Stress Disorder – type I; Psychosis (Not Otherwise Specified); and Cognitive Disorder (NOS). According to Dr. Woods, defendant's symptoms of depression were augmented by the heart attack he suffered in February 2007, which also impaired his cognitive functioning and created the psychosis he suffers from today. Dr. Woods testified that, since his heart attack and his break up with Lori Frazier, defendant is no longer capable of regulating his compulsions, and his compulsions or actions are driven by his obsessions. The most significant obsession in this regard is the defendant's sexual obsession.

{¶41} However accurate that diagnosis might be, it does not explain defendant's propensity for murder. Defendant admitted to having sex with all of his victims. Dr. Woods diagnosis would explain that admission. But Dr. Woods diagnosis fails to provide an explanation as to why defendant's compulsion caused him to murder these women after having sex with them. As pointed out by Dr. Knoll during his testimony, there was no evidence of any significant cognitive dysfunction or mental defect in the mind of the defendant that would explain why he had to kill. Hatred for women was a theory introduced

8. Dr. Woods admitted that there is no recognized sexual component to his diagnosis of OCD, but added it to his diagnosis because he thought it was relevant.

by the State during Dr. Woods cross-examination, but he would not adopt that as "the" reason for the defendant's action. Without any significant evidence that a mental disease or defect caused him to be unable to conform his conduct to the law, in other words, not to kill people, the Court gives some, but not significant weight to defendant's evidence addressed to this factor in mitigation.

R.C. 2929.04(B)(7) - ANY OTHER FACTORS THAT ARE RELEVANT TO THE ISSUE OF WHETHER THE OFFENDER SHOULD BE SENTENCED TO DEATH

{¶42} Under R.C. 2929.04(B)(7), the Court may consider any other evidence not specifically set forth above that would be such as to justify mitigating a sentence of death to a life alternative. The defendant submitted evidence of defendant's military record for consideration under this factor. The defendant also indicated that his mental capacity, as described by Dr. Watson and Dr. Woods should also be considered under this factor. Defendant failed to specifically identify other factors that would merit consideration under 2929.04(B)(7). However, the Court can infer from the evidence presented that defendant is asserting the following as factors in mitigation: the love and support of defendant's family; his academic record; his work history; his ability to function as a productive person in a structured environment such as prison; and his remorse for his crimes.

{¶43} The Court considers defendant's academic record as a child in the City of Cleveland and City of East Cleveland schools as a factor in mitigation. Defendant had a near perfect attendance record, but struggled to keep his grades at a "C" level. There is no indication that defendant needed special education classes, so the inference can be made that he was an average to below-average student, who may have tried but did not accomplish much from an academic perspective. According to the report by defendant's mitigation

expert, defendant cherished his time in school because it got him out of his home environment, but he did a lot of day dreaming and doodling in class instead of applying himself. This caused him to be reprimanded by teachers. There is no dispute that defendant was a "below-average" student. However, given defendant's own lack of effort, it is difficult to find any mitigation evidence in defendant's educational record and the Court affords it no weight.

{¶44} The Court next considers the love and support of defendant's family as a mitigating factor. There was testimony by Tressa Garrison, Alan Sowell, Twyla Austin, and Roosevelt Lloyd in support of defendant. Roosevelt Lloyd is not a family member, but was, and still is according to him, defendant's best friend. Their testimony regarding the good that they saw in the defendant over the course of his life is entitled to some weight and the Court will acknowledge the love and support of family as a mitigating factor.

{¶45} Defendant raises his military record in the U.S. Marines as a mitigating factor. Testimony by Walter Bansley, defendant's military records expert and a former Marine himself, testified that defendant was at the top of his class in basic training and was promoted to the level of Private First Class, a very high distinction for a Marine recruit. Defendant also was promoted to the rank of Lance Corporal, Corporal and ultimately Sergeant. Defendant served a total of nearly eight years in the Marines before being honorably discharged in 1985. One of the few negative marks found in defendant's military record was a disciplinary proceeding where he suffered a reduction in rank after an altercation with a ranking officer. However, defendant's exemplary military record is entitled to some weight in mitigation and the Court weighs it accordingly.

{¶46} Defendant's ability to function as a productive person while in prison is given little weight in mitigation. The institutional record produced by defendant during the Sentencing Phase indicates that the defendant adjusted to prison during a previous 15-year incarceration for attempted rape. However, it is equally clear that subsequent to his release, defendant has engaged in a pattern of offenses against women culminating in the serial killings of eleven women and attack on three others. It appears that prison has had little effect on defendant's future conduct. Therefore, little to no weight is given to this factor.

{¶47} The Court considered defendant's record as a productive employee as a mitigating factor. Defendant worked for about three months at North American Packaging and then approximately a year and one-half with Custom Rubber before a heart attack caused him to be released in July 2007. He also worked as a cook for the Cleveland Indians at Jacobs Field for about three months. Despite an employment record demonstrating that defendant was a good worker, the record also indicates that he never held a job longer than his time at Custom Rubber. After his heart attack there was no indication that he was disabled to the point where he could no longer work. In fact, he did work after his heart attack in 2007, but his employment history was spotty at best. It appeared as if defendant just "gave up" on working to find gainful employment after Custom Rubber. Defendant's employment record is entitled to some weight, but given the totality of his work history, that weight is minimal.

{¶48} The Court also considers the evidence presented, but not accepted in support of the 2929.04(B)(3) factor discussed above. That is the testimony of Dr. Dale Watson regarding

evidence of brain dysfunction or impairment in the defendant's parietal lobe causing a delay in processing speed and suggesting the further possibility of a psychological disturbance. However, even as a 2929.04(B)(7) factor, Dr. Watson's opinion is still subject to the contrary opinion of Dr. Diana Goldstein. Dr. Goldstein reviewed the same data as Dr. Watson and did not find any evidence of significant brain dysfunction or link between a suspected personality disorder and defendant's 2007 heart attack. Also considered as a (B)(7) factor, are Dr. Woods' findings and conclusions with respect to the diagnoses of OCD, PTSD and Psychosis NOS. These findings were severely questioned by Dr. James Knoll and found to be without proper foundation or support. Therefore the factors concerning defendant's mental health, which are again considered under 2929.04(B)(7) are given no weight as they were previously afforded some weight under 2929.04(B)(3).

{¶49} The Court next considers remorse as a mitigating factor. The Court gives defendant's demonstration of remorse no weight. This is due to the fact that, even though he said he was sorry – sorry from the bottom of his heart, he failed to take responsibility for his crimes by adding " I don't know what happened!" "I can't explain it." If defendant was truly remorseful, he would accept responsibility for his actions. It should also be noted that, when the bodies were being discovered from his house on 12205 Imperial, the defendant was playing video games at his sister's house. When notified of the discovery by a neighbor, defendant, knowing full well what was in the house at 12205 Imperial, avoided the scene, was preparing to leave the area and gave police a false name when arrested. Defendant's cooperation with police during a tortured 12-hour interview session over the course of two days was minimal. He lied to police when questioned about his attack on Latundra Billups. He told police that she wanted to whip him with an extension cord, then

when confronted with the fact of her allegation that he used an extension cord to strangle her, he denied any knowledge of an extension cord. At trial, defendant never changed his expression when photograph after photograph of the crime scene and the decomposed bodies of eleven women were hauled out from in and around his house. However, when one of his family members or his ex-girlfriend, Lori Frazier, testified, defendant's affect changed and he showed emotion, both happiness (laughter) and sadness (tears) during their testimony. The testimony and diagnoses of Dr. Woods might explain some of what the court observed, i.e. defendant's psychosis or "disassociation" with the real world. But Dr. Knoll's explanation is equally plausible - that is, "disassociative amnesia" - or the inability to recall traumatic incidents after the fact. Dr. Knoll also suggested that the defendant has no capacity for remorse. In other words, he's a psychopath -- a serial killer. That diagnosis is subject to debate, but what's clear is that it was too easy for defendant to turn off the world when it called for him to feel for others, and then turn it back on when the focus was on him. The Court therefore gives no weight to defendant's expression of remorse.

WEIGHING THE AGGRAVATING CIRCUMSTANCE AGAINST MITIGATING FACTORS

{¶50} The Court first notes that the Aggravating Circumstances in this case are significant and entitled to great weight. The Course of Conduct Aggravating Circumstance is especially deserving of great weight. The fact that the defendant purposefully killed or attempted to kill two or more persons, meaning the 13 victims of Aggravated Murder or Attempted Murder for each Count, and that he committed the crime of Aggravated Murder while also committing the felony offense of Kidnapping, raises the seriousness of these

circumstances to the highest level. Against these two aggravating circumstances the Court must weigh the mitigating factors. Although the factors in mitigation are entitled to some weight, after weighing the Aggravating Circumstance of Felony Murder and Course of Conduct against the Mitigating Factors, the Court finds that the Aggravating Circumstances outweigh the Mitigating Factors beyond a reasonable doubt and therefore finds that the sentence of death shall be imposed upon the defendant, Anthony Sowell for each Count of Aggravated Murder for which the jury found him guilty.

IT IS SO ORDERED!

Date: 8/24/2011

JUDGE DICK AMBROSE

CERTIFICATE OF SERVICE

A copy of the foregoing Sentencing Opinion was sent by ordinary U.S. Mail on this 24th day of August, 2011 to the following:

Richard Bombeck
Pinky Carr
Lauren Bell
Assistant County Prosecutors
Office of William D. Mason - Cuyahoga County Prosecutor
9th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
ATTORNEYS FOR THE STATE OF OHIO

and

John Parker, Esq.
988 E. 185th St.
Cleveland, Ohio 44119

Rufus Sims, Esq.
75 Public Square, #1111
Cleveland, Ohio 44113
ATTORNEYS FOR DEFENDANT ANTHONY SOWELL

and

Clerk of Courts
Supreme Court of Ohio
65 South Front Street
Columbus, Ohio 43215

Fifth Amendment - Rights of Persons

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.

Sixth Amendment - Rights of Accused in Criminal Prosecutions

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

Amendment VIII

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

(Effective 1791)

Fourteenth Amendment - Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection

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 I § 1.10 Ohio Constitution Trial for crimes; witness (1851; amended 1912)

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.)

Article I § 9 Bail; cruel and unusual punishments

All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

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

(As amended January 1, 1998.)

Article I § 16 Redress in courts (1851, amended 1912)

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.

(As amended September 3, 1912.)

AMENDMENT IX

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

Article 2 - The Executive Branch
Section 2 - Civilian Power Over Military, Cabinet, Pardon Power, Appointments

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

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

RULE 11. Pleas, Rights Upon Plea

(A) Pleas. A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas. With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim.R. 32.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim.R. 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses. In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim.R. 44 by appointed counsel, waives this right.

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

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

(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.

[Effective: July 1, 1973; amended effective July 1, 1976; July 1, 1980; July 1, 1998.]

RULE 18. Venue and Change of Venue

(A) General venue provisions. The venue of a criminal case shall be as provided by law.

(B) Change of venue; procedure upon change of venue. Upon the motion of any party or upon its own motion the court may transfer an action to any court having jurisdiction of the subject matter outside the county in which trial would otherwise be held, when it appears that a fair and impartial trial cannot be held in the court in which the action is pending.

(1) Time of motion. A motion under this rule shall be made within thirty-five days after arraignment or seven days before trial, whichever is earlier, or at such reasonable time later as the court may permit.

(2) Clerk's obligations upon change of venue. Where a change of venue is ordered the clerk of the court in which the cause is pending shall make copies of all of the papers in the action which, with the original complaint, indictment, or information, he shall transmit to the clerk of the court to which the action is sent for trial, and the trial and all subsequent proceedings shall be conducted as if the action had originated in the latter court.

(3) Additional counsel for prosecuting attorney. The prosecuting attorney of the political subdivision in which the action originated shall take charge of and try the case. The court to which the action is sent may on application appoint one or more attorneys to assist the prosecuting attorney in the trial, and allow the appointed attorneys reasonable compensation.

(4) Appearance of defendant, witnesses. Where a change of venue is ordered and the defendant is in custody, a warrant shall be issued by the clerk of the court in which the action originated, directed to the person having custody of the defendant commanding him to bring the defendant to the jail of the county to which the action is transferred, there to be kept until discharged. If the defendant on the date of the order changing venue is not in custody, the court in the order changing venue shall continue the conditions of release and direct the defendant to appear in the court to which the venue is changed. The court shall recognize the witnesses to appear before the court in which the accused is to be tried.

(5) Expenses. The reasonable expenses of the prosecuting attorney incurred in consequence of a change of venue, compensation of counsel appointed pursuant to Rule 44, the fees of the clerk of the court to which the venue is changed, the sheriff or bailiff, and of the jury shall be allowed and paid out of the treasury of the political subdivision in which the action originated.

[Effective: July 1, 1973.]

RULE 24 Trial Jurors

(A) Examination of jurors. Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to the juror's qualifications. The court may permit the attorney for the defendant, or the defendant if appearing *pro se*, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry.

(B) Challenge for cause. A person called as a juror may be challenged for the following causes:

(1) That the juror has been convicted of a crime which by law renders the juror disqualified to serve on a jury.

(2) That the juror is a chronic alcoholic, or drug dependent person.

(3) That the juror was a member of the grand jury which found the indictment in the case.

(4) That the juror served on a petit jury drawn in the same cause against the same defendant, and the petit jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside.

(5) That the juror served as a juror in a civil case brought against the defendant for the same act.

(6) That the juror has an action pending between him or her and the State of Ohio or the defendant.

(7) That the juror or the juror's spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against the juror.

(8) That the juror has been subpoenaed in good faith as a witness in the case.

(9) That the juror is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

(10) That the juror is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted; or to the defendant.

(11) That the juror is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant.

(12) That the juror is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney, of any person included in division (B)(11) of this rule.

(13) That English is not the juror's native language, and the juror's knowledge of English is insufficient to permit the juror to understand the facts and the law in the case.

(14) That the juror is otherwise unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in division (B) of this rule shall be determined by the court.

(C) Peremptory challenges. In addition to challenges provided in division (B) of this rule, if there is one defendant, each party peremptorily may challenge three jurors in misdemeanor cases, four jurors in felony cases other than capital cases, and six jurors in capital cases. If there is more than one defendant, each defendant peremptorily may challenge the same number of jurors as if the defendant was the sole defendant.

In any case where there are multiple defendants, the prosecuting attorney peremptorily may challenge a number of jurors equal to the total peremptory challenges allowed all defendants. In case of the consolidation of any indictments, informations or complaints for trial, such consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information or complaint.

(D) Manner of exercising peremptory challenges. Peremptory challenges may be exercised after the minimum number of jurors allowed by the Rules of Criminal Procedure has been passed for cause and seated on the panel. Peremptory challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge. If all parties, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused and another juror shall be called who shall take the place of the juror excused and be sworn and examined as other jurors. The other party, if that party has peremptory challenges remaining, shall be entitled to challenge any juror then seated on the panel.

(E) Challenge to array. The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law. A challenge to the array shall be made before the examination of the jurors pursuant to division (A) of this rule and shall be tried by the court.

No array of petit jurors shall be set aside, nor shall any verdict in any case be set aside because the jury commissioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return.

(F) Alternate jurors.

(1) Non-capital cases. The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. Except in capital cases, an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternative jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by this rule may not be used against an alternate juror.

(2) Capital cases. The procedure designated in division (F)(1) of this rule shall be the same in capital cases, except that any alternate juror shall continue to serve if more than one deliberation is required. If an alternate juror replaces a regular juror after a guilty verdict, the court shall instruct the alternate juror that the juror is bound by that verdict. No alternate juror shall be substituted during any deliberation. Any alternate juror shall be discharged after the trial jury retires to consider the penalty.

(G) Control of juries.

(1) Before submission of case to jury. Before submission of a case to the jury, the court, upon its own motion or the motion of a party, may restrict the separation of jurors or may sequester the jury.

(2) After submission of case to jury.

(A) Misdemeanor cases. After submission of a misdemeanor case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors.

(B) Non-capital felony cases. After submission of a non-capital felony case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors during any period of court adjournment or may require the jury to remain under the supervision of an officer of the court.

(C) Capital cases. After submission of a capital case to the jury, the jury shall remain under the supervision of an officer of the court until a verdict is rendered or the jury is discharged by the court.

(3) Separation in emergency. Where the jury is sequestered or after a capital case is submitted to the jury, the court may, in an emergency and upon giving cautionary instructions, allow temporary separation of jurors.

(4) Duties of supervising officer. Where jurors are required to remain under the supervision of an officer of the court, the court shall make arrangements for their care, maintenance and comfort.

When the jury is in the care of an officer of the court and until the jury is discharged by the court, the officer may inquire whether the jury has reached a verdict, but shall not:

(a) Communicate any matter concerning jury conduct to anyone except the judge or;

(b) Communicate with the jurors or permit communications with jurors, except as allowed by court order.

[Effective: July 1, 1973; amended effective July 1, 1975; July 1, 2002.]

Staff Note (July 1, 2002 Amendment)

Criminal Rule 24 Trial Jurors
Criminal Rule 24(A), (B), (C), (D), and (E)

Throughout divisions (A) – (E), masculine references were changed to gender-neutral language, the style used for rule references was changed, and other grammatical changes were made. No substantive amendment to any of these divisions was intended.

Criminal Rule 24 (F) Alternate jurors

The amendment effective July 1, 2002 divided division F of the previous rule into divisions (F)(1) and (F)(2). Division (F)(1) [Non-capital cases] contains the substance of previous division (F), plus the inclusion of an exception for capital cases. Division (F)(2) [Capital cases] was added to permit alternate jurors in capital murder cases to continue to sit as alternate jurors after a guilty verdict has been rendered. If an alternate juror replaces a regular juror for the penalty phase of the trial, the trial judge shall instruct the alternate juror that the alternate juror is bound by the guilty verdict.

RULE 31. Verdict

(A) Return. The verdict shall be unanimous. It shall be in writing, signed by all jurors concurring therein, and returned by the jury to the judge in open court.

(B) Several defendants. If there are two or more defendants the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(C) Conviction of lesser offense. The defendant may be found not guilty of the offense charged but guilty of an attempt to commit it if such an attempt is an offense at law. When the indictment, information, or complaint charges an offense including degrees, or if lesser offenses are included within the offense charged, the defendant may be found not guilty of the degree charged but guilty of an inferior degree thereof, or of a lesser included offense.

(D) Poll of jury. When a verdict is returned and before it is accepted the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged.

[Effective: July 1, 1973.]

2929.02 Murder penalties.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Effective Date: 10-19-1981

2929.03 Imposition of sentence for aggravated murder.

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

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

(a) Life imprisonment without parole;

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

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

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

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

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

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

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

2929.04 Death penalty or imprisonment - aggravating and mitigating factors.

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

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

(2) The offense was committed for hire.

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

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

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

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

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

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

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

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

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

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

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

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

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

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and

(3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

Effective Date: 05-15-2002

2929.05 Supreme court review upon appeal of sentence of death.

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

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

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

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

2939.20 Concurrence by twelve grand jurors for indictment.

At least twelve of the grand jurors must concur in the finding of an indictment. When so found, the foreman shall indorse on such indictment the words "A true bill" and subscribe his name as foreman.

Effective Date: 10-01-1953

2941.143 Offense in school safety zone or towards a person in school safety zone specification.

Imposition of a sentence by a court pursuant to division (H) of section 2929.14 of the Revised Code is precluded unless the indictment, count in the indictment, or information charging aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence specifies that the offender committed the offense in a school safety zone or towards a person in a school safety zone. The specification shall be stated at the end of the body of the indictment, count, or information and shall be in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The grand jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender committed aggravated murder, murder, or the felony of the first, second, or third degree that is an offense of violence in a school safety zone or towards a person in a school safety zone)."

Amended by 129th General Assembly File No. 29, HB 86, § 1, eff. 9/30/2011.

Effective Date: 08-06-1999

2945.06 Procedure for trial by 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.

Effective Date: 10-19-1981

2945.171 Written verdicts.

In all criminal cases the verdict of the jury shall be in writing and signed by each of the jurors concurring therein.

Effective Date: 09-28-1961

2945.21 Peremptory challenges.

(A)(1) In criminal cases in which there is only one defendant, each party, in addition to the challenges for cause authorized by law, may peremptorily challenge three of the jurors in misdemeanor cases and four of the jurors in felony cases other than capital cases. If there is more than one defendant, each defendant may peremptorily challenge the same number of jurors as if he were the sole defendant.

(2) Notwithstanding Criminal Rule 24, in capital cases in which there is only one defendant, each party, in addition to the challenges for cause authorized by law, may peremptorily challenge twelve of the jurors. If there is more than one defendant, each defendant may peremptorily challenge the same number of jurors as if he were the sole defendant.

(3) In any case in which there are multiple defendants, the prosecuting attorney may peremptorily challenge a number of jurors equal to the total number of peremptory challenges allowed to all of the defendants.

(B) If any indictments, informations, or complaints are consolidated for trial, the consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information, or complaint.

(C) The exercise of peremptory challenges authorized by this section shall be in accordance with the procedures of Criminal Rule 24.

Effective Date: 10-19-1981

2945.25 Challenges for cause.

A person called as a juror in a criminal case may be challenged for the following causes:

(A) That he was a member of the grand jury that found the indictment in the case;

(B) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial;

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

(D) That he is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted, or to the defendant;

(E) That he served on a petit jury drawn in the same cause against the same defendant, and that [petit] jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside;

(F) That he served as a juror in a civil case brought against the defendant for the same act;

(G) That he has been subpoenaed in good faith as a witness in the case;

(H) That he is a chronic alcoholic, or drug dependent person;

(I) That he has been convicted of a crime that by law disqualifies him from serving on a jury;

(J) That he has an action pending between him and the state or the defendant;

(K) That he or his spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him;

(L) That he is the person alleged to be injured or attempted to be injured by the offense charged, or is the person on whose complaint the prosecution was instituted, or the defendant;

(M) That he is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney of any person included in division (L) of this section;

(N) That English is not his native language, and his knowledge of English is insufficient to permit him to understand the facts and law in the case;

(O) That he otherwise is unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in this section shall be determined by the court.

Effective Date: 10-19-1981

2945.27 Challenges for cause to be made before jury sworn.

The judge of the trial court shall examine the prospective jurors under oath or upon affirmation as to their qualifications to serve as fair and impartial jurors, but he shall permit reasonable examination of such jurors by the prosecuting attorney and by the defendant or his counsel.

Effective Date: 09-09-1957

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

V.

Kevin L. Gray

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 00-157-1

Francis D. Carter
Defendant's Attorney

FILED
MAY 11 2005
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

THE DEFENDANT:

Was found guilty by jury trial on Count(s) 2 thru 14, 21 thru 27,30 thru 36, 39 thru 44, 58 thru 66, 72 thru 78, 80 thru 82, 89 thru 92, 96,97, 101,103 108,110, ,113 thru 118, 120 thru 122, 124,126,128,129 and 131 on 1/9/03 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Count(s)
21USC848(a)&(b)	Continuing Criminal Enterprise	11/00	2
18USC1963 & 1962(d)	RICO Conspiracy	11/00	3
22DCC2401,3202 & 105	First Degree Murder While Armed, Aiding&Abetting	11/00	4,6,8,10,12,13 21,23,25,26,30 32,34,43,58,60 62,64,72 & 74

As pronounced on 3/9/05, the defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Signed this the 11th day of May, 2005.

Royce C. Lamberth

The Honorable Royce C. Lamberth, USDJ

Defendant's Soc. Sec. No.: XXX-XX-9448
Defendant's Date of Birth: XX-XX-71
Defendant's USM No.: 28479-037 & 16850-016
Defendant's Residence and Mailing Address:

2181

Defendant: Kevin L. Gray

Case Number: CR00-157-1

CONTINUATION PAGE

Title and Section	Nature of Offense	Date Offense Concluded	Count(s)
21USC848(e)(1)(A)&2	Continuing Criminal Enterprise (Murder),Aiding & Abetting	11/00	5,7,9,11 14,22,24,27, 31,35,59,63
18USC1959(a)(1)	Violent Crime(Murder) in Aid of Racketeering	11/00	33,44,61 65,73,75
18USC1512(a)(11)©	Tampering With a Witness or Informant by Killing	11/00	36 & 66
22DCC503&3202	Assault With Intent to Commit Murder While Armed & Aiding & Abetting	11/00	39&41
18USC1959(a)(1)	Violent Crime(Attempted Murder) in Aid of Racketeering	11/00	40&42
18USC924(c)(1)(A)(iii	Use of Firearm	11/00	76
18USC924(c)(1)(C)(I)	Use of Firearm	11/00	77,78,80,81 82,89,90,91 92,96, 97
21USC841(a)(1)&(b) (1)(A)&18USC2	Distribution of Cocaine Base, Aiding & Abetting	11/00	101
21USC841(a)(1)&(b) (1)(B)&18USC2	Distribution of Cocaine Base,Aiding & Abetting	11/00	103
21USC841(a)(1)&(b) (1)(A)&18USC2	Unlawful Possession With Intent to Distibute Cocaine Base,Aiding & Abetting	11/00	108

Title and Section	Nature of Offense	Date Offense Concluded	Count(s)
21USC841(a)(1)&(b)(1)(C)&18USC2	Unlawful Possession With Intent to Distribute Heroin & Aiding & Abetting	11/00	110
21USC843	Unlawful Use of a Communication Facility	11/00	113,114,115, 116,117,118, 120,121,122, 124,126,128, 129,131

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of LIFE as to each of Counts 2,3,5,7,9,11,14,22,24,27,31,33,35,36,40,42,44,59,61,63,65,66,73,75,101 and 108; THIRTY(30)YEARS to LIFE as to each of Counts 4,6,8,10,12,13,21,23,25,26,30,32,34,39,41,43,58,60,62,64,72 & 74; FOUR HUNDRED EIGHTY(480) MONTHS as to Count 103; TWO HUNDRED FORTY(240) MONTHS as to Count 110; FORTY-EIGHT(48) MONTHS as to each of Counts 113,114,115,116,117,118,120,121,122,124,126,128,129 and 131; These terms of imprisonment are imposed concurrently; TEN(10) YEARS as to Count 76; TWENTY-FIVE(25) years as to each of Counts 77,78,80,81,82,89,90,91,92,96,and 97; Count 76 is imposed consecutive to Counts 2 thru 44, Counts 58 thru 66, Counts 72 thru75, 101,103,108,110; Count 77 consecutive to 76; Count 78 consecutive to 77; 80 consecutive to 78; Count 81 consecutive to 80; Count 82 consecutive to 81; Count 89 consecutive to 82; Count 90 consecutive to 89; Count 91 consecutive to 90; Count 92 consecutive to 91; Count 96 consecutive to 92; Count 97 consecutive to 96.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By: _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE(5) YEARS on each of Counts 2,3,5,7,9,11,14,22,24,27,31,33,35,36,40,42,44,59,61,63,65,66,73,75,76,77,78,80,81,82,89,90,91,92,96,97,101,103, and 108; THREE(3) YEARS as to Count 110; ONE(1) YEAR as to each of Counts 113 through 118, 120,121,122,124,126,128,129 and 131; the terms of supervised release shall be served concurrently..

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event later than 72 hours of release from the custody of the Bureau of Prisons.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

1. You will not leave the judicial district without permission of the Court or probation officer.
2. You will report to the probation officer and submit a truthful and complete written report within the first five days of each month.
3. You will answer truthfully all inquiries by the probation officer, and follow the instructions of the probation officer.
4. You will support your dependents and meet other family responsibilities, to include complying with any court order or order of administrative process requiring the payment of child support.
5. You will work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6. You will notify the probation officer at least ten days prior to any change of residence or employment.
7. You will not frequent places where controlled substances are illegally sold, or administered; you shall refrain from excessive use of alcohol and will not purchase, possess, use, distribute or administer any controlled substance or paraphernalia related to such substances, except as prescribed by a physician.
8. You will not associate with any persons engaged in criminal activity, and will not associate with any person convicted of a crime unless granted permission to do so by the probation officer.
9. You will permit a probation officer to visit at any time at your home, employment or elsewhere and will permit confiscation of any contraband observed in plain view by the probation officer.
10. You will notify the probation officer within seventy-two hours of being arrested, questioned, or upon having any contact with a law enforcement officer.
11. You will not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.
12. As directed by the probation officer, you will notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and permit the probation officer to make such notifications and to confirm your compliance with such notification requirements.
13. You will not possess a firearm, destructive device, or other dangerous weapon.

ADDITIONAL CONDITIONS:

1. The defendant shall have no direct or indirect contact with any of the surviving victims, their families or the families of deceased victims, via telephone, written correspondence, or third-party means for any reason.
2. The defendant shall pay the balance of thefine at a rate of no less than $100 each month and provide Verification of payments to the Probation Office.
3. The defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, or negotiating or consummating any financial contracts without the approval of the Probation Office.
4. The defendant shall provide the Probation Office with his income tax returns, authorization for release of credit information, and any other business or financial information in which he has a control or interest.
5. The defendant shall participate in, and successfully complete, a residential and/or out-patient substance abuse treatment program, which may include drug testing and detoxification service, as approved and directed by the Probation Office.
6. The defendant shall resolve all outstanding warrants within 60 days of the commencement of

supervision.

The Probation Office shall release the PSI report to all appropriate agencies in order to execute the sentence of the Court. Treatment agencies shall return the PSI report to the Probation Office upon the defendant's completion of, or termination from treatment.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties; payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine; (4) cost of prosecution; (5) interest; (6) penalties.

ASSESSMENT	RESTITUTION	FINE
$7,000.00	$0.00	$130,000.00

ASSESSMENT

It is ordered that the defendant shall pay to the United States a special assessment of $4,800.00 as follows: $50 for each of Counts 5,7,9,11,14,22,24,27,31,76,77&101;$100for each of Counts 2,3,33,35,36,40,42,44,59,61,63,65,66,73,75,78,80,81,82,89,90,91,92,96,97,103,108,113 thru 118,120,121,122,124,126,128,129 & 131; 4,6,8,10,12,13,21,23,25,26,30,32,34,43,58,, which shall be due immediately. The defendant shall pay a $100 assessment fee for each conviction that violated the D.C. Criminal Code for a total of $2,200. (The total amount of special assessment for all counts is $7,000.

FINE

The defendant shall pay a fine in the total amount of $130,000.00 as to Count 2. The interest requirement for the fine is waived by the Court.

The fine payment is due immediately.

If the fine and/or restitution is not paid, the Court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614. Pursuant to 18 U.S.C. §§ 3572(d)(3) and 3664(k), the defendant shall notify the Court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution. As set out in 18 U.S.C. § 3664(n), if the defendant receives substantial resources from any source, including inheritance, settlement, or other judgment, during the period of incarceration, the defendant shall apply the value of such resources to any restitution or fine still owed.

All criminal monetary penalty payments are to be made to the United States District Court Clerk, 333 Constitution Ave., N.W., Rm. 1825, Washington, D.C. 20001, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

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CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY DEPUTY

JOHN S. LEONARDO
United States Attorney
District of Arizona
WALLACE H. KLEINDIENST
MARY SUE FELDMEIER
Assistant U.S. Attorneys
United States Courthouse
405 W. Congress Street, Suite 4800
Tucson, Arizona 85701
Telephone: 520-620-7300
Wallace.Kleindienst@usdoj.gov
Mary.Sue.Feldmeier@usdoj.gov
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States America, Plaintiff, vs. Jared Lee Loughner, Defendant.	CR 11-187-TUC-LABU **PLEA AGREEMENT**

AGREEMENT

The United States of America and the defendant agree to the following disposition of this matter:

1. Guilty Plea:

The defendant agrees to plead guilty to 19 counts of the Superseding Indictment, which charge the defendant with felony violations of the United States Code, and admit one of the Special Findings, as follows:

Count 1, Attempted Assassination of United States Congresswoman Gabrielle D. Giffords, a Class A Felony, in violation of 18 U.S.C. § 351(c);

Count 5, Murder of United States District Court Chief Judge John M. Roll, a federal employee, a Class A Felony, in violation of 18 U.S.C. §§ 1114 and 1111;

Count 8, Murder of Congressional Aide Gabriel M. Zimmerman, a federal employee, a Class A Felony, in violation of 18 U.S.C. §§ 1114 and 1111;

Count 11, Attempted Murder of Congressional Aide Ronald S. Barber, a federal employee, a Class C Felony, in violation of 18 U.S.C. §§ 1114 and 1113;

Count 13, Attempted Murder of Congressional Aide Pamela K. Simon, a federal employee, a Class C Felony, in violation of 18 U.S.C. §§ 1114 and 1113;

Count 18, Causing the Death of Christina-Taylor Green, a Participant at an Activity Provided by the United States, a Class A Felony, in violation of 18 U.S.C. § 245(b)(1)(B);

Count 21, Causing the Death of Dorothy J. Morris, a Participant at an Activity Provided by the United States, a Class A Felony, in violation of 18 U.S.C. § 245(b)(1)(B);

Count 24, Causing the Death of Phyllis C. Schneck, a Participant at an Activity Provided by the United States, a Class A Felony, in violation of 18 U.S.C. § 245(b)(1)(B);

Count 27, Causing the Death of Dorwan C. Stoddard, a Participant at an Activity Provided by the United States, a Class A Felony, in violation of 18 U.S.C. § 245(b)(1)(B);

Count 30, Injuring Through the Use of a Glock pistol, Bill D. Badger, a Participant at an Activity Provided by the United States, a Class C Felony, in violation of 18 U.S.C. § 245(b)(1)(B);

Count 32, Injuring Through the Use of a Glock pistol, Kenneth W. Dorushka, a Participant at an Activity Provided by the United States, a Class C Felony, in violation of 18 U.S.C. § 245(b)(1)(B);

Count 34, Injuring Through the Use of a Glock pistol, James E. Fuller, a Participant at an Activity Provided by the United States, a Class C Felony, in violation of 18 U.S.C. § 245(b)(1)(B);

Count 36, Injuring Through the Use of a Glock pistol, Randy W. Gardner, a Participant at an Activity Provided by the United States, a Class C Felony, in violation of 18 U.S.C. § 245(b)(1)(B);

Count 38, Injuring Through the Use of a Glock pistol, Susan A. Hileman, a Participant at an Activity Provided by the United States, a Class C Felony, in violation of 18 U.S.C. § 245(b)(1)(B);

Count 40, Injuring Through the Use of a Glock pistol, George S. Morris, a Participant at an Activity Provided by the United States, a Class C Felony, in violation of 18 U.S.C. § 245(b)(1)(B);

Count 42, Injuring Through the Use of a Glock pistol, Mary C. Reed, a Participant at an Activity Provided by the United States, a Class C Felony, in violation of 18 U.S.C. § 245(b)(1)(B);

Count 44, Injuring Through the Use of a Glock pistol, Mavanell Stoddard, a Participant at an Activity Provided by the United States, a Class C Felony, in violation of 18 U.S.C. § 245(b)(1)(B);

Count 46, Injuring Through the Use of a Glock pistol, James L. Tucker, a Participant at an Activity Provided by the United States, a Class C Felony, in violation of 18 U.S.C. § 245(b)(1)(B);

Count 48, Injuring Through the Use of a Glock pistol, Kenneth L. Veeder, Sr., a Participant at an Activity Provided by the United States, a Class C Felony, in violation of 18 U.S.C. § 245(b)(1)(B); and

Special Finding that in the commission of these offenses, the defendant knowingly created a grave risk of death to Carol A. Dorushka, Robert C. Gawlick, Daniel Hernandez, Mark S. Kimble, Patricia R. Maisch, Emma E. McMahon, Owen A. McMahon, Thomas J. McMahon, Sara M. Rajca, Faith M. Salzgeber, Roger D. Salzgeber, Doris Tucker, and Alexander J. Villec.

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2. **Counts to be Dismissed**

In exchange for the defendant's pleas of guilty, and if the defendant is sentenced within the terms of this plea agreement, the government agrees to dismiss the remaining Counts of the Superseding Indictment at Sentencing.

3. **Elements of the Crimes**

The defendant understands the elements of the crimes to which he is pleading guilty are as follows:

Count 1: Attempted Assassination of a Member of Congress (18 U.S.C. §§ 1114 and 1111)

1. The defendant did something that was a substantial step toward killing Gabrielle D. Giffords;

2. When the defendant took that substantial step, the defendant intended to kill Gabrielle D. Giffords; and

3. At the time of the attempted killing, Gabrielle D. Giffords was a Member of Congress.

Counts 5, 8: First Degree Murder of a Federal Employee (18 U.S.C. §§ 1114 and 1111)

1. The defendant unlawfully killed John M. Roll and Gabriel M. Zimmerman;

2. The defendant killed John M. Roll and Gabriel M. Zimmerman with malice aforethought;

3. The killing was premeditated; and

4. At the time of the killing, John M. Roll and Gabriel M. Zimmerman were federal officers or employees engaged in the performance of official duties, or were assisting Gabrielle D. Giffords, a federal officer, in the performance of her official duties.

3. ***Elements of the Crimes cont'd.***

Counts 11, 13: Attempted Murder of a Federal Employee (18 U.S.C. §§ 1114 and 1113)

1. The defendant did something that was a substantial step toward killing Ronald S. Barber and Pamela K. Simon;

2. When the defendant took that substantial step, the defendant intended to kill Ronald S. Barber and Pamela K. Simon; and

3. At the time of the attempted killing, Ronald S. Barber and Pamela K. Simon were federal employees engaged in the performance of official duties, or were assisting Gabrielle D. Giffords, a federal officer, in the performance of her official duties.

Counts 18, 21, 24, 27: Causing the Death of a Participant in a Federally Provided Activity (18 U.S.C. § 245(b)(1)(B))

1. The defendant, by force or threat of force, attempted to or willfully injured, intimidated, or interfered with Christina-Taylor Green, Dorothy J. Morris, Phyllis C. Schneck and Dorwan C. Stoddard;

2. The defendant did so because Christina-Taylor Green, Dorothy J. Morris, Phyllis C. Schneck and Dorwan C. Stoddard were participating in or enjoying a service, program, or activity administered by the United States, to wit: United States Congresswoman Gabrielle D. Giffords' *Congress on Your Corner*;

3. The defendant's actions resulted in the deaths of Christina-Taylor Green, Dorothy J. Morris, Phyllis C. Schneck and Dorwan C. Stoddard; and

4. The defendant's acts included the use, attempted use, or threatened use of a dangerous weapon, to wit: a Glock 9mm pistol.

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3. Elements of the Crimes cont'd.

Counts 30, 32, 34, 36, 38, 40, 42, 44, 46, 48: Causing Injury to a Participant in a Federally Provided Activity (18 U.S.C. § 245(b)(1)(B))

1. The defendant, by force or threat of force, attempted to or willfully injured, intimidated, or interfered with Bill D. Badger, Kenneth W. Dorushka, James E. Fuller, Randy W. Gardner, Susan A. Hileman, George S. Morris, Mary C. Reed, Mavanell Stoddard, James L. Tucker, and Kenneth L. Veeder, Sr.;

2. The defendant did so because Bill D. Badger, Kenneth W. Dorushka, James E. Fuller, Randy W. Gardner, Susan A. Hileman, George S. Morris, Mary C. Reed, Mavanell Stoddard, James L. Tucker, and Kenneth L. Veeder, Sr. were participating in or enjoying a service, program, or activity administered by the United States, to wit: United States Congresswoman Gabrielle D. Giffords' *Congress on Your Corner*;

3. The defendant's acts included the use, attempted use, or threatened use of a dangerous weapon, to wit: a Glock 9mm pistol.

4. Maximum Penalties

The defendant understands the maximum penalties for the offenses to which he is pleading are as follows:

a. for the Class A Felony Attempted Assassination of a Member of Congress (Count 1), up to imprisonment for life and a fine of no more than $250,000.00, and a period of not more than five years supervised release;

b. for the Class A Felonies Murder of a Federal Employee (Counts 5, 8) and Causing the Death of a Participant in a Federally Provided Activity (Counts 18, 21, 24, 27), death or imprisonment for life, and fine of no more than $250,000.00. Death is provided for in the statute, but is not being sought under the terms of this plea agreement.

c. for the Class C Felonies Attempted Murder of a Federal Employee (Counts 11, 13), up to 20 years imprisonment, and a fine of no more than $250,000.00, and a period of not more than three years supervised release, and;

d. for the Class C Felonies Injuring a Participant in a Federally Provided Activity (Counts 30, 32, 34, 36, 38, 40, 42, 44, 46, 48), up to 10 years imprisonment, and a fine of not more than $250,000, and a period of not more than three years supervised release.

5. Fines and Special Assessments

The defendant agrees to pay a fine imposed pursuant to 18 U.S.C. § 3572, unless the defendant establishes the applicability of the exceptions contained in U.S.S.G. § 5E1.2(e).

Pursuant to 18 U.S.C. § 3013, the defendant shall pay a special assessment of $100.00 for each count of conviction. The special assessment is due and payable at the time the Court enters judgment unless the defendant is indigent. If the defendant is indigent, the special assessment will be collected according to the provisions of Chapters 227 and 229 of Title 18, United States Code.

6. Restitution

Pursuant to 18 U.S.C. §§ 3663 and 3663A, and U.S.S.G. § 5E1.1, the defendant agrees to imposition of a restitution order for the full amount of the victims' losses, not to exceed $19 million dollars. The government and the defendant stipulate and agree that the individuals listed in the counts of conviction and the Special Finding in this plea agreement are victims as defined in 18 U.S.C. §§ 3663 and 3663A, and U.S.S.G. § 5E1.1.

7. Sentencing Agreement

Pursuant to Fed. R. Crim. P., Rule 11(c)(1)(C), the government and the defendant stipulate and agree that as to Counts 1, 5, 8, 18, 21, 24 and 27 the defendant shall be

sentenced to a term of imprisonment for life on each count; as to Counts 11 and 13 the defendant shall be sentenced to 20 years imprisonment on each count; and as to Counts 30, 32, 34, 36, 38, 40, 42, 44, 46, and 48, the defendant shall be sentenced to 10 years imprisonment on each count. The parties further agree the sentences for all these counts shall run consecutively to each other.

The defendant agrees to forfeit to the United States of America any interest he has in one Glock model 19, 9mm semi-automatic pistol, bearing serial number PWL699, one Harrington and Richardson Topper Model 098 12 Gauge Shotgun, bearing serial number HXZ17155, and associated magazines and ammunition, and any interest he has in all other items obtained by law enforcement following his arrest on January 8, 2011.

The defendant agrees that he shall disgorge any monies paid in whole or in part to him or on his behalf, in return for writing, interviews, or other information disclosed by the defendant, including but not limited to access to the defendant, photographs or drawing of or by the defendant or any other type of artifact or memorabilia to the Clerk of the United States District Court for the District of Arizona for restitution or other distribution to the victims in this case.

The defendant agrees not to pursue further review of the actions in Ninth Circuit Court of Appeals case numbers11-10432, 11-10504 and 11-10339.

8. Waiver of Defenses, Appeal, Collateral Attack or Other Post-Conviction Action

As part of this agreement, the defendant waives any and all motions, defenses, probable cause determinations, and objections which the defendant could assert to the indictment, or to the Court's entry of judgment against the defendant and imposition of sentence upon the defendant providing the sentence is consistent with this agreement. The defendant further waives: (1) any right to appeal the Court's entry of judgment or any order of restitution against defendant; (2) any right to appeal the imposition of sentence upon defendant under Title 18, United States Code, Section 3742 (sentence appeals); (3)

any right to collaterally attack defendant's conviction and sentence under Title 28, United States Code, Section 2255, or any other form of collateral attack; (4) any right to file a motion for modification of sentence, including under Title 18, United States Code, Section 3582(c).

The defendant acknowledges that this waiver shall result in the dismissal of any appeal or collateral attack the defendant might file challenging his conviction or sentence in this case. If the defendant files a notice of appeal, a habeas petition, or any other form of collateral attack on his conviction or sentence, defendant agrees that this case shall, upon motion of the government, be remanded to the district court to determine whether defendant is in breach of this agreement and, if so, to permit the government to withdraw from the plea agreement.

9. Court Approval

The defendant understands that the Court is neither a party to nor bound by this agreement. If the Court, after reviewing this plea agreement, concludes any provision is inappropriate, it may reject the plea agreement pursuant to Rule 11(c)(5), Fed. R. Crim. P., giving the defendant, in accordance with Rule 11(d)(2)(A), Fed. R. Crim. P., an opportunity to withdraw his guilty pleas.

10. Withdrawal from the Plea Agreement

Either party may withdraw from the plea agreement if the defendant is not sentenced in accordance with the terms of this agreement.

11. Withdrawal or Rejection of Guilty Plea

If the defendant's guilty plea is rejected, withdrawn, vacated, or reversed by any court in a later proceeding, the government will be free to prosecute the defendant for all charges as to which it has knowledge arising out of the defendant's conduct as set forth in the Superseding Indictment; any charges that have been dismissed because of this plea

agreement will be automatically reinstated; and all potential penalties for those charges, including the death penalty, may be pursued by the government. In such event, the defendant waives any objections, motions, or defenses based upon the Speedy Trial Act or the Sixth Amendment to the Constitution as to the delay occasioned by the later proceedings.

12. Cooperation with Preparation of Presentence Investigation Report

The defendant understands and agrees to cooperate fully with the United States Probation Office in providing:

a. All criminal history information, i.e., all criminal convictions as defined under the Sentencing Guidelines.

b. All financial information, i.e., present financial assets or liabilities that relate to the ability of the defendant to pay a fine or restitution.

c. All history of drug abuse which might warrant a treatment condition as part of sentencing.

d. All history of mental illness or conditions which might warrant a treatment condition as part of sentencing.

13. Civil Proceedings

Nothing in this plea agreement shall be construed to protect the defendant from civil forfeiture proceedings or prohibit the United States from proceeding with and/or initiating an action for civil forfeiture. Further, this agreement does not preclude the United States from instituting any civil proceedings that may be appropriate in the future.

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DEFENDANT'S WAIVER OF RIGHTS AND FACTUAL BASIS FOR THE PLEA

1. Waiver of Rights

I have read each of the provisions of the entire plea agreement with the assistance of counsel and understand its provisions. I have discussed the case and my constitutional and other rights with my attorneys. I understand that by entering my plea of guilty I will be giving up my right to plead not guilty; to trial by jury; to confront, cross-examine, and compel the attendance of witnesses; to present evidence in my defense; to remain silent and refuse to be a witness against myself by asserting my privilege against self-incrimination; all with the assistance of counsel; to be presumed innocent until proven guilty beyond a reasonable doubt; and to appeal or collaterally attack my convictions or sentence.

I agree to enter my guilty plea as indicated above on the terms and conditions set forth in this agreement.

I have been advised by my attorneys of the nature of the charges to which I am entering my guilty plea. I have been advised by my attorneys of the nature and range of the possible sentences, and that I will not be able to withdraw my guilty plea if I am dissatisfied with the sentence the court imposes.

My guilty plea is not the result of force, threats, assurance or promises other than the promises contained in this agreement. I agree to the provisions of this agreement as a voluntary act on my part, rather than at the direction of or solely because of the recommendation of any other person, and I agree to be bound according to its provisions.

I agree that this written plea agreement contains all the terms and conditions of my plea and that promises made by anyone (including any of my attorneys) that are not contained within this written plea agreement are without force and effect and are null and void.

I am satisfied that my defense attorneys have represented me in a competent manner.

I am not now on or under the influence of any drug, medication, liquor, or other intoxicant or depressant, which would impair my ability to fully understand the terms and conditions of this plea agreement.

2. Factual basis

I agree that the following facts accurately describe my conduct in connection with the offenses to which I am pleading guilty and that if this matter were to proceed to trial the government could prove the elements of the offenses beyond a reasonable doubt:

On January 8, 2011, I went to Congresswoman Gabrielle Giffords' *Congress on Your Corner* outside the Safeway Grocery Store located at 7110 North Oracle Road, Tucson, in the District of Arizona. I was armed with a Glock model 19, 9mm semi-automatic pistol, loaded with 33 rounds of ammunition, and 3 additional magazines containing an additional 60 rounds of ammunition. Prior to arriving, I had formed a plan to kill Congresswoman Giffords and the people who were at *Congress on Your Corner*.

I walked up to Congresswoman Giffords, drew the pistol and shot her in the head at close range, intending to kill her. The government can prove Ms. Giffords was a member of Congress at the time I tried to kill her.

I then shot the people who were participating in *Congress on Your Corner*, with the Glock pistol, intending to kill them, and having planned the killings. I did so because they were attending *Congress on Your Corner*. The government can prove that *Congress on Your Corner* was a federal service, program, or activity administered by the United States.

I killed John M. Roll and Gabriel M. Zimmerman by shooting them with the Glock pistol. The government can prove John M. Roll was a federal judge, engaged in the performance of official duties, at the time I killed him. The government can prove Gabriel M. Zimmerman was an aide to Congresswoman Giffords, engaged in the performance of his official duties and assisting Congresswoman Giffords at *Congress on Your Corner*, when I killed him.

I shot Ronald S. Barber and Pamela K. Simon with the Glock pistol, intending to kill them. The government can prove that at the time I tried to kill them, both were engaged in the performance of their official duties and assisting Congresswoman Giffords at *Congress on Your Corner*.

I also shot Christina-Taylor Green, Dorothy J. Morris, Phyllis C. Schneck and Dorwan C. Stoddard, with the Glock pistol, intending to willfully injure, intimidate or interfere with them, resulting in their deaths. I shot them because they were participating in *Congress on Your Corner*.

I also shot Bill D. Badger, Kenneth W. Dorushka, James E. Fuller, Randy W. Gardner, Susan A. Hileman, George S. Morris, Mary C. Reed, Mavanell Stoddard, James L. Tucker, and Kenneth L. Veeder, Sr., with the Glock pistol, willfully injuring, intimidating or interfering with each of them. I shot them because they were participating in *Congress on Your Corner*.

I also admit that by shooting the Glock pistol in close proximity to the following people who were working at or participating in *Congress on Your Corner*, I knowingly created a grave risk of death to Carol A. Dorushka, Robert C. Gawlick, Daniel Hernandez, Mark S. Kimble, Patricia R. Maisch, Emma E. McMahon, Owen A. McMahon, Thomas J. McMahon, Sara M. Rajca, Faith M. Salzgeber, Roger D. Salzgeber, Doris Tucker, and Alexander J. Villec.

Dated: 08/06/2012

Jared Lee Loughner
JARED LEE LOUGHNER
Defendant

DEFENSE ATTORNEYS' APPROVAL

We have discussed this case and the plea agreement with our client in detail and have advised the defendant of all matters within the scope of Rule 11, Fed. R. Crim. P., the constitutional and other rights of an accused, the factual basis for and the nature of the

offenses to which the guilty pleas will be entered, possible defenses, and the consequences of the guilty plea, including the defendant's waiver of the right to appeal, and collaterally attack his convictions and sentences. No assurances, promises, or representations have been given to us or to the defendant by the government or by any of its representatives which are not contained in this written agreement. We concur in the entry of the plea as indicated above and on the terms and conditions set forth in this agreement as in the best interests of our client, Jared Lee Loughner. We agree to make a bona fide effort to ensure that the guilty plea is entered in accordance with all the requirements of Rule 11, Fed. R. Crim. P.

Dated: 8-6-12

JUDY CLARKE
REUBEN CAMPER CAHN
MARK FLEMING
ELLIS JOHNSTON
JANET TUNG
Attorneys for Defendant

GOVERNMENT'S APPROVAL

We have reviewed this matter and the plea agreement. We agree on behalf of the United States that the terms and conditions set forth are appropriate and are in the best interests of justice.

Dated: 8/7/12

JOHN S. LEONARDO
United States Attorney
District of Arizona

WALLACE H. KLEINDIENST
MARY SUE FELDMEIER
CHRISTINA M. CABANILLAS
Assistant U.S. Attorneys

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

V.

Rodney L. Moore

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 00-157-2 (Amended Order)

Barry Coburn & Steven McCool, Esq.
Defendant's Attorney

FILED
OCT - 6 2005
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

THE DEFENDANT:

Was found guilty by jury trial on Count(s) 2,3,4,5,8,9,21,22,23,24,26,27,32,33,43,44, 45,,46, 47,48,49,50,51,52, 60,61,77,82,84,85,86, 90 on 1/9/03 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Count(s)
21USC848(a)&(b)	Continuing Criminal Enterprise	11/00	2
18USC1963 & 1962(d)	RICO Conspiracy	11/00	3
22DCC2401,3202 & 105	First Degree Murder While Armed, Aiding & Abetting	11/00	4,8,21,23,26,32 ,35,43,45,50 & 60
21USC848(e)(1)(A)&18U SC2	Continuing Criminal Enterprise(Murder),Aiding & Abetting	11/00	5,9,22,24,27,& 46
18USC1959(a)(1)	Violent Crime(Murder) in Aid of Racketeering	11/00	33,44,51 & 61
18 USC 1512(a)(1)(C)	Tampering With a Witness or Informant by Killing	11/00	47 & 52
22DCC 503 & 3202	Assault With Intent to Commit Murder	11/00	48
18USC1959(a)(5)	Violent Crime(Attempted Murder) in Aid of Rackeeteering	11/00	49
18USC924(c)(1)(A)(iii)	Use of Firerarm	11/00	77
18USC924(c)(1)(C)(i)	Use of Firearm	11/00	82,84,85,86 & 90

As pronounced on 3/9/05, the defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Signed this the 6th day of October, 2005.

Royce C. Lamberth

The Honorable Royce C. Lamberth, USDJ

Defendant's Soc. Sec. No.: XXX-XX-9167
Defendant's Date of Birth: XX-XX-65
Defendant's USM No.: 23093-016
Defendant's Residence and Mailing Address:

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of LIFE imprisonment as to each of Counts 2,3,5,9,22,24,27,33,44,46,47,51,52,and 61; THIRTY(30) YEARS to LIFE as to each of Counts 4,8,21,23,25,26,32,43,45,48,50 and 60; TEN(10) YEARS as to each of Counts 49 and 77; TWENTY-FIVE(25) YEARS as to each of Counts 82,84,85,86 and 90 . Counts 3,4,5,8,9,21,22,23,24,25,26,27,32,33,43,44,45,46,47,48,49,50,51,52 and 60 shall be served concurrently with Count 2; Count 77 shall be served consecutive to Count 2; Count 82 shall be served consecutive to Count 77; Count 84 shall be served consecutive to Count 82; Count 85 shall be served consecutive to 84; Count 86 shall be served consecutive to Count 85; Count 90 shall be served consecutive to Count 86.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By: _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE(5) YEARS as to Counts 2,3,5,9,22,24,27,33,44,46,47,49,51,52,61,77,82,84,85,86 and 90. All terms of supervised release are to run concurrently..

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. The defendant shall report in person to the Probation Office in the district to which the defendant is released as soon as possible, but in no event later than 72 hours of release from the custody of the Bureau of Prisons.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

1. You will not leave the judicial district without permission of the Court or probation officer.
2. You will report to the probation officer and submit a truthful and complete written report within the first five days of each month.
3. You will answer truthfully all inquiries by the probation officer, and follow the instructions of the probation officer.
4. You will support your dependents and meet other family responsibilities, to include complying with any court order or order of administrative process requiring the payment of child support.
5. You will work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6. You will notify the probation officer at least ten days prior to any change of residence or employment.
7. You will not frequent places where controlled substances are illegally sold, or administered; you shall refrain from excessive use of alcohol and will not purchase, possess, use, distribute or administer any controlled substance or paraphernalia related to such substances, except as prescribed by a physician.
8. You will not associate with any persons engaged in criminal activity, and will not associate with any person convicted of a crime unless granted permission to do so by the probation officer.
9. You will permit a probation officer to visit at any time at your home, employment or elsewhere and will permit confiscation of any contraband observed in plain view by the probation officer.
10. You will notify the probation officer within seventy-two hours of being arrested, questioned, or upon having any contact with a law enforcement officer.
11. You will not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.
12. As directed by the probation officer, you will notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and permit the probation officer to make such notifications and to confirm your compliance with such notification requirements.
13. You will not possess a firearm, destructive device, or other dangerous weapon.

ADDITIONAL CONDITIONS:

1. The defendant shall have no direct or indirect contact with any of the surviving victims, their families or the families of the deceased victims, via telephone, written correspondence, or third party means for any reason.
2. The defendant shall submit to the collection of a DNA sample at the direction of the of the U.S. Probation Office pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000.
3. The defendant shall pay the balance of the fine at a rate of no less than $100 each month and provide verification of payments to the Probation Office.
4. The defendant shall be prohibited from incurring new credit charges, opening additional lines of credit, or negotiating or consummating any financial contracts without the approval of the Probation Office.
5. The defendant shall provide the Probation Office with his income tax returns, authorization for release of credit information, and any other business or financial information in which he has a control or interest.
6. The defendant shall participate in, and successfully complete, a residential and/or out-patient substance abuse treatment program, which may include drug testing and detoxification service, as approved and directed by the Probation Office.
7. The defendant shall resolve all outstanding warrants within 60 days of the commencement

of supervision.

The Probation Office shall release the PSI report to all appropriate agencies in order to execute the sentence of the Court. Treatment agencies shall return the PSI report to the Probation Office upon the defendant's completion of or termination from treatment.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties; payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine; (4) cost of prosecution; (5) interest; (6) penalties.

ASSESSMENT	RESTITUTION	FINE
$3,300.00	$0.00	$70,000.00

ASSESSMENT

It is ordered that the defendant shall pay to the United States a special assessment of $3300.00 for Count(s) 2,3,4,5,8,21,22,23,24,25,26,27,32,33,43,44,45,46,50,51,52,60,61,77,82,84,85,84 & 90, which shall be due immediately.(The amount of the assessment includes $2,100.00 to be paid to the Clerk of the U.S. District Court, District of Columbia for violation of U.S. code offenses and $1200 to be paid to the Criminal Finance Office, Room 4203, D.C. Superior Court, 500 Indiana Avenue, NW, Washington, D.C. for violation of DC Code offenses.)

FINE

The defendant shall pay a fine in the total amount of $70,000.00. The interest requirement for the fine is waived by the Court.

The defendant shall pay a fine of $70,000.00, as to Count 2.

The fine payment is due immediately.

If the fine and/or restitution is not paid, the Court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614. Pursuant to 18 U.S.C. §§ 3572(d)(3) and 3664(k), the defendant shall notify the Court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution. As set out in 18 U.S.C. § 3664(n), if the defendant receives substantial resources from any source, including inheritance, settlement, or other judgment, during the period of incarceration, the defendant shall apply the value of such resources to any restitution or fine still owed.

All criminal monetary penalty payments are to be made to the United States District Court Clerk, 333 Constitution Ave., N.W., Rm. 1825, Washington, D.C. 20001, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.