

ORIGINAL

IN THE SUPREME COURT OF OHIO

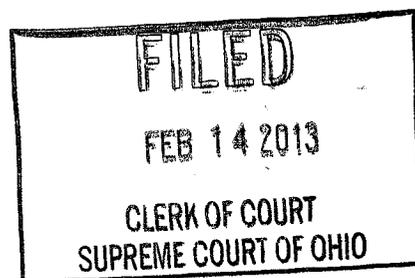
STATE OF OHIO, * Supreme Court Case No. 12-0902
*
Appellee, * On Appeal from the
* Lucas County Court of
v. * Common Pleas
*
ANTHONY BELTON, * **DEATH PENALTY CASE**
*
* Common Pleas
Appellant. * Case No. CR08-2934

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STATEMENT OF THE CASE

Appellant, Anthony Belton ("Mr. Belton"), was indicted by a Lucas County Grand Jury on August 25, 2008 for one count of Aggravated Murder with specifications in violation of R.C. § 2903.01(B) and (F), one count of Aggravated Robbery with specification in violation of R.C. § 2911.01(A)(1), and one count of Aggravated Robbery with specification in violation of R.C. § 2911.01(A)(3). Record Item ("R.") 1.

Mr. Belton received appointed counsel pursuant to Sup. R. 20. (R. 4.)

The parties engaged in extensive pretrial motion practice. Of particular significance was the "Defendant's Motion for Determination of Constitutionality of R.C. § 2929.03 & Criminal Rule 11(C)(3)" (R. 106) filed February 19, 2009 in which Mr. Belton challenged the procedural bar apparently imposed by Ohio law which prohibited him from entering a "no contest" plea before a panel of judges and then having a jury determine the issue of punishment. Both parties filed a number of memoranda on this issue. (See, e.g., R. 126, R.129, R. 131, R. 142, R. 143, R. 144, R. 152, R.155, and R. 157.) Hearings on the issue were held on August 14, 2009; September 10, 2009; September 30, 2009; November 5, 2009; and November 30, 2009. The trial court issued its Judgment Entry upholding the constitutionality of Ohio's statutory scheme on November 30, 2009. (R. 160.)

Subsequently, on October 25, 2010, Mr. Belton filed a "Notice of Intent to Admit in Accordance with Crim. R. 11(C)(3) and Impanel a Jury for Determination of Appropriate Sentence." (R. 291.) On the same date, Mr. Belton made an oral motion asking the court to reconsider its order upholding the constitutionality of Ohio's death penalty scheme and the court issued an order denying the motion on November 1, 2010. (Transcript of Proceedings held October 25, 2010; Nunc Pro Tunc Order (R. 300) filed Nov. 1, 2010.)

Mr. Belton made two attempts to appeal the order denying his request to admit and impanel a jury, which eventually culminated in this Court's decision in State ex rel. Bates v. Court of Appeals for the Sixth Appellate Dist. (2011), 130 Ohio St. 3d 326, where this Court determined that the lower appellate court lacked jurisdiction over this matter and that jurisdiction is proper only in this Court.

The case eventually proceeded to trial before a three-judge panel who received Mr. Belton's plea of "no contest" and then went on to determine the matter of punishment over Mr. Belton's continuing objection that proceeding in such a manner violated his Sixth Amendment right to a trial by jury.

The three-judge panel determined that the appropriate punishment was the imposition of the death penalty and entered its judgment and opinion accordingly,

sentencing Mr. Belton as appears of record. (R. 452; R. 453.) The trial court also appointed appellate counsel for Mr. Belton in accordance with Sup. R. 20. (R. 452.)

Mr. Belton now takes this timely appeal. (R. 460.)

STATEMENT OF THE FACTS

A. TRIAL PHASE FACTS

Mr. Belton entered pleas of no contest to the charges in the indictment. The court accepted the pleas and turned to the state to adduce evidence of Mr. Belton's guilt. Tr. Vol. I at 20, 77.

Samuel Baiz was the owner of a BP gas station and carry out located on the corner of Secor and Dorr Streets in Toledo, Ohio. In August of 2008 he employed a young man by the name of Matthew Dugan to cover the night shift. Mr. Dugan worked the night shift on August 13, 2008 commencing at midnight. It came to Mr. Baiz's attention on the morning of August 13, 2008 that sometime during Mr. Dugan's shift, the carryout was robbed and Mr. Dugan had died. Tr. Vol. I at 124, 132.

Tiffany Greenlee testified that she entered the BP sometime around 7:30 a.m. on August 13, 2008. She selected some items to purchase and went the counter but she did not see anyone there. She called out and no one answered. She left some money on the counter to pay for her items and exited the store. As she passed by a window that looked in behind the cash register, she saw a man on the floor in a pool of blood. She immediately called 911. Tr. Vol. I at 7, 14.

Sergeant Paul Csurgo of the University of Toledo Police Department was the first officer to arrive on the scene. He secured the carryout until officers of the Toledo Police Department arrived. Tr. Vol. II at 3,8.

Officer Chris Sargent of the Ottawa Hills Police Department was the first officer to enter the carryout. He checked to see if there were other victims or possible suspects present within the store but found no one. Tr. Vol. II 11-18.

Next to testify was Det. William Goetz of the Special Investigations Unit of the Toledo Police Department. He testified that he took photographs and began collecting items of evidence from the scene. He also testified that he was involved in the execution of a search warrant later that day issued with respect to a 1997 Buick Skylark automobile. A pair of Adidas tennis shoes and fingerprints matching Mr. Belton's fingerprints were retrieved from the automobile. Det. Goetz also testified about other items of an evidentiary nature retrieved from the BP. Tr. Vol. II at 28-92.

Next to testify was Det. Scott Smith of the Toledo Police Department. Det. Smith testified that he retrieved a .9 mm handgun from under a tree stump from the yard of a residence located at 1018 Ranch Street in Toledo. The gun was loaded and was missing a grip on its left side. Tr. Vol. II at 9-7.

Detective Jason Lenhart of the Toledo Police Department gave testimony concerning Mr. Belton's appearance the day before the robbery-homicide and how

appeared later in the day on August 13, 2008; specifically, that Mr. Belton sported a Mohawk-style haircut the day before the incident but that it had been cut by the time he saw him on August 13, 2008. He also gave testimony regarding the collection of certain items of evidence, including his participation in the execution of the search warrant on the 1997 Buick Skylark, the retrieval of the handgun, and his contact with Mr. Belton in the Skylark automobile on the evening of August 13, 2008. Tr. Vol. III at 24-45.

Officer Ruben Jurva of the Toledo Police Department testified that he also participated in the location and retrieval of the .9 mm handgun and that Mr. Belton was instrumental in helping the officers locate the gun. Tr. Vol. III at 348-46.

Sergeant Corey Russell of the Toledo Police Department testified that he was writing reports in the immediate vicinity of the holding cell where Mr. Belton and two others were placed after being taken into custody and overheard Mr. Belton make statements to the effect that he couldn't understand why one of the other individuals was being questioned because he (Mr. Belton) was "the one who had done it." Tr. Vol. III at 357-80.

Dr. Diane Scala-Barnett, deputy coroner for Lucas County, then testified to her findings at autopsy and as to the cause and manner of Mr. Dugan's death. Tr. Vol. III at 387-420.

Last to testify during the trial phase proceedings was Det. Jeff Clark of the Toledo Police Department. Det. Clark testified that he was the lead detective on the case and that Mr. Belton admitted his guilt for the crime and made statements to the effect that he didn't mean to kill Mr. Dugan. Tr. Vol. III at 423-82.

The state then moved several additional exhibits into evidence, rested in its presentation of the evidence and both sides gave their summations. The court then made a finding of guilty on all three counts and their attendant specifications. Tr. Vol. IV at 521-65.

Additional facts will be discussed and addressed in the Propositions of Law where appropriate.

B. MITIGATION HEARING FACTS

Anthony Belton grew up in a non-traditional, dysfunctional home. His mother, Kim Harold, was -- by her own admission -- a constant street drug abuser who would spend time incarcerated from time to time, including a prison term. Discipline often involved the use of a belt. She denied using drugs in the boys' presence, except for marijuana, which she did consume in their presence. She never held a steady job when they were young nor did she provide for her children. Tr. Vol. V at 628-31.

Linda Berry, a family member and a great-aunt of Anthony, testified that Anthony and his brothers moved homes a lot. Ms. Berry testified that she observed

Ms. Harold administer discipline, often using a belt. Ms. Berry, along with other family members attempted to assist, but due to limited resources were unable to do much. Tr. Vol. V at 702-13.

During their younger years the boys and their mother lived in many homes, some eight or nine, according to Ms. Harold's testimony. Living conditions and school attendance was less than ideal. Ms. Harold's male friends would often beat her, with police involvement often occurring. The boys witnessed these incidents. Tr. Vol. V at 646-48, 657-63.

His mother and father, Anthony Belton, Sr., never married. Their relationship lasted only long enough to produce Anthony and his brother, Aaron. There is a third child, Christopher, the father of whom is the nephew of Anthony, Sr. When Anthony was very young his father joined the Marines and, except for periods of time when he returned to Toledo on leave, he left Anthony's life and resided in California. He never had the boys sent to him for summers or otherwise. Even when he returned to Toledo on leave he would stay with his mother, and not with the boys. Tr. Vol. V at 629-40.

Anthony's mother's incarceration left her without anyone to look after the boys. Anthony was in the sixth grade. In what was described as a "spur of the moment" decision, Anthony and his brother were sent to California. Prior to their

arrival in California they had had no contact with their father for a long period of time. The time in California was relatively stable, but discipline was very firm. Anthony's father had a girlfriend who provided a stable environment. This did not last and there appear to have been a series of relationships by their father with other women. Tr. Vol. V at 666-68; Tr. Vol. VI at 804-08.

Anthony attended a high school that was equivalent to a war zone. Testimony described the dangers of the high school, Gompers, in vivid terms. After some five or so years the boys were sent back to Toledo, by bus. The journey lasted two days. Tr. Vol. V at 666-68.

Anthony's relationship with his father appears to have ceased. Indeed, Mark Rooks, an investigator collecting information for mitigation, spoke with Anthony's father by telephone on two occasions, and even then only after great difficulty. His father, according to Mr. Rooks, did not appear either engaged or concerned about his son's situation. Tr. Vol. V at 612-14. He never appeared at trial. Others testified about Anthony's father in a similar manner. Tr. Vol. VI at 796-98.

Matthew Martin, a forensic counselor at the Lucas County Jail, testified that as an inmate Mr. Belton was very little trouble. He did tell the court that Mr. Belton had a couple of fights when he first arrived at the jail, but since that time he has been little trouble. Tr. Vol. V at 728-31.

On cross-examination the prosecutor asked questions about a number of fights that had occurred subsequent to his arrival at the jail. Some were close to the time of trial. Mr. Martin agreed that Mr. Belton was not a model inmate. Tr. Vol. V at 731-38.

The panel next heard from Dr. Robert Stinson, a forensic psychologist certified by the American Board of Professional Psychology in Forensic Psychology. He is also a fellow of the American Academy of Forensic Psychology. He testified about the materials he reviewed in anticipation of his testimony, his contacts with Mr. Belton, and others. Tr. Vol VI. at 766-79.

Dr. Stinson testified in general terms about the importance of a stable home environment and how it influences an individual's mental and physical health. He also explained how a lack of a stable home can impact an individual's maturity and ability to cope with life's many challenges. Tr. Vol. VI at 781-87.

The testimony then shifted to the significance of the data he reviewed and some of the opinions he could draw. Prior to interviewing Anthony he spoke with family members to gain a context of its dynamics. Dr. Stinson described the family as suffering from "multi-generational distress," which is another way of saying it has been going on for generations. Dr. Stinson spoke with family members who related that sexual abuse in the family was rampant. Tr. Vol. VI at 789-94.

Dr. Stinson testified that Anthony's father had little influence and as a result provided little guidance. He testified about Gompers High School:

Gompers High School at that time was and I don't think it's over dramatic to say it was just a horrific place. I have done a lot of mitigation evaluations so I've seen, you know, different things, but this school and the description of this school were as bad as it comes. The typical description for Gompers was that it was a crime ridden, gang infested environment. People had -- there were descriptions of there being breezeways at the school that were lined with chain link fences, and what the protocol was at the school is when fights would break out they would swing gates closed at either end of the chain link breezeway to literally cage off the fights. So you would have a cage fight going. Teachers would lock the doors until the police arrived. And there were reports in the records I have that the San Diego Police Department, in fact the swat team, would show up to quell riots at that school. So it wasn't just a schoolyard fight, I mean these were gang riots that were going on at the school.

Tr. Vol. VI at 808-09.

Anthony attended Gompers and was a witness to the description given by Dr. Stinson. The boys eventually left California and returned to Toledo. Anthony began running with the wrong crowd. Tr. Vol. VI at 815-20.

Dr. Stinson opined that because of these and other factors, such as a lack of a stable and consistent structure, a positive adult male relative, and the handicap of

being a member of a multi-generational dysfunctional family, Anthony has developed a drug dependency that has contributed to a diagnosis of bi-polar, a mental illness.

The State called as rebuttal David Connell, Ph.D., a self-employed clinical psychologist. Dr. Connell disagreed with some of Dr. Stinson's conclusions, but did agree with many. Dr. Connell disagreed, however, with the bi-polar diagnosis, for one. Tr. Vol. VI at 1025-28.

PROPOSITION OF LAW NO. ONE

A CAPITAL DEFENDANT IS DENIED DUE PROCESS AND THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, AND A FAIR AND RELIABLE TRIAL, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHERE COUNSEL FAILS TO ADVOCATE FOR A NON-DEATH SENTENCE WHEN A NON-DEATH SENTENCE IS REQUIRED AS A MATTER OF LAW.

Reversal of a conviction for ineffective assistance of counsel requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Strickland v. Washington (1984) 466 U.S. 668, 687. Accord State v. Bradley (1989), 42 Ohio St. 3d 136, paragraph two of the syllabus. To demonstrate that counsel is deficient, a defendant must show that counsel's performance fell below an objective standard of reasonable representation. Bradley, supra. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. Bradley, supra, paragraph three of the syllabus.

Counsel below was ineffective for failing to advocate for a non-death sentence under R.C. 2929.11 as amended effective Sept. 30, 2011. The amended statute reads as follows:

R.C. 2929.11. Purposes of felony sentencing

(A) A court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. To achieve those purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both.

(B) A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders.

(C) A court that imposes a sentence upon an offender for a felony shall not base the sentence upon the

race, ethnic background, gender, or religion of the offender.

(Emphasis added.)

On its face, it is clear that R.C. 2929.11, as amended, is a reaction to the concerns associated with the expenses attendant to Ohio's criminal sentencing laws in existence prior to the enactment of Amended Substitute HB 86.¹ Although Ohio has never conducted a cost study of its death penalty system, a rigorous study conducted by the State of Maryland found that a single death sentence in that state costs almost \$2 million more than a comparable non-death penalty case. Roman, Chalfin, Sundquist, Knight, Darmenov, *The Cost of the Death Penalty in Maryland*, Urban Institute, Justice Policy Center, March 2008, found at <http://www.deathpenaltyinfo.org/CostsDPMaryland.pdf>. In addition, more than a dozen states have found that the death penalty is up to ten times more expensive than sentences of life without parole ("LWOP"). Cook and Slawson, 1993, *The Costs of Prosecuting Murder Cases in North Carolina*, referenced in "The High Costs of the Death Penalty," American Civil Liberties Union, Capital Punishment Project, found at

¹ Indeed, the prior version of the statute did not contain the language addressed to the burdens imposed on state and local governments. See R.C. 2929.11 eff. 7-1-96, 146 v S 2.

[http://www.criminaljustice.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/9706e0aac59259be85256b740055872c/\\$FILE/DP_WhitePaper.pdf](http://www.criminaljustice.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/9706e0aac59259be85256b740055872c/$FILE/DP_WhitePaper.pdf); see also, "Death Penalty Facts," Amnesty International USA, found at <http://www.amnestyusa.org/abolish/cost.html>. One key study found that the costs of the death penalty are borne primarily by increasing taxes and cutting services like police and highway funding, with county budgets bearing the brunt of the burden. Katherine Baicker, "The Budgetary Repercussions of Capital Convictions," Dartmouth College and the National Bureau of Economic Research, October 2002. The former Delaware County Prosecutor, David Yost, is reported to have claimed that one-half of his office's resources were occupied for as may as three months during the 2003 prosecution of Gerald Hand. The Bryan Times, "Death Penalty Cases can be Costly," Tuesday, May 10, 2005, found at <http://news.google.com/newspapers?nid=799&dat=20050510&id=2aVNAAAIBAJ&sjid=iEkDAAAIBAJ&pg=3424,769503>. Moreover, his office staff of ten criminal assistant prosecutors was still working through a backlog of over 500 felony indictments six months after Hand's trial. Id. And the case of Wilford Berry, "The Volunteer," reportedly consumed up to 10% of the Ohio Attorney General's Capital Crimes Division's annual budget for a full five years, and in a case where Mr. Berry essentially dropped his appeals. Samah, Criminal Justice, 7th Ed., © 2006 Thomson

Wadsworth, p. 395. Finally, it goes without saying, as this Court is well aware, that the costs associated with prosecuting, defending, appealing, and collaterally attacking and defending death penalty cases is exorbitant when compared to non-death cases; after all, “death is different.”

The enactment of R.C. 2929.11 by Amended Substitute HB 86 has effectively repealed Ohio’s death penalty. That this is so can be gleaned from the clear legislative intent underlying the statute. After all, death penalty cases are astronomically more expensive than a comparable non-death penalty case from start to finish, and place enormous burdens on state and local resources. Moreover, the cost/benefit analysis between a capital case and a LWOP case reveals a cost difference more apparent than the difference between night and day, as a LWOP sentence confers a societal benefit (protecting the public from future crime by the offender and others and punishing the offender) commensurate with a capital sentence without all of the associated costs.

That the death penalty has been effectively repealed is further compelled by a simple application of Ohio’s rules of statutory construction.

R.C. 1.51, Special or local provision prevails as exception to general provision provides as follows:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is

irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

The statutes governing the imposition of the death penalty, R.C. §§ 2929.03 and 2929.04, are special provisions, as opposed to the more general R.C. § 2929.11. Under the test mandated by R.C. § 1.51, it must first be determined whether a conflict exists between the special and general provisions. If a conflict exists, then it must next be determined whether the provisions are irreconcilable. If the provisions are irreconcilable, then the effective dates of the provisions control which provision has operative effect.

Applying the test of R.C. § 1.51, there can be no question, given the clear legislative intent behind R.C. § 2929.11, as amended, that those portions of R.C. § 2929.03 and the operative divisions of R.C. § 2929.04 regarding imposition of a penalty of death are irreconcilable with the “overriding purposes” of felony sentencing as stated in R.C. § 2929.11, which require that courts employ the minimum sanctions necessary in order to protect the public from future crime by the offender and others and to punish the offender for his criminal conduct. Given that ever since 2005 prosecutors have the ability to seek a LWOP sentence without having to capitally indict a defendant, and further given that a LWOP sentence protects the

public from future crimes by the offender just as effectively as a sentence of death, the moral rationales underlying Ohio's death penalty are no longer valid. Furthermore, it is by no means a certainty that the death penalty has any more of a deterrent effect on homicides than does a long-term prison sentence, although there is considerable disagreement on this point. See, e.g., Radelat & Lacock, Recent Developments, Do Executions Lower Homicide Rates?: The Views of Leading Criminologists, *The Journal of Criminal Law & Criminology*, Vol. 99, No. 2, © 2009 by Northwestern University, School of Law.

Accordingly, the usefulness of the death penalty as a penological tool is in doubt, further undermining any justification of its continued use. In a like manner, imposition of the death penalty eschews the mandate in R.C. § 2929.11(A) which commands a court to consider ("shall consider") the need for a defendant's rehabilitation. Death does not rehabilitate. Accordingly, imposition of the death penalty is irreconcilable with the current and overriding purposes of felony sentencing.

Further applying the test of R.C. § 1.51, Amended Substitute HB 86's version of R.C. § 2929.11 was enacted after the current versions of R.C. §§ 2929.03 and 2929.04. Moreover, as already discussed, the intent of the General Assembly in enacting the current version of R.C. § 2929.11 is manifest upon the face of the statute.

Thus, under the test employed by R.C. § 1.51, the enactment of Amended Substitute HB 86 has effectively repealed Ohio's death penalty.

This result is also compelled by reference to R.C. § 1.52:

§ 1.52. Irreconcilable statutes or amendments - harmonization

(A) If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.

Finally, R.C. § 1.58 instructs that:

(B) If the penalty, forfeiture, or punishment for any offense is reduced by the reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

(Emphasis added.)

As already discussed, Amended Substitute HB 86's version of R.C. § 2929.11 modified the overriding purposes of felony sentencing contained in the prior version of the statute and mandates that a court employ the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources. So, even though Mr. Belton committed his offense before the effective date of Amended Substitute HB 86's version of R.C. § 2929.11, he was sentenced after it took effect, and he therefore is – as he was at the time of his sentencing – entitled to its benefit.

Trial counsel failed to advocate for a non-death sentence under the current law. An effective attorney as contemplated by the Sixth Amendment would have recognized the significance of the change in Ohio law and would have advocated for a non-death sentence consistent with that change. So advocating would have made the difference between life and death. Objectively, trial counsel's performance fell below the standard of reasonable representation required by the Sixth Amendment. And given the difference that objectively reasonable performance would have made, there can be no question but that Mr. Belton was prejudiced by his trial counsel's ineffective performance. Strickland and Bradley, supra.

For all these reasons, Mr. Belton was denied due process and the effective assistance of trial counsel at trial, and a fair and reliable trial, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding portions of the Ohio Constitution.

Moreover, denial of this proposition of law would be contrary to, and an unreasonable application of, clearly established federal law as set forth in the United States Constitution and as defined by the United States Supreme Court in decisions cited in this proposition of law in particular, and in his merit brief in general and would also, at the same time, result in a decision that is based on an unreasonable

determination of the facts in light of the evidence presented in this state court proceeding.

PROPOSITION OF LAW NO. TWO

THE DEATH PENALTY IS NO LONGER A VALID SENTENCE UNDER OHIO AND INTERNATIONAL LAW; ACCORDINGLY, A TRIAL COURT'S IMPOSITION OF THE DEATH PENALTY VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION AND A DEFENDANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL, AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Belton has already made the case that the enactment of R.C. § 2929.11 by Amended Substitute HB 86 has effectively repealed Ohio's death penalty. See Proposition of Law No. One, supra. Mr. Belton incorporates the argument made in that proposition in its entirety as if fully restated herein.

Because R.C. § 2929.11 as enacted by Amended Substitute HB 86 repealed Ohio's death penalty, imposition of a capital sentence in Ohio is also barred by the American Declaration of the Rights and Duties of Man, as made binding on the United States by the Charter of the Organization of American States ("OAS Charter") and the International Covenant on Civil and Political Rights ("International Covenant.") Mr. Belton is cognizant of the fact that this Court, as well as others, have rejected challenges to Ohio's death penalty under the OAS Charter and the International Covenant, see e.g., Buell v. Mitchell, 274 F.3d 377 (6th Cir. 2001), and

State v. Short (2011), 129 Ohio St. 3d 360, but he argues that the change made to R.C. § 2929.11 by Amended Substitute HB 86 changes the calculus of those decisions. Indeed, it was discussed in Buell, supra at 371, "[t]hat the International Covenant specifically recognizes the existence of the death penalty. Article 6, paragraph 2, of the treaty states:

In countries which have not abolished the death penalty, a sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

ICCPR, 999 U.N.T.S. 171, 174.

The International Covenant was ratified by the United States Senate on June 8, 1992. Article 7 of the International Covenant prohibits cruel, inhumane, or degrading punishment. International Covenant on Civil and Political Rights (ICCPR), opened for signature Dec. 19, 1966, art. 7, 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976). The United States agreed to abide by this prohibition to the extent that the Fifth, Eighth, and Fourteenth Amendments ban cruel and unusual punishment. See 138 Cong. Rec. S-4781-01, S4783 (1992) ("That the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading

treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Sixth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States").

When determining whether a punishment is cruel and unusual, the United States Supreme Court typically begins with "objective indicia of society's standards, as expressed in legislative enactments and state practice." Graham v. Florida, 560 U.S. ___, ___, 130 S. Ct. 2011, 2022 (2010); see also, e.g., Kennedy v. Louisiana, 554 U.S. 407 (2008); Roper v. Simmons, 543 U.S. 551, 564 (2005). The Court looks to these "objective indicia" to ensure that it is not simply following its own subjective values or beliefs. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Such tangible evidence of societal standards allows an objective determination of whether there is a "consensus against" a given sentencing practice. Graham, *supra*, at ___, 130 S. Ct., at 2022-2023. If there is, the punishment may be regarded as "unusual." The Supreme Court's Eighth Amendment cases have also said that guidance should be derived from "evolving standards of decency that mark the progress of a maturing society." Estelle v. Gamble, 429 U.S. 97, 102 (1976); (internal quotation marks omitted). Mercy toward the guilty can be a form of decency, and a maturing society may abandon harsh punishments that it comes to view as unnecessary or unjust. Id.

The changes made to Ohio's criminal sentencing laws by Amended Substitute HB 86 represent an objective determination by the General Assembly that capital punishment is no longer an acceptable practice in Ohio, a decision reflecting "evolving standards of decency that mark the progress of a maturing society." Estelle, supra. The LWOP sanction achieves the same societal and penological objectives formerly thought to only be served by capital punishment, and at a fraction of the cost, in keeping with the overriding purposes of felony sentencing in Ohio.

Mr. Belton has already pointed out that, under the rubric of R.C. § 1.58, he is entitled to the benefit of the changes made to Ohio law pursuant to Amended Substitute HB 86. So, in essence, then, the changes made by Amended Substitute HB 86 constitute "the law in force at the time of the commission of the crime" as contemplated by the International Covenant. Accordingly, the death sentence cannot be imposed in this case without running afoul of the OAS Charter and the International Convent. That being the case, the imposition of the death penalty in this case violates the Supremacy Clause of the United States Constitution, in addition to being contrary to Ohio law. "No court has the authority to impose a sentence that is contrary to law." State v. Fischer (2010), 128 Ohio St. 3d 92, ¶ 23; Colegrove v. Burns (1964), 175 Ohio St. 437, 438.

For all these reasons, the death penalty is no longer a valid sentence under Ohio and international law, and a trial court's imposition of the death penalty violates the Supremacy Clause of the United States Constitution and a defendant's rights to due process and a fair trial, and also constitutes cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

Moreover, denial of this proposition of law would be contrary to, and an unreasonable application of, clearly established federal law as set forth in the United States Constitution and as defined by the United States Supreme Court in decisions cited in this proposition of law in particular, and in his merit brief in general and would also, at the same time, result in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in this state court proceeding.

PROPOSITION OF LAW NO. THREE

OHIO'S DEATH PENALTY STATUTE AND RULES VIOLATE THE SIXTH AND FOURTEENTH AMENDMENT 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 (2000), 530 U.S. 466, 120 S.Ct. 2348, and its progeny, including particularly Ring v. Arizona (2002), 536 U.S. 584, 122 S.Ct. 2428, mandates 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 capital 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 (1981), 451 U.S. 430, 101 S.Ct. 1852.

Moreover the denial of a right to jury sentencing after a plea of guilty violates a capital 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 through the Fourteenth Amendment and, in this case, Lockett v. Ohio (1978), 438 U.S. 586, 98 S.Ct. 2954. See also, Holmes v. South Carolina (2006), 547 U.S. 319, 324-225.

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, ¶ 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. 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 law alone applies in a jury trial.

In United States v. Jackson (1969), 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.

Justice Stewart, writing for the Court observed:

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, quoting People v. Michael A.C. (N.Y. 1970), 27 N.Y.2d 79, 86, 313 N.Y.S.2d 695, 261 N.E.2d 620, summarizing the rule of United States v. Jackson (1968), 390 U.S. 570, 88 S.Ct. 1209.

What applied to the Federal Kidnaping Act and to New York's capital punishment law applies also to Ohio's law. For all these reasons, Ohio's death penalty statutes and rules violate a capital defendant's right to due process and a fair and reliable sentencing hearing, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution and the corresponding portions of the Ohio Constitution.

Moreover, denial of this proposition of law would be contrary to and an unreasonable application of clearly established federal law as set forth in the United States Constitution and as defined by the United States Supreme Court in decisions cited in this proposition of law in particular and in his merit brief in general and would also, at the same time, result in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in this state court proceeding.

PROPOSITION OF LAW NO. FOUR

LETHAL INJECTION AS ADMINISTERED IN OHIO CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND VIOLATES MR. BELTON'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTIONS NINE, TEN AND SIXTEEN OF THE OHIO CONSTITUTION.

In this proposition of law Mr. Belton argues that the present practices in Ohio of putting to death a person through lethal injection violates all standards of decency and is cruel and unusual punishment as that term is defined by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article One, Sections Nine, Ten and Sixteen of the Ohio Constitution.

The aspects of lethal injection as administered in Ohio that are constitutionally troubling include, at least in part, the training of the technicians performing the lethal injection procedure, the reliability of any back up procedures in the event of any difficulty, such as an inability to locate a suitable vein for injection, and the efficacy of the single drug protocol. These issues and concerns remain and are a vital component of Ohio's lethal injection protocol.

In Scott v. Houk, 127 Ohio St.3d 317, 939 N.E.2d 835, 2010-Ohio 805, the United States District Court for the Northern District of Ohio, Eastern Division in

Scott v. Houk, Case No. 4:07CV0753, United States District Court for the Northern District of Ohio, Eastern Division certified a state law question to this Court. The State, named in the action as the Warden, opposed the certification request. In that certification the district court sought an answer to the following question: Is there a post-conviction or other forum to litigate the issue of whether Ohio's lethal injection protocol is constitutional under Baze v. Rees (2008), 533 U.S. —, or under Ohio law?

In a reversal of the State's position in the federal district court, the State of Ohio encouraged the Supreme Court of Ohio to answer the certified question. This Court held that there is no state postconviction relief or other state-law mode of action to litigate the issue of whether a specific lethal-injection protocol is constitutional under Eighth Amendment or under Ohio law. Id. at 318-19.

The Ohio General Assembly, this Court noted, has not yet provided an Ohio law cause of action for Ohio courts to process challenges to a lethal-injection protocol. Moreover, given the review available on this issue through 42 U.S.C. 1983 for injunctive relief against appropriate officers or federal habeas corpus petitions, this Court found no need to judicially craft a separate method of review under Ohio law. Accordingly, until the General Assembly explicitly expands state review of death-penalty cases by creating a methodology for reviewing Ohio's lethal-injection

protocol, there is no state postconviction relief or other state-law mode of action to litigate the issue of whether a specific lethal-injection protocol is constitutional.

The absence of a state court remedy is ample reason, by itself, to sustain this proposition of law. By limiting review to federal courts, rather than Ohio's own court system, it demonstrates in vivid fashion the unreasonableness of any means of execution, whether it be lethal injection or otherwise. It also begs a question: How can it pass constitutional muster when there is no state court mechanism to mount a challenge?

For these reasons it is requested that the Proposition of Law be sustained and that, under current technology, any death sentence by lethal injection cannot be imposed without violating the applicable provisions of the United States and Ohio Constitutions and every common standard of decency, as well violating a capital defendant's right to due process and a fair and reliable sentencing hearing, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding portions of the Ohio Constitution.

Moreover, denial of this proposition of law would be contrary to and an unreasonable application of clearly established federal law as set forth in the United States Constitution and as defined by the United States Supreme Court in decisions cited in this proposition of law in particular and in his merit brief in general and

would also, at the same time, result in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in this state court proceeding.

PROPOSITION OF LAW NO. FIVE

A CRIMINAL DEFENDANT AND A CRIMINAL APPELLANT IN A DEATH PENALTY CASE IS DENIED DUE PROCESS OF LAW GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED CONSTITUTION WHERE THE RIGHT TO A TRIAL BY JURY IS UNDERMINED BY A TRIAL COURT'S CONTINUED DENIAL OF MOTIONS SEEKING TO PROTECT THAT RIGHT.

Mr. Belton, prior to trial, filed a number of pre trial motions seeking various orders from the trial court. A number of those motions sought to protect the right to a trial by jury as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution. Most of those motions were denied by the trial court.

It is the position of Mr. Belton that as a result he was left with no choice other than to waive his right to a trial by jury and try his case to a three-judge panel. The disadvantages of such a course are many. As an example, it is presumed that a panel of judges will consider only relevant, competent and admissible evidence in its deliberations. State v. Davis (1992), 63 Ohio St.3d 44, 48. Absent some indication that a three-judge panel was influenced by or considered erroneously admitted evidence in arriving at a sentencing decision, such admission does not constitute prejudicial error. State v. Post (1987), 32 Ohio St.3d 380, 394.

Of course a trial to a jury often results in a series of issues that may, at some point, provide relief to a defendant. This would not, based on the authority from this court, occur in a trial -- or sentencing hearing -- before a three-judge panel.

The denied motions consisted of motions to prohibit the use of peremptory challenges to exclude members of the venire who expressed reservations about the death penalty; to prohibit the prosecution from referring to the nature and circumstances of offense until offered in mitigation; limiting the prosecution's argument of aggravating factors to those introduced at the first phase; denial of motion to instruct the jury that the defense has no burden of proof at the second phase; denial of mercy as a mitigating factor; denying the defense the opportunity to argue last at the second phase; and the denial of a defense motion for a jury view of death row or permitting the jury to view a video of death row.

While it is true a trial court is not necessarily required to accept as mitigating everything offered by the defendant and admittedly the fact that an item of evidence is admissible under R.C. 2929.04(B)(7) does not automatically mean that it must be given any weight. State v. Steffen (1987), 31 Ohio St.3d 111, para. two of the syllabus.

Yet it is well-established that a defendant must be given great latitude in the presentation of evidence supporting mitigating factors, R.C. 2929.04(C), Lockett v.

Ohio (1978), 438 U.S. 586, 604. This is reflected in R.C. 2929.04(B)(7) which evinces the legislature's intent that a defendant in a capital case be given wide latitude to introduce any evidence the defendant considers to be mitigating. The Eighth Amendment allows a capital defendant to introduce "any aspect of [his] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis added.) Lockett v. Ohio (1978), 438 U.S. 586, 604, 98 S.Ct. 2954, 2965.

Moreover, this Court has held that a plea of guilty to the offense as charged represents substantial mitigating factors. As this Court noted in State v. Ashworth (1999), 85 Ohio St.3d 56, 72, 706 N.E.2d 1231, "guilty pleas are traditionally accorded substantial weight in imposing a sentence." State v. Newton, 108 Ohio St. 3d 13, 2006-Ohio 81 at ¶119. It follows that in the context of a Crim.R. 11(C)(3) proceeding that a no contest plea has similar mitigating value.

It must be remembered that the first phase evidence against Mr. Belton was fairly strong. Before a three-judge panel the basic facts were uncontested. Cross-examination was often brief. Objections were few.

Mitigation was fairly extensive, as outlined in the Statement of Facts and argued in Proposition of Law No. Nineteen. However, the ability of the defense to exploit that evidence would have been even stronger had the defense been permitted

to tailor its arguments to a jury -- rather than a panel -- and include the factors and procedures the trial court excluded. These limitations on the defense's ability to present a meaningful mitigation hearing is more pronounced when the mitigating evidence that was presented is examined. Similarly, not permitting the jury to be told the defense has no burden of proof and permitting it to argue last was equally limiting.

The inability, to use an example, to argue to a jury that they may consider mercy removed one of the few potentially effective mitigating factors. 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 (1980), 542 U.S. 274, 284-85. 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 v. Oklahoma (1982), 455 U.S. 104; and Skipper v. South Carolina (1986), 476 U.S. 1. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the court, the prosecutor nor the jury. Eddings, supra, at 113-114; accord, Boyd v. California (1990), 494 U.S. 370 (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 the trial court barred the defense from presenting and arguing the weight of significant mitigation, including his intention to plead to the essential elements and contest sentencing only. It must be remembered that this Court has held that trial counsel has a duty to plead for mercy on his client's behalf. State v. Rogers (1986), 28 Ohio St.3d 427. The United States Supreme Court has similarly recognized the importance of mercy in Saffle v. Parks (1990), 494 U.S. 484. 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. Accordingly, if counsel must argue for mercy, then it is only logical that a jury can and should treat mercy as a mitigating factor.

Denying the motion to permit a jury view or a video of ODRC is yet another potentially effective mitigating factor left unavailable to the defense. It is not out of the realm of possibility that, upon either a direct view or a video aided view, one or more jurors would find that a life spent at ODRC, with all its limitations on an individual's freedom, would be a substantial mitigating factor in favor of a life sentence.

These are all important considerations that a jury should have been required to consider. The cumulative effect of the denial of these motions eviscerated the

defense's ability to present meaningful mitigating factors. The only remedy is to vacate the death sentence and remand the matter to the trial court to consider one of the presumptive life sentence options, in order to protect Mr. Benton's right to due process and a fair and reliable sentencing hearing, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding portions of the Ohio Constitution.

Moreover, denial of this proposition of law would be contrary to and an unreasonable application of clearly established federal law as set forth in the United States Constitution and as defined by the United States Supreme Court in decisions cited in this proposition of law in particular, and in his merit brief in general, and would also, at the same time, result in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in this state court proceeding.

PROPOSITION OF LAW NO. SIX

A TRIAL COURT ERRS IN A DEATH PENALTY CASE WHEN IT DENIES A DEFENSE MOTION TO HAVE A COMPLETE COPY OF THE PROSECUTOR'S FILE TURNED OVER TO THE COURT AND SEALED FOR APPELLATE REVIEW.

In a pre trial motion the defense, on October 27, 2008, filed a motion directing that a complete copy of the prosecutor's file be made and turned over to the court for review and to be sealed for appellate review, if necessary. The State, in a response filed November 10, 2008, opposed the motion. In an order dated November 17, 2008, the trial court denied the motion. It is the position of Mr. Belton that the trial court erred in denying this motion, causing him prejudice and denying him his right to due process under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

It is well-established that in a criminal case the prosecutor is required to disclose to a criminal defendant evidence that, if suppressed, would deprive the Defendant of a fair trial. This includes exculpatory as well as impeachment evidence. See Brady v. Maryland (1963), 373 U.S. 83, and United States v. Bagley (1985), 473 U.S. 667, 675-76. If such suppressed evidence is material in that it undermines confidence in the outcome of the trial, constitutional error occurs and the conviction must be reversed. Bagley, id., at 678. See also State v. Johnston (1988), 39 Ohio St.

3d 48; City of Chillicothe v. Knight (1992), 75 Ohio App. 3d 544; State v. Sowell (1991), 73 Ohio App. 3d 672; State v. Walden (1984), 19 Ohio App. 3d 141.

The United States Supreme Court has stated “[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.” Bagley, id., at 681, quoting United States v. Agurs (1976), 427 U.S. 97, 111. In cases in which courts have found that evidence was wrongly suppressed, the records do not state how such suppression was discovered.

This Court, in State v. Brown (2007), 125 Ohio St.3d 55, reversed a conviction and death sentence at least in part for the reason that certain exculpatory evidence was not revealed to the defense. This Court found that the withheld material was of such a character to cast doubt on the confidence of the jury’s verdict. This Court was in a position to make that determination for the reason that the trial court in Brown had ordered, at defense request, that a copy of the prosecutor’s file be made available for appellate review. Without this request and order by the trial court, and the information contained in the prosecution file, the result in Brown would not have occurred. Id. at 63-66.

In Mr. Belton’s case a conviction occurred. The prosecutor’s file is necessary to determine whether the State has complied with defense counsel’s requests for disclosure that were filed at the trial court level. However, the failure of the trial

court to grant the motion has resulted in this information not being before this Court. The result is an inability of this Court to ensure that all procedures and rights under Brady and its progeny were protected.

Under the authority of Brown, the only remedy is for this matter to be remanded to the trial court for a new trial or, in the alternative, for a limited remand so that the prosecutor's file be copied and transferred to this Court for its review. This relief is necessary to protect Mr. Belton's right to due process under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

Moreover, denial of this proposition of law would be contrary to and an unreasonable application of clearly established federal law as set forth in the United States Constitution and as defined by the United States Supreme Court and, at the same time, would result in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in this state court proceeding.

PROPOSITION OF LAW NO. SEVEN

THE ACCUSED'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS VIOLATED WHEN THE STATE IS PERMITTED TO CONVICT UPON A STANDARD OF PROOF BELOW PROOF BEYOND A REASONABLE DOUBT.

In the trial phase of Mr. Belton's case, the panel was required to employ Ohio's statutory definition of reasonable doubt. R.C. 2901.05(D) defines reasonable doubt as:

"Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

Ohio's statutory definition of "beyond a reasonable doubt" does not require the constitutionally mandated quantum of proof in two key respects.² First, the "firmly

² The arguments advanced in this Proposition of Law were rejected by this Court in State v. Van Gundy (1992), 64 Ohio St. 3d 230; See also State v. Taylor (1997), 78 Ohio St. 3d 15, 29. But

convinced” language in the first sentence of the statute defines reasonable doubt in terms nearly identical to the accepted definition of clear and convincing evidence. Second, as many courts have recognized, the “willing to act” language in the last sentence of the statute represents a standard of proof below that required by Due Process.

The Supreme Court of the United States in In re Winship (1970, 397 U.S. 358, addressed the fundamental nature of the reasonable doubt concept. The Court noted that “[t]here is always in litigation a margin of error” and stressed that “[i]t is critical that the moral force of the criminal law not to be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.” Id. at 364. To maintain confidence in our system of laws, the Court continued, proof beyond a reasonable doubt must be held to be proof of guilt “with utmost certainty.” Id. Accordingly, the Supreme Court reversed a Louisiana defendant’s capital conviction and death sentence because the reasonable doubt definition could have led the sentencing authority to find guilt “based on a degree of proof below that required by the Due Process Clause.” Cage v. Louisiana (1990), 498 U.S. 39, 41.

see State v. Goff (1998), 82 Ohio St. 3d 123, 132. As explained *infra*, the Van Gundy and Taylor decisions are in direct contradiction of United States Supreme Court precedent. Therefore, Mr. Belton is making a good faith effort to argue for a change in the law, and preserving this issue for federal review. Engle v. Isaac (1982), 456 U.S. 107, 130.

Likewise, the definition of reasonable doubt utilized by the three judge panel allowed the trial court to find guilt on proof below than that required by the Due Process Clause. While this Court has held that the statutory reasonable doubt definition is not an unconstitutional dilution of the State's burden of proof, State v. Nabozny (1978), 54 Ohio St. 2d 195, 202-03, the Supreme Court of the United States, the majority of federal circuit courts and lower Ohio courts have condemned the language in the statute that defines reasonable doubt as "proof of such character that an ordinary person would be willing to rely and act upon in the most important of his own affairs."

In Holland v. United States (1994), 348 U.S. 121, 140, the Court indicated strong disapproval of the "willing to act" language when defining proof beyond a reasonable doubt. The United States Court of Appeals has also noted that "there is a substantial difference between a [trier of fact] verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him." Scurry v. United States (D.C. Cir. 1965), 347 F.2d 468, 470. The Scurry court stated that human experience shows that a prudent person, called upon to act in his more important business or family affairs, would gravely weigh the risks and considerations tending in both directions. After weighing these considerations, however, a person would not necessarily be convinced beyond a reasonable doubt

that he had made the right judgment. Id. Indeed, the majority of the federal circuit courts have disapproved the “willing to act” phrase and adopted a preference for defining proof beyond a reasonable doubt in terms of a prudent person who would hesitate to act when confronted with such evidence. See e.g., Monk v. Zelez (10th Cir. 1990), 901 F.2d 885; United States v. Colon (2nd Cir. 1987), 835 F.2d 27; United States v. Pinkney (D.C. Cir. 1976), 551 F.2d 1241; United States v. Conley (8th Cir. 1975), 523 F.2d 650.

Ohio courts have also criticized the “willing to act” language of R.C. 2901.05 (D). In State v. Frost, No. 77AP-728, slip op. at 8 (Franklin Ct. App. May 2, 1978), the court concluded that the final sentence of R.C. 2901.05 (D) should be eliminated or modified by adding the word “unhesitating” to the last sentence before the phrase “in the most important of his own affairs.” Ordinary people who serve as a trier of fact are frequently required to make important decisions based upon proof of a lesser nature by choosing the most preferable action. This was recognized in State v. Crenshaw (1977), 51 Ohio App. 2d 63, 65, where the court held that the “willing to act” language was the traditional test for the clear and convincing evidence standard of proof: “A standard based upon the most important affairs of the average [trier of fact] ... reflects adversely upon the accused.” A majority of federal courts and several Ohio courts have recognized, the “willing to act” language in R.C. 2901.05 (D) does

not meet the standard of proof beyond a reasonable doubt standard. This is because most people do not make important decisions based upon a reasonable doubt standard but rather are “willing to act” upon a lesser standard.

The willing to act language is not the only defect in the reasonable doubt definition. The “firmly convinced” language in the first sentence of R.C. 2901.05 is not reasonable doubt, but rather it defines the clear and convincing standard. In Cross v. Ledford (1954), 161 Ohio St. 469, syl., the Court defined clear and convincing evidence as that “which will provide in the mind of the [trier of fact] a firm belief or conviction to the facts sought to be established.” That definition is similar to R.C. 2901.05 (D), where reasonable doubt is present only if the trier of fact “cannot say they are firmly convinced of the truth of the charge.” Resultantly, the definition of reasonable doubt in R.C. 2901.05(D) fails to satisfy the Due Process Clause.

The R.C. 2901.05 definition of reasonable doubt is further flawed because it informs the trier of fact that “[r]easonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt.” The phrase “moral evidence” improperly shifted the focus of the trier of fact to the subjective morality of Anthony Belton, and from the

required legal quantum of proof, Victor v. Nebraska (1994), 511 U.S. 1, notwithstanding.

In Victor, the Court rejected a due process challenge to a reasonable doubt definition that included the phrase “moral evidence”. Id. at 13. But see id. at 21 (Kennedy J., concurring). The Court found no error because the phrase “moral evidence” was proper when placed in the context of the definition on reasonable doubt that was given:

[T]he instruction itself gives a definition of the phrase. The jury was told that “everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt” - in other words, that absolute certainty is unattainable in matters relating to human affairs. Moral evidence, in this sentence, can only mean empirical evidence offered to prove such matters - the proof introduced at trial.

Id. at 13 (emphasis added).

Unlike Victor, the definition in this case did not guide the trier of fact by placing the phrase “moral evidence” within any proper context. In Victor, the trier of fact was properly guided on the phrase “moral evidence” because it was conjunctively paired with the phrase “matters relating to human affairs.” Id. The trier of fact was not directed to consider “moral evidence” as evidence that is “related to human affairs.” Instead, the trial court considered both evidence related to human

affairs “or moral evidence.” See Victor, 511 U.S. at 13. Accordingly, the trial court was allowed to convict Anthony Belton based on considerations of subjective morality, rather than evidentiary proof required by Due Process Clause. Victor, 511 U.S. at 21 (Kennedy J., concurring) (“[the] use of ‘moral evidence’ ... seems quite indefensible ... the words will do nothing but baffle”).

This Court in State v. Taylor (1997), 78 Ohio St. 3d 15, 29, 676 N.E.2d 82, 96, held that the reasonable doubt definition is generally acceptable. However this Court partially retreated from this holding in State v. Goff (1998), 82 Ohio St. 3d 123, 132, 694 N.E.2d 916, 924. In Goff, this Court recognized that the R.C. §2901.05(D) definition of reasonable doubt is not appropriate during the penalty phase of a capital case. This Court held that the trier of fact “must be firmly convinced that the aggravating circumstance(s) outweigh the mitigating factor(s)”. Id. The use of the R.C. 2901.05 definition of reasonable doubt in the penalty phase violates the Due Process Clause and renders the death sentence invalid.

Triers of fact in Ohio are convicting criminal defendants on a clear and convincing evidence standard. A majority of the federal courts agree that the “willing to act” language found in R.C. 2901.05(D) represents a standard of proof below that required by the Due Process Clause. Furthermore, the “firmly convinced” language in the first sentence of R.C. 2901.05(D) defines the presence of reasonable doubt in

terms nearly identical to the accepted definition of clear and convincing evidence. Courts that have disapproved the “willing to act” language have generally allowed it to be used only when the instruction, taken in its entirety, conveyed the true meaning of “reasonable doubt” as required by the Due Process Clause. See Holland, 384 U.S. at 140.

This is not, however, the case in Ohio. R.C. 2901.05 (D) defines reasonable doubt in terms far too similar to the definition of “clear and convincing” evidence. The “willing to act” language in the last sentence of R.C. 2901.05(D) is defective because reasonable doubt is also defined in a clear and convincing standard from the outset in the phrase “firmly convinced.” Moreover, the reference to “moral evidence” obfuscates the trier of fact’s duty to focus upon the evidence at trial rather than on subjective considerations of morality. R.C. 2901.05(D), as applied to this case, defines reasonable doubt by an insufficient standard. Accordingly, this definition of reasonable doubt allowed the trier of fact to find guilt “based on a degree of proof below that required by the Due Process Clause.” Cage, 498 U.S. at 41. These convictions must be reversed or at the minimum the death sentence of Mr. Belton must be vacated.

PROPOSITION OF LAW NO. EIGHT

A CRIMINAL DEFENDANT AND A CRIMINAL APPELLANT IN A DEATH PENALTY CASE IS DENIED DUE PROCESS OF LAW GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE ABILITY TO CONDUCT AN INDEPENDENT ANALYSIS OF THE APPROPRIATENESS OF THE DEATH SENTENCE IS RESTRICTED BY THE OHIO SUPREME COURT'S DECISION IN STATE V. McGUIRE.

Pursuant to the statute, this Court must conduct an independent review not only of the jury's recommendation of death, but also that of the trial court as well. One of the factors the panel was not permitted to consider was that of residual doubt, such as whether Mr. Belton was guilty of the offense in the sense that he fired the weapon accidentally, rather than with prior calculation and design.

It is the position of Mr. Belton that this Court -- as well as any other court conducting a weighing of evidence to determine the appropriateness of the death penalty in a particular instance -- should have the ability to consider whether any residual doubts exist in this case and whether they mitigate the degree of punishment so that a sentence of less than death may be imposed. Since this involves a matter of legal interpretation, this Court's standard of review is de novo, State v. Sufronko (1995), 105 Ohio App.3d 504, 506.

In State v. McGuire (1997), 80 Ohio St.3d 390, 403-04, 686 N.E. 2d 1112, 1123, this Court held that residual doubts of guilt are irrelevant to the issue of whether a person convicted of a capital crime should be sentenced to death or a lesser punishment. That decision flatly precludes the capital sentencer in Ohio from entertaining residual doubts of guilt with regard to the capital defendant's moral culpability; notwithstanding proof beyond a reasonable doubt of his or her legal culpability.

In Oregon v. Guzek (2006), 546 U.S. 517, the United States Supreme Court addressed the issue of residual doubt. The Court did not resolve the issue of whether a defendant has an Eighth Amendment right to present residual doubt. However, it appears to suggest the answer is that defendant does not have such a right, but does not do so conclusively.

The Court noted:

Nevertheless, the Eighth Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted. Rather, States are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty.

Id. at 521-22 (emphasis added).

That as part of the weighing process residual doubt is permitted to be considered in Ohio or else where is clear from this passage. This assertion is supported by Justice Scalia's concurrence, which begins with this observation:

In this case, we have the opportunity to put to rest, once and for all, the mistaken notion that the Eighth Amendment requires that a convicted capital defendant be given the opportunity, at his sentencing hearing, to present evidence and argument concerning residual doubts about his guilt. Although the Court correctly holds that there is no Eighth Amendment violation in this case, I would follow the Court's logic to its natural conclusion and reject all Eighth Amendment residual-doubt claims.

Id. at 528.

Lamenting what he views as a lost opportunity, Justice Scalia concludes his concurrence:

In mentioning, however, the superfluous circumstance that Oregon law happens to provide for the admission at sentencing of some evidence that relates to innocence, the Court risks creating doubt where none should exist. Capital defendants might now be tempted to argue that the amount of residual-doubt evidence carried over from the guilt phase in their sentencing hearings is insufficient to satisfy the Court's third factor. Every one of these "residual-doubt" claims will be meritless in light of the Court's first two factors. We should make this perfectly clear today.

Id. at 530.³

³ Mr. Belton is mindful of this Court's decision in McGuire and the United States Supreme Court's decision in Guzek. This proposition of law is offered to

An erroneously-imposed prison sentence may always be commuted or otherwise shortened to correct an injustice or a sentencing error. On the other hand, a sentence of death, once carried out, may not be undone. Basic principles of justice and fairness demand that every effort be undertaken to ensure the reliability of the capital-sentencing process.

It is requested that this court entertain residual doubt when it conducts its independent review of the sentence of death, in order to protect Mr. Belton's due process rights and a fair and reliable sentencing hearing under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding portions of the Ohio Constitution.

Moreover, denial of this proposition of law would be contrary to and an unreasonable application of clearly established federal law as set forth in the United States Constitution and as defined by the United States Supreme Court and, at the same time, would result in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in this state court proceeding.

preserve this issue for review by other courts.

PROPOSITION OF LAW NO. NINE

A CRIMINAL DEFENDANT IS DENIED DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE EVIDENCE CONCERNING HIS POST-ARREST STATEMENTS IS ADMITTED AT TRIAL AND WHERE THOSE STATEMENTS WERE OBTAINED IN A MANNER THAT OVERCAME THE DEFENDANT'S FREE AND VOLUNTARY WILL.

Mr. Belton gave a confession to officers of the Toledo Police Department the day after the robbery-homicide. The confession was a result of coercive police misconduct designed to overcome Mr. Belton's free will. The trial court refused to suppress the confession and admitted evidence concerning it at Mr. Belton's trial, a trial which resulted in the imposition of the ultimate penalty: Death. Mr. Belton's confession was obtained in violation of his privilege against self-incrimination and its admission at trial deprived him of his rights to due process of law as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

Whether a statement of a criminal defendant is admissible at a subsequent trial involves the resolution of four issues: 1) was the defendant "in custody" at the time he made the statement; 2), did the police utilize adequate procedural safeguards effective to secure the privilege against self-incrimination; 3) having been advised of

those safeguards, did the defendant voluntarily waive them and agree to speak to the police; and 4) did the defendant voluntarily provide the statement sought to be used against him? Miranda v. Arizona, 384 U.S. 436 (1966).

A statement is voluntary if it is “the product of an essentially free and unconstrained choice by its maker.” State v. Wiles (1991), 59 Ohio St. 3d 71. The prosecution bears the burden of proving the voluntariness of a statement by a preponderance of the evidence. Lego v. Twomey (1972), 404 U.S. 477, 486 – 487. State v. Melchior (1978), 56 Ohio St. 2d 15, 25. It is not the case that all forms of influences, pressures, or promises that result in a confession are improper, as, “[t]he United States Supreme Court has consistently made clear that the test of voluntariness is whether an examination of all the circumstances discloses that the conduct of ‘law enforcement officials was such as to overbear [the defendant’s] will to resist and bring about confessions not freely self-determined. . . . ’” United States v. Ferrara, 377 F.2d 16, 17 (2nd Cir. 1967), citing Rogers v. Richmond, 365 U.S. 534, 544 (1961). In making this determination, courts consider the totality of the circumstances surrounding the confession. State v. Edwards (1976), 49 Ohio St. 2d 31, overruled as to the death penalty, 438 U.S. 911; State v. Arrington (1984), 14 Ohio App. 3d 111, paragraph one of the syllabus. Important factors include whether the confession is the result of threats or inducements designed to overcome a defendant’s free will. State

v. Barker (1978), 53 Ohio St. 2d 135, paragraph two of the syllabus; State v. Smith (1991), 61 Ohio St. 3d 284, 288.

In the case at hand, it is undisputed that Mr. Belton was in custody at the time of his confession. Moreover, it is undisputed that he received the procedural safeguards required by Miranda not once, but twice. Further, it is not a point of contention that Mr. Belton waived his right to counsel and his right to silence and agreed to speak to the police. Rather, the issue is whether his confession was the product of threats and inducements designed to overcome his free will and result in a coerced confession.

Mr. Belton and two other individuals were arrested between 7:30 p.m. and 8:00 p.m. on August 13, 2008. (Transcript of Proceedings held December 19, 2008, p. 33, lines 7 – 18; p. 34, lines 13 – 20.) All three were transported to the Toledo Police Safety Building sometime between 8:30 p.m. and 8:45 p.m.. (Id., p. 154, lines 1 – 6.) Of the three, Mr. Belton was interrogated last, and his interrogation did not commence until approximately 1:00 a.m. on August 14, 2008. (Id., p. 158, lines 1 – 11.) The interrogation was videotaped and the tape was introduced at the December 19, 2008 suppression hearing as Defense Exhibits “A” and “B.” During the course of his interrogation, Mr. Belton gave the police, “globally, three different versions” of

the circumstances surrounding the robbery-homicide. (Id., p. 219, lines 15 – 23.) The police pressed Mr. Belton harder after each version.

Trial counsel categorized the substance of Mr. Belton's interrogation under various labels, the most significant of which are those referred to by the defense as "Chances at Redemption" and "Dire Consequences of Failing to Confess and the Advantages of Confessing." Defendant's motion to suppress and supporting memorandum (Mot. 9), p. 6. The officers' statements to Mr. Belton in these regards are as follows (by reference to the time-marks on Defendant's Exhibits "A" and "B"):

"I don't think he meant to kill that man." (1:28.15); ". . . he made a mistake, if he could take it back. . . ." (1:28.22); ". . . everyday people make mistakes. . . ." (1:29.45); ". . . admission goes a long way." (1:39.54); ". . . if you didn't mean to kill him . . . give him something." (1:41.20); ". . . gotta give [Det. Clark] something to take to the prosecutors. . . ." (1:40:57); "I'm starting to believe you didn't mean to kill him." (1:49.39); ". . . if you didn't mean to do it . . . intent and accident are two different things." (2:19.40); "I hope your grandmother doesn't hear it on the news." 7(2:46.00); "[p]ut you away for the rest of your life or put you in the chair." (1:37.34) (emphasis added); "[s]ave yourself brother. . . ." (1:39.23); ". . . courts could have mercy. . . ." (1:40.00); "death or life without parole. . . ." (1:42.15); then, less than one minute later, "it could be your saving grace." (1:43.00) (emphasis added); "Now is

your chance to save yourself" (1:48.10) (emphasis added); "That's what is going to hang you. . . ." (2:53.30) (emphasis added).

The foregoing statements by the officers were obviously made with the intention of extracting a full confession from Mr. Belton in exchange for promises of leniency and/or the threat of imposition of the ultimate punishment. As a result, Mr. Belton confessed to the crime, and in spite of the promises of leniency, received the ultimate punishment. This scenario distinguishes this case from those relied upon by the trial court in denying Mr. Belton's motion to suppress; see, e.g., United States v. Barfield, 507 F.2d 53 (5th Cir. 1975) (defendant was told that it would be in "his best interest" to tell the "real story," whereas lying might leave him "holding the bag"); State v. Estep, 2007-Ohio-6554 (confession voluntary where defendant was repeatedly told to tell the truth even to the point of "badgering"); State v. Slaughter, 2000 Ohio App. LEXIS 1821 (Ct. App. Hamilton County Apr. 28, 2000) (lengthy, tense, coarse, and heated interrogation in which defendant was sometimes combative and officers responded in kind, telling defendant "his ass would burn" in the courtroom and in hell were permissible interrogation techniques because the statements were relatively minor and the threats were beyond the officers' ability to carry out). In the case sub judice, the officers had the ability to influence the charging

decision and the charging decision was exactly what the officers told Mr. Belton he could avoid by giving a confession.

It is unconscionable and offends every notion of due process and fair play for the agents of the State of Ohio to essentially promise leniency and imply to Mr. Belton that confessing or not confessing would literally make the difference between life and death ("death or life without parole. . . ." (1:42.15); "it could be your saving grace." (1:43.00); "Now is your chance to save yourself" (1:48.10) (emphasis added)) and then for the State of Ohio to seek the death penalty and use the confession to obtain it. See, State v. Tyren (Ohio Com. Pl. 1998), 91 Ohio Misc. 2d 67 (dismissal of indictment proper where agents of the State of Ohio dupe a parent into confessing to molesting his daughter on a promise of reunification and then use the confession to obtain an indictment against the parent for the act of molestation).

While Mr. Belton's initial waiver of his privilege against self-incrimination may have been voluntary, it cannot be said that his ultimate confession was voluntary "in the sense that it was [not] the product of a free and deliberate choice [but was] rather . . . [the product of] intimidation, coercion, [and] deception," and was not "made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine (1986), 475 U.S. 412, 421.

Mr. Belton's confession was a result of coercive police misconduct designed to overcome his free will. The trial court refused to suppress the confession and admitted evidence concerning it at Mr. Belton's trial, a trial which resulted in the imposition of the ultimate penalty: Death. Mr. Belton's confession was obtained in violation of his privilege against self-incrimination and its admission at trial deprived him of his rights to due process of law as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

Moreover, denial of this proposition of law would be contrary to, and an unreasonable application of, clearly established federal law as set forth in the United States Constitution and as defined by the United States Supreme Court in decisions cited in this proposition of law in particular, and in his merit brief in general and would also, at the same time, result in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in this state court proceeding.

PROPOSITION OF LAW NO. TEN

A CRIMINAL DEFENDANT IS DENIED DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE FINGERPRINT EVIDENCE IS COLLECTED BY AN INCOMPETENT WITNESS AND WHERE THE EVIDENCE SO COLLECTED IS ADMITTED INTO EVIDENCE THROUGH THE TESTIMONY OF THE INCOMPETENT WITNESS.

Before expert testimony may be admitted at trial, the trial court "must make 'a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue.'" United States v. Smithers, 212 F.3d 306, 313 (6th Cir. 2000) (quoting Daubert v. Merrell Dow Pharm., Inc. (1993), 509 U.S. 579, 592 – 593.

The admission of opinion testimony by an expert is governed by Evid. R. 702, which states:

Rule 702. Testimony by Experts

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

© The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

Ohio implicitly adopted the Daubert test as early as 1996, as evidenced by this Court's opinion in Wagner v. Roche Laboratories (1996), 77 Ohio St.3d 116, 124. Where the qualifications of a witness to testify as an expert are not properly established pursuant to the requirements of Evid. R. 702 and Daubert, supra, the witness' testimony is merely speculative and not scientifically sound, and therefore constitutes incompetent evidence. Weisgram v. Marley Co. (2000), 528 U.S. 440. The admission of incompetent evidence at a capital trial is error. State v. Strong (1963),

119 Ohio App. 31. It is important to avoid error in capital proceedings. Satterwhite v. Texas (1988), 486 U.S. 249). It is incumbent on the prosecution to prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict and that the error is harmless before the verdict may stand. Chapman v. California (1967), 386 U.S. 18, 24).

The state introduced fingerprint evidence over a defense objection through Toledo Police Detective William Goetz ("Goetz"). Goetz, a detective in the Scientific Investigation Unit, testified as to how he obtained fingerprints from a 1997 Buick Skylark that Mr. Belton was in or near the evening after the robbery-homicide. Tr. Vol. II at 49-90; Tr. Vol. 3 at 435-36. Mr. Belton objected to Goetz's testimony for lack of foundation and was afforded an opportunity to voir dire the witness. Tr. Vol. II at 57-78. After the voir dire, Mr. Belton objected to further testimony regarding the fingerprint evidence on the basis of Goetz's lack of proper credentials and also on the basis that the requirements of Daubert were not satisfied. Tr. Vol. II at 68-74. The trial court allowed the testimony.

Goetz testified to his education, training, and experience essentially as follows: That he has collected hundreds of fingerprints; that he has had training by the FBI and BCI & I; that he attends semi-annual training updates; that he has made fingerprint comparisons "in excess of 20 – 25" times; that he has testified as an expert on

fingerprints 25 – 30 times; that he was not tested on his knowledge or skills at the conclusion of his fingerprint training through the FBI; that his FBI training did not involve any kind of peer review of his performance while in training; that he didn't recall any statistical or error rate that may have been applied during or after his training; that he could not recall the number of hours of training in fingerprint evidence he received through BCI & I but that he was "tested out" and received a certificate of completion and that he did not "think" there was an applicable error rate and could not recall if there was a statistical evaluation of the training he received; that he completed his training in 1996 and has not been tested on his skills since that time; that he has attended bi-annual update sessions "six or seven times" since 1996; that he has never testified outside of Lucas County as an expert; that he is not aware of any organization in the scientific community that recognizes fingerprint collection and identification as a science and that award certificates not just for training but for proficiency; that he is not aware of any publication, report or anything in any of the seminars and training that provides any theory or technique that can be tested as to the proficiency of collecting and comparing fingerprints; that he does not know of any peer review standards for the techniques he has learned; that he is not familiar with any publication or advised of any information in any of his training or seminars about the rate of errors with regard to collecting and comparing fingerprints; that he

is not aware of any educational facility that issues any type of degree or recognizes any type of degree for the training of collecting and comparing fingerprints; that he is not aware of any standards issued by the Bureau of Criminal Identification and Investigation about how to collect and compare fingerprints and what exactly should be done or how it should be done; and that the Toledo Police Department does not have any standards set forth that he must meet on a continuing basis. Tr. Vol. II at 54-67.

Despite Goetz's clear lack of qualifications to render expert fingerprint testimony, he was permitted to do so. This was error, especially when the fingerprint evidence, combined with Mr. Belton's involuntary confession (see Proposition of Law No. Nine), essentially established the element of Mr. Belton's identity as the perpetrator, of which there was no other conclusive evidence. Unless the state can prove beyond a reasonable doubt that the error complained of was harmless, the only remedy is to vacate the death sentence and remand this matter for a new trial in order to protect Mr. Belton's right to due process and a fair and reliable trial as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

Moreover, denial of this proposition of law would be contrary to, and an unreasonable application of, clearly established federal law as set forth in the United

States Constitution and as defined by the United States Supreme Court in decisions cited in this proposition of law in particular, and in his merit brief in general and would also, at the same time, result in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in this state court proceeding.

PROPOSITION OF LAW NO. ELEVEN

WHEN A CAPITAL DEFENDANT ENTERS A PLEA OF NO CONTEST TO A CHARGE OF AGGRAVATED MURDER AND THE ATTENDANT SPECIFICATIONS, IT IS PROSECUTORIAL MISCONDUCT FOR THE PROSECUTION TO INTRODUCE EVIDENCE CONCERNING THE NATURE AND CIRCUMSTANCES OF THE OFFENSE WHICH GO BEYOND THE FACTS NECESSARY FOR THE FACT-FINDER TO MAKE A FINDING OF GUILTY IN AN ATTEMPT TO PREJUDICE THE FACT-FINDER AGAINST THE DEFENDANT IN VIOLATION OF THE DEFENDANT'S RIGHTS TO DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION OF LAW NO. TWELVE

WHEN A CAPITAL DEFENDANT ENTERS A PLEA OF NO CONTEST TO A CHARGE OF AGGRAVATED MURDER AND THE ATTENDANT SPECIFICATIONS, IT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL DOES NOT OBJECT TO THE PROSECUTION'S INTRODUCTION OF EVIDENCE CONCERNING THE NATURE AND CIRCUMSTANCES OF THE OFFENSE WHICH GO BEYOND THE FACTS NECESSARY FOR THE FACT-FINDER TO MAKE A FINDING OF GUILTY IN AN ATTEMPT TO PREJUDICE THE FACT-FINDER AGAINST THE DEFENDANT, THEREBY DEPRIVING THE DEFENDANT OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO DUE PROCESS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Because these propositions of law are related, they will be argued together.

Crim. R. 11 provides in pertinent parts as follows:

Rule 11. Pleas, Rights Upon Plea

...

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

...

(3) [] 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.

Correspondingly, R.C. § 2945.06 provides that:

Accordingly, when a capitally-indicted defendant enters a plea of guilty or no contest to the aggravated murder count and the attending specification(s), it is nevertheless incumbent upon the state to present evidence sufficient to establish the defendant's guilt pursuant to Crim. R. 11 (C)(3) and R.C. § 2945.06. State v. Newton (2006), 108 Ohio St. 3d 13.

Thus, under Ohio's capital statutory scheme, if at least one of the statutory death specifications is charged in an indictment, the defendant is afforded a bifurcated trial wherein the question of guilt is determined by the trier of fact, independent of any punishment considerations. The first phase of the trial can be essentially waived by a plea of guilty or no contest, with the proviso that the prosecution must present that quantum of evidence necessary to establish a factual basis for the plea so as to allow the fact-finder to make a determination of guilt. Only if the defendant is found guilty beyond a reasonable doubt of at least one capital offense is this first phase followed by a separate evidentiary proceeding to determine the appropriate punishment.

During the penalty phase, the trier of fact is required to separately and independently decide whether, based upon proof beyond a reasonable doubt, the aggravating circumstances the defendant was found guilty of committing outweigh the mitigating factors present in the case. R.C. § 2909.03(D)(2); R.C. § 2909.04. "Only where it is determined, beyond a reasonable doubt, that the aggravating factors outweigh the mitigating factors may a defendant be sentenced to death. [] R.C. 2929.03 assigns this weighing task to [] the [fact-finder]. Following independent deliberations, the [fact-finder is] required to come to separate conclusions regarding whether life imprisonment or death is the appropriate sentence in the case." State v.

Buell (1986), 22 Ohio St. 3d 124, 136. Evidence concerning the nature and circumstances of the offense is to be considered during the penalty phase of a capital proceeding and only then on the side of mitigation. State v. Wogenstahl (1996), 75 Ohio St. 3d 344.

In the case sub judice, the prosecution intentionally went too far in the guilt phase proceedings with regard to the testimony of the medical examiner, County Deputy Coroner Dr. Diane Scala-Barnett. (Tr. Vol. III at 387-420. Her graphic testimony concerning her findings at autopsy about the distance of the gun from the victim, the injuries sustained by the victim, the length of time it took for him to expire and what he must have experienced during that time was not only overkill, it was unnecessary. Moreover, her autopsy report (state's Ex. 23) was admitted without objection. Indeed, this Court has previously held that it is improper for a prosecutor to attempt to portray the nature and circumstances of the offense as an aggravating circumstance. See Wogenstahl, supra, paragraph two of the syllabus. This Court has also held that it is improper for a prosecutor to portray a victim's suffering as an aggravating circumstance. State v. Combs (1991), 62 Ohio St. 3d 278, 283. And as already indicated, any such reference to this type of evidence is only properly admitted during the penalty phase of the proceedings. Wogenstahl, supra. And, since it was improper for the prosecution to introduce the complained of testimony during

the guilt phase of the proceedings, and to introduce it for an improper purpose, defense counsel was ineffective for failing to object to it. Strickland v. Washington (1984) 466 U.S. 668.

For all these reasons, Mr. Belton was subjected to prosecutorial misconduct, was denied due process and the effective assistance of trial counsel at trial, and a fair and reliable trial, as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding portions of the Ohio Constitution.

Moreover, denial of these propositions of law would be contrary to, and an unreasonable application of, clearly established federal law as set forth in the United States Constitution and as defined by the United States Supreme Court in decisions cited in this proposition of law in particular, and in his merit brief in general and would also, at the same time, result in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in this state court proceeding.

PROPOSITION OF LAW NO. THIRTEEN

OHIO'S DEATH PENALTY LAW IS UNCONSTITUTIONAL BOTH IN THE ABSTRACT AND AS APPLIED.

For at least the following reasons, Ohio's death penalty scheme is unconstitutional in general and as applied to Mr. Belton because it violates a capital defendant's rights to a fair trial and both substantive and procedural due process under the Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution and the comparable provisions of the Ohio Constitution. In addition, Ohio's death penalty law violates the Cruel and Unusual Punishment Clauses of both the federal and Ohio Constitutions. In addition, Ohio's death penalty law unconstitutionally violates international law and treaties to which the United States has made itself a party. Violating international law and treaties violates also the Supremacy Clause of the United States Constitution Article VI.

It is a too-often used catchphrase that "death is different." Gregg v. Georgia (1976), 428 U.S. 153, 188. In truth, however, it is. As various appellants have repeatedly argued before this Court, the finality and irreversibility of the death penalty requires heightened standards of due process and a greater assurance of reliability and appropriateness.

Admittedly, the death penalty is an established part of Ohio's law. And while there may be frustration on the part of some in the failure of the state not to have executed more than it has, though the pace is certainly speeding up, the reasons are not nefarious. Rather, the State's failure to kill is a function of the very processes the State has elected to set in motion. What is telling is not that so many have been sentenced to die but not killed. It is that so many who have been sentenced to die get some sort of judicial relief or have, at least, substantial claims to present to the courts.

The problem, in short, is that the alleged "procedural safeguards," too often work not at the time of charging defendants or trying them but years down the road. In State v. McGuire (1997), 80 Ohio St.3d 390, Justice Pfeifer reviewed the case of the factually innocent Randall Dale Adams, id. at 405 (Pfeifer, J., concurring in judgment only), who spent some twelve years in prison in Texas, many of them on death row. There have now been (1998) 100 exonerations from death rows around the country. Perhaps more horribly, there is significant evidence that at least some factually innocent persons have been executed, a state of affairs which, in the words of Justice Blackmun, is "close to simple murder." Herrera v. Collins (1993), 506 U.S. 390, 446.

Beyond the danger of executing the innocent, however, and it seems likely more frequently, is the danger of executing those who simply do not deserve death.

The effort to weigh the aggravating circumstances of a crime against the mitigation presented by a defendant's life is inherently fanciful, requiring the balance of things of altogether different sorts, the comparison not of apples and oranges but apples and automobiles. Precision is simply not possible, and the fact that an imprecise process is repeated by an appellate court or two does not add precision to it but, rather, as any statistician can explain, multiplies the imprecision.

As Justice Blackmun recognized in Callins v. Collins (1994), 510 U.S. 1141, "the death penalty experiment has failed." Id. at 1145 (Blackmun, J., dissenting from the denial of certiorari). And the failure is due, simply, to the fact that there is no rational way to determine who shall live and who shall die. What cannot rationally and consistently be decided, cannot, without violating the Due Process and Cruel and Unusual Punishment Clauses, be imposed. What cannot be done right ought not be done at all.

This Court has repeatedly, and without reaching the core issues involved, chanted the mantra of constitutionality. In State v. Reynolds (1998), 80 Ohio St.3d 670, 685, for instance, it was written:

Reynolds argues that Ohio's capital sentencing scheme violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution. We summarily reject this argument.

Appellant asks this Court to reconsider. The short of it is that Ohio's death penalty law is unconstitutional for at least the following reasons:

(1) it permits imposition of the death penalty in an arbitrary and capricious and discriminatory manner due to the uncontrolled discretion afforded elected county prosecutors in determining when to seek the death penalty;

(2) it requires proof of aggravating circumstances at the guilt phase of a capital trial rather than segregating statutory aggravating circumstances from the determination of guilt thereby providing a mechanism for individualized determination and narrowing of the categories of defendants eligible for the death penalty, see Zant v. Stephens (1983), 462 U.S. 862; Barclay v. Florida (1983), 463 U.S. 939;

(3) the statutory capital felony murder scheme permits aggravating circumstances merely to repeat elements of the aggravated felony murder thereby providing no effective and meaningful narrowing, see Lowenfield v. Phelps (1988), 484 U.S. 231;

(4) because a trial court has no discretion to dismiss death specifications in the interests of justice when a capital defendant goes to trial -- discretion a judge has when such a defendant elects to enter a plea of guilty, see Crim.R.

11(C)(3) -- it penalizes capital defendants who exercise their constitutional right to trial;

(5) by failing to require either the conscious desire to kill or premeditation and deliberation as the culpable mental states for a death sentence, Ohio violates the constitutional requirements of heightened reliability and the avoidance of arbitrariness and caprice in death sentences;

(6) it wrongfully requires that any pre-sentence report requested by the defendant be submitted to the sentencer, even if the report contains prejudicial or otherwise irrelevant and inadmissible material, R.C. 2929.03(D)(1);

(7) it does not require the state to prove either that there are no mitigating factors or that death is the only appropriate penalty in a particular case;

(8) it does not provide any means for ensuring proper and consistent weighing of aggravating and mitigating circumstances;

(9) it shifts the burden of proof at the mitigation phase of the trial from the State to the defendant as the defendant is required to prove by a preponderance of the evidence the existence of mitigating factors, thereby preventing the sentencer from considering mitigation which, while persuasive, is insufficiently proved;

(10) it precludes considerations of sympathy and mercy both in the abstract and in reaching the individualized determinations necessary; a jury which might, on a particular set of facts, wish to afford a defendant mercy is precluded by its oath from doing so;

(11) it fails to provide the option of a life sentence when there are no mitigating factors;

(12) it fails to permit a sentencer to grant mercy based on mitigation if mitigation is outweighed beyond a reasonable doubt by aggravating circumstances;

(13) it fails to require – or even to permit, the sentencer to determine whether a death sentence is appropriate to the nature and circumstances of the offense and offender or proportional to other cases where death sentences were sought, and it fails to require that such determinations – when resulting in a sentence of death, be made in such a way as to be reviewable;

(14) because it does not require the sentencing jury to identify mitigating factors it found, it makes meaningful appellate review impossible;

(15) because it provides appellate proportionality review only through examination of cases where a death sentence has been imposed, State v. Steffen (1987), 31 Ohio St.3d 111, paragraph one of the syllabus, certiorari denied

(1988), 485 U.S. 916, it creates a closed, self-referential system that allows for no real, fair, and adequate determination of proportionality and appropriateness;

(16) it fails in practice to require appellate review of whether a death sentence is appropriate, although R.C.2929.05(A) requires such a determination and due process requires that a state, having decided to provide a process, must do so in a constitutionally adequate manner and may not ignore those processes it has created, see, generally, Ross v. Moffitt (1974), 417 U.S. 600; Mayer v. Chicago (1971), 404 U.S. 189; Douglas v. California (1963), 372 U.S. 353;

(17) it fails to satisfy the Eighth Amendment prohibition against cruel and unusual punishment by "the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles (1958), 356 U.S. 86, 101;

(18) it fails to satisfy due process by interfering with the fundamental right to life absent compelling evidence of its necessity or any showing that the same interest cannot be served by a less restrictive means such as life without the possibility of parole, see, e.g., Commonwealth v. O'Neal (Mass. 1975), 327 N.E.2d 622;

(19) it utilizes lethal injection absent a specific request from the condemned, but lethal injection is cruel and unusual punishment because the state cannot demonstrate the ability to carry out a death sentence without unnecessarily inflicting torture and pain on the person being executed;

(20) it inflicts extreme psychological, emotional, and physical distress and anxiety prior to the execution, see Trop, supra (analyzing the extreme psychological anxiety and distress of a punishment in determining that it was unconstitutional); and

(21) it violates the Supremacy Clause, Paragraph II, Article VI, United States Constitution, providing that the judges of every state are bound by international treaties which the United States has entered "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," for Ohio's death penalty law violates the Organization of American States Treaty which binds the United States to the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. When state law conflicts with international law, state law must yield. See, e.g. Zschernig v. Miller (1968), 389 U.S. 429, 440;

(22) as a reimposed death penalty, it violates the custom and practice of civilized nations, which determine customary law, see The Paquete Habana (1900), 175 U.S. 677;

(23) it violates the expectations of the United Nations and the Council of Europe, see United Nations Charter, Articles 55 and 56; International Covenant on Civil and Political Rights; Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty, European Treaty Series No. 114, May 1983;

(24) it also violates United States treaty obligations under the International Covenant on Civil and Political Rights, the International Convention on the Elimination of all Forms of Racial Discrimination, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment all of which are binding on Ohio through the Supremacy Clause.

Because Mr. Belton was sentenced to an unconstitutional punishment by unconstitutional means, his death sentence violates his rights under the Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution. And because his sentence violates both international customary law and also treaties to which the United States

is a party, his sentence also violates the Supremacy Clause of Article VI, United States Constitution.

PROPOSITION OF LAW NO. FOURTEEN

A CAPITAL DEFENDANT IS DENIED DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE TRIAL COURT DENIES THE DEFENDANT A FULL AND FAIR OPPORTUNITY TO DEVELOP AND PRESENT ALL EVIDENCE RELEVANT TO MITIGATION OF THE IMPOSITION OF A SENTENCE OF DEATH.

PROPOSITION OF LAW NO. FIFTEEN

A CAPITAL DEFENDANT IS DENIED DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHERE THE TRIAL COURT DENIES THE DEFENDANT A FULL AND FAIR OPPORTUNITY TO DEVELOP AND PRESENT ALL EVIDENCE RELEVANT TO MITIGATION OF THE IMPOSITION OF A SENTENCE OF DEATH, THEREBY UNDULY INFLUENCING THE DEFENDANT'S DECISION TO PROCEED TO TRIAL BEFORE A THREE JUDGE PANEL OUT OF CONCERNS OF PREJUDICE.

Because these propositions of law are related, they will be argued together.

R.C. § 2929.03(D)(1) reads in part that "[t]he defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of

7the imposition of the sentence of death." (Emphasis added.) See also R.C. § 2929.04©.

In determining an appropriate sentence, a fact finder should be aware of the consequences and conditions associated with life incarceration. It stands to reason that a three-judge panel, and more so a jury, can only know the appropriateness of such a sentence if the members are familiarized with prison life. Moreover, the quality of an inmate's life differs depending on the security level of the institution. Whether society is sufficiently protected by placement of a defendant in a maximum security facility, and whether life-long placement in such a facility serves the purpose of punishment as contemplated by R.C. § 2929.11(A), are factors that are relevant to mitigating a sentence of death. In pursuit of this aim, and to provide the fact finders with sufficient information whereby an informed decision could be rendered, Mr. Belton requested the court permit a jury-view of a maximum security facility or, alternatively, funds to hire a videographer to record the sights and sounds of a maximum security facility. The trial court denied the alternative requests, relying on State v. Hanna (2002), 95 Ohio St. 3d 285, 306. (Judgment Entry filed February 20, 2009.) The defendant in Hanna was convicted by a jury of aggravated murder and sentenced to death. On appeal, the defendant argued that during his mitigation hearing, his trial counsel was ineffective by failing to have a representative from the

maximum security prison in Youngstown, Ohio or someone from the Department of Rehabilitation and Corrections to testify concerning conditions of confinement for life. In determining that the claim had no merit, this Court held:

Testimony about prison conditions was of questionable relevance, since evidence about future conditions of confinement involves speculation as to what future officials in the penal system will or will not do. Such evidence did not relate to appellant, his background or the nature and circumstances of the crime and therefore is not mitigating. See State v. White, 85 Ohio St. 3d at 448, 709 N.E.2d 140; see, also, People v. Thompson (1988), 45 Cal.3d 86, 139, 246 Cal.Rptr. 245, 753 P.2d 37; People v. Coddington (2000), 23 Cal.4th 529, 636, 97 Cal.Rptr.2d 528, 2 P.3d 1081 (conditions of confinement irrelevant to a capital sentencing scheme); Schmitt v. Commonwealth (2001), 262 Va. 127, 146, 547 S.E.2d 186 (evidence of prison life and security pictures of a maximum security prison not admissible); but, c.f., State v. Rhines (1996), 1996 SD 55, 175, 548 N.W.2d 415 (prison life relevant when weighing alternatives of life imprisonment and the death penalty). Thus, this claim of ineffectiveness has no merit.

It is worthy of note that this Court considered Hanna's request from an ineffective assistance of counsel perspective as opposed to a due process argument that he was deprived of an opportunity present evidence in mitigation of the death penalty itself. Accordingly, this Court did not consider that the evidence was relevant to mitigation of the sentence as opposed to mitigation of Hanna's conduct, and Hanna is not dispositive of the issue herein raised.

The United States Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." Vitek v. Jones (1980), 445 U.S. 480. As a general rule, a violation of state law, without more, is not the equivalent of a violation of the Fourteenth Amendment. Chambers v. Bowersox, 157 F.3d 560, 564 (8th Cir. 1998), cert. denied, 527 U.S. 1029 (1999). However, in Hicks v. Oklahoma (1980), 447 U.S. 343, the Supreme Court held that:

[w]here... a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

Id. at 346 (citation omitted).

Accordingly, given that R.C. § 2929.03(D)(1) provides that "[t]he defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death," (emphasis added), and that whether or not the imposition of the death penalty is appropriate after

consideration of those factors, it affords the fact finder discretion in determining an appropriate penalty. See also R.C. § 2929.04(C). But where a trial court improperly limits a capital defendant's ability to present such evidence, he is deprived of an interest which the Due Process Clause of the Fourteenth Amendment protects.

In addition to considerations under the Fourteenth Amendment, Eighth Amendment law also applies. Eddings v. Oklahoma (1982), 455 U.S. 104, says that states must allow "any relevant mitigating evidence." *Id.* at 113 – 114. Eddings does not limit what the evidence may mitigate. Again, it is the mitigation of the imposition of the death penalty itself which is at issue here, not any factors that may or may not tend to mitigate the offense.

And because the trial court improperly denied Mr. Belton's request to present relevant, mitigating evidence, he was forced to make a choice: Either proceed, in the absence of such evidence, to a trial by jury, or waive the jury and rely upon a panel of three judges to determine his fate. Since the State of Ohio was armed with a video depicting the graphic nature of the offense, and being deprived of the countervailing ability to depict the graphic nature of a life behind bars to a jury, he was constructively forced to waive his right to trial by jury out of concerns of undue prejudice. Accordingly, the court's ruling also has Sixth Amendment implications.

The trial court's denial of Mr. Belton's request for a jury view or, alternatively, for funds to hire a videographer to record the sights and sounds of a maximum security facility, deprived him of his rights to due process under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

Moreover, denial of these propositions of law would be contrary to, and an unreasonable application of, clearly established federal law as set forth in the United States Constitution and as defined by the United States Supreme Court in decisions cited in this proposition of law in particular, and in his merit brief in general and would also, at the same time, result in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in this state court proceeding.

PROPOSITION OF LAW NO. SIXTEEN

A CAPITAL DEFENDANT WHO EXHIBITS SIGNS OF ANTI-SOCIAL PERSONALITY DISORDER IS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND IS THEREFORE DENIED DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN COUNSEL FAILS TO COMMISSION A NEUROPSYCHOLOGICAL EVALUATION, AS VIOLENT OFFENDERS WHO EXHIBIT SIGNS OF ANTI-SOCIAL PERSONALITY DISORDER MORE OFTEN THAN NOT ALSO EXHIBIT SIGNS OF ABNORMAL BRAIN DEVELOPMENT ON IMAGING SCANS, AND SUCH EVIDENCE MITIGATES AGAINST IMPOSITION OF THE DEATH PENALTY.

Reversal of a conviction for ineffective assistance of counsel requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Strickland v. Washington (1984) 466 U.S. 668, 687; State v. Bradley (1989), 42 Ohio St. 3d 136, paragraph two of the syllabus. To demonstrate that counsel is deficient, a defendant must show that counsel's performance fell below an objective standard of reasonable representation. Bradley, supra. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that

there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. Bradley, *supra*, paragraph three of the syllabus.

"[A] penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose." Furman v. Georgia (1972), 408 U.S. 238, 331 (Marshall, J., concurring); see also *id.*, at 332 ("The entire thrust of the Eighth Amendment is, in short, against 'that which is excessive'").

In Atkins v. Virginia (2002), 536 U.S. 304), the United States Supreme Court found that while "mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes, [b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, [] they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants. Presumably for these reasons, in the 13 years since we decided Penry v. Lynaugh, 492 U.S. 302 (1989), the American public, legislators, scholars, and judges have deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal. The consensus reflected in those deliberations informs our answer to the question presented by this case: whether such executions are 'cruel and unusual punishments' prohibited by the Eighth Amendment to the Federal

Constitution." Id. at 306–307. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. Trop v. Dulles, 356 U.S. 86, 100 – 101 (1958).

The Atkins court found it significant that a number of states had made it unlawful to impose a death penalty on mentally retarded defendants in the years since it had decided, supra, and that this fact reflected a growing consensus among the states that imposition of the death penalty on mentally retarded defendants indeed constitutes cruel and unusual punishment:

This consensus unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty. Additionally, it suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards. As discussed above, clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant

evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 317 – 318 (footnotes omitted).

It is plainly apparent from the foregoing that imposition of the death penalty on a mentally-impaired defendant serves no legitimate penological interest and violates society's ever-evolving sense of decency. With that being said, it cannot be overlooked that our ever-evolving understanding of the human brain teaches us more and more over time that there are significant and common brain characteristics shared by offenders who commit violent crimes. See, e.g., "Brain Anatomy of Persistent Violent Offenders," Tiihonen, Rossi, et al., *Psychiatry Research: Neuroimaging* 163 (2008) 201 – 212 (copy in appendix); "Hippocampal Structural Asymmetry in Unsuccessful Psychopaths," Raine, Ishikawa, et al., *Biol. Psychiatry* 2004;55;185 – 191 (copy in appendix); "Psychobiology of the Violent Offender," Volavka, Martell, and Convit, *Journal of Forensic Sciences, JFSCA*, Vol. 37, No. 1, Jan. 1992, pp. 237 – 251 (copy in appendix). And, if it is the case that these brain abnormalities do indeed make such persons more prone to committing violent offenses than people who do not have such characteristics, is that not a factor to be considered in mitigation of the death penalty? After all, the person possessing such characteristics,

being biological phenomena, is no more deserving of punishment than a person suffering from the common cold or cancer. See Robinson v. California (1962), 370 U.S. 660, 667.

Counsel below sought and received approval for funds to retain a psychological expert and for a neuropsychological evaluation, which included brain imaging. (Transcript of Proceedings held March 8, 2010, pp. 20 – 23.) While counsel retained the expert services of a psychologist, Robert Stinson, Psy. D., counsel decided – inexplicably – to forego the neuropsychological evaluation and brain imaging, notwithstanding Dr. Stinson's indication to counsel his recommendation that a neuropsychological evaluation and/or neuroimaging assessments be conducted. (Transcript of Penalty Phase Proceedings Vol. 6, April 5, 2012, p. 872, line 12 – p. 873, line 13.) In fact, Dr. Stinson's testimony was replete with references to factors that the foregoing and other studies indicate are common to those suffering brain abnormalities of the type which result in impulsive and violent behavior. (See, Dr. Stinson's direct examination, Transcript of Penalty Phase Proceedings Vol. 6, April 5, 2012, pp. 764 – 878.) Moreover, even the prosecution's forensic psychiatrist, Dr. David Connell, confirmed Mr. Belton's diagnosis of Anti-Social Personality Disorder. (Transcript of Penalty Phase Proceedings, Vol. 7, April 5, 2012, p. 1026, line 16 – p. 1027, line 9.) Thus, given the frequency with which brain abnormalities are

associated with the occurrence of Anti-Social Personality Disorder, it was error prejudicial to Mr. Belton for his trial counsel to forego the neuropsychological evaluation and concomitant scanning procedures, as the presence of brain abnormalities would mitigate against the imposition of the death penalty. See, R.C. § 2929.04(B)(3) ("mental disease or defect"); R.C. § 2929.04(B)(7) ("[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death"); *Atkins*, *supra*. Moreover, trial counsel failed to develop the correlation between brain abnormalities and the diagnosis of Anti-Social Personality Disorder, which also inured to Mr. Belton's prejudice.

For all of the foregoing reasons, Mr. Belton received ineffective assistance of trial counsel for counsel's failure to follow-through with a neuropsychological evaluation and concomitant scanning procedures, in violation of his rights under the Sixth Amendment to the United States Constitution, and as a result he was denied due process of law in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Ohio Constitution.

Moreover, denial of this proposition of law would be contrary to, and an unreasonable application of, clearly established federal law as set forth in the United States Constitution and as defined by the United States Supreme Court in decisions cited in this proposition of law in particular, and in his merit brief in general and

would also, at the same time, result in a decision that is based on an unreasonable determination of the facts in light of the evidence presented in this state court proceeding.

PROPOSITION OF LAW OF LAW NO. SEVENTEEN

WHEN COUNSEL IN A CAPITAL CASE DO NOT ADEQUATELY PRESERVE THE RECORD FOR APPELLATE PURPOSES, THEY PROVIDE CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL.

Part of the job of trial counsel is to preserve issues for appellate review. While there may be some reason not to repeatedly object to the only marginally objectionable, there can be no justifiable reason for failing to preserve whole categories of issues for review. In this case, the record is replete with objections not made and issues therefore ripe for review only for plain error.

Appointed capital counsel are required to attend specialized training the in the trial of capital cases. C.P.Sup.R. 20. At seminar after seminar, they have been told of the importance of preserving issues for appellate review. Yet counsel too often ignore that obligation to their client. In doing so, they deny him the effective assistance of counsel. This is such a case.

Counsel's failures to object, and thereby preserve issues, deprived Mr. Belton of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under the cognate provisions of the Ohio Constitution. 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 C.P.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.

PROPOSITION OF LAW NO. EIGHTEEN

A CRIMINAL DEFENDANT IS DENIED DUE PROCESS AND THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE ACTIONS OF HIS TRIAL COUNSEL FALL BELOW ANY ACCEPTED STANDARD OF COMPETENCE IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE OHIO CONSTITUTION.

It is the position of Mr. Belton that he was denied his constitutional right to effective assistance of counsel due to the actions (and substantial inactions) of his trial counsel. It is submitted that this lack of effective assistance infected Mr. Belton's due process rights at both the trial and penalty phases to the extent that the only remedy is a new trial at which point appellant would be provided competent and effective counsel.

In order to prove that his Sixth Amendment right to effective assistance of counsel has been violated, an appellant must show that his counsel's representation fell below an objective standard of reasonableness by presenting evidence of specific acts or omissions. Strickland v. Washington (1984), 466 U.S. 668, 688; State v. Bradley (1989), 42 Ohio St.3d 136, 142. To prevail under an ineffective assistance of counsel claim, appellant must demonstrate that his defense was prejudiced by counsel's actions or omissions to such an extent that there is a reasonable probability

that, but for counsel's errors, a different result would have occurred. Strickland, at 691-96; Bradley, paragraph two of the syllabus.

The record is replete with instances where counsel failed to provide effective assistance within the meaning of the Sixth Amendment, as set forth in Strickland and Bradley. Each of these instances are detailed, individually, below.

a. Waiving a jury and electing to have a three-judge panel decide the sentence

While ostensibly tactical, waiving a jury in capital case – and any other criminal case – is a questionable tactic. The trial court here conducted an expansive colloquy in accepting the jury waiver.

In State v. Jells (1990), 53 Ohio St.3d 22, 559 N.E.2d 464, paragraph one of the syllabus, this Court we held, “There is no requirement for a trial court to interrogate a defendant in order to determine whether he or she is fully apprized of the right to a jury trial.” “The Criminal Rules and the Revised Code are satisfied by a written waiver, signed by the defendant, filed with the court, and made in open court, after arraignment and opportunity to consult with counsel. While it may be better practice for the trial judge to enumerate all the possible implications of a waiver of a jury, there is no error in failing to do so.” Id. at 26, 559 N.E.2d 464.

In addition, Mr. Belton incorporates by reference the law and argument in Propositions of Law Nos. Twelve, Fourteen, and Sixteen, as is fully reproduced in this proposition of law.

b. Waiving opening statement at the penalty phase

For reasons unknown, the defense waived opening statement at the penalty phase. It is difficult to see how such a waiver of the opening statement can—at best—be viewed as either “tactical” or “strategic.”

The United States Supreme Court has written that defense counsel is required to maintain a role as an “active advocate” at all times. Evitts v. Lacy (1985), 469 U.S. 387, 394. Moreover, defense counsel must, during the course of representation, pursue a course of “zealous and loyal representation.” Nix. V. Whiteside (1986), 475 U.S. 157, 188.

When viewed cumulatively, the waiver of opening statement at the penalty phase is another example of trial counsel’s ineffectiveness.

c. Failure to obtain a drug/alcohol expert and present testimony of substance abuse by Mr. Belton and its effects on his life

A constant theme of the State’s case involved the use by Mr. Belton of alcohol and drugs. At the mitigation hearing there was testimony offered by Dr. Stinson regarding Mr. Belton’s drug and alcohol abuse. See, e.g., Tr. Vol. VI at 837-39, 860-

25. Testimony by family members also mentioned substance abuse. Yet this testimony was not as effective or credible as testimony from a person certified as an expert in drug and alcohol issues. This lack undoubtedly contributed in part to the panel's decision to impose the death penalty.

It is Mr. Belton's position that had trial counsel contacted and engaged such an expert the resultant sentence would have been other than death. Once again, the only remedy is to remand the matter to the trial court for a new trial so that effective and competent counsel may be appointed to represent Mr. Belton at the new trial. Such a course of action is necessary to protect Mr. Belton's due process rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

d. Ineffective assistance in calling Matthew Martin as a witness

During the mitigation phase of the trial, the defense called Matthew Martin, a forensic counselor at the Lucas County jail. Mr. Martin was a counselor for many inmates at the jail, including Mr. Belton. The testimony, to put it charitably, was a disaster. It is obvious he was not prepared and had no real knowledge of Mr. Belton, given his answers on cross-examination.

The problem with this testimony is that it permitted the prosecution to introduce evidence of Mr. Belton's altercations at the jail. It must be remembered

that the prosecution did not attempt to introduce this evidence. It only did so once “the door was opened” by the ill prepared testimony of Mr. Martin. It was not until on cross-examination that the panel learned of the altercations -- the last thing the panel needed to hear -- that Mr. Belton may have difficulty adjusting to an institutional environment.

Another problem is that it prevented the panel from inferring otherwise. It also established the opposite of the principles of Skipper v. South Carolina (1986) 487 U.S. 1.

It is clear that a properly prepared witness would have been made aware of these salient facts. It is also clear that had properly prepared defense counsel been aware of these facts they would not have called Mr. Martin as a witness. His testimony, on balance, did much more harm than good.

For these reasons counsel were ineffective in not properly preparing Mr. Martin as a witness and failing to anticipate the content and basis of cross-examination. There is nothing “strategic” in having the panel know of these altercations. The prejudice is clear and this Court is urged to find that the calling of Mr. Martin as a witness constituted ineffective assistance of counsel under Strickland and Bradley.

e. Other areas

There are other examples in the record to demonstrate the sub standard performance of trial counsel. These include the failure to object to the death penalty based on changes in Ohio's sentencing law (Proposition of Law No. One); failing to object to the prosecutor's emphasizing the nature and circumstances of the offense. (Proposition of Law No. Twelve), and failing to consult with and possibly retain a neuero psychologist (Proposition of Law No. Sixteen).

It is difficult to see how any of the factors outlined above can—at best—be viewed as either “tactical” or “strategic.” Rather, it should be viewed as exactly what it is—a substandard performance by two attorneys who were not keeping their client's best interest at heart.

The United States Supreme Court has written that defense counsel is required to maintain a role as an “active advocate” at all times. Evitts v. Lucey (1985), 469 U.S. 387, 394. Moreover, defense counsel must, during the course of representation, pursue a course of “zealous and loyal representation.” Nix. v. Whiteside (1986), 475 U.S. 157, 188. It is clear from an examination of trial counsels' performance that they did not meet the minimum standards contemplated by Strickland and Bradley.

The effects the substandard representation had with the panel is, of course, unknown.

It is suggested that the only remedy is to remand the matter to the trial court for a new trial so that effective and competent counsel may be appointed to represent Mr. Belton at the new trial. Such a course of action is necessary to protect Mr. Belton's due process rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the applicable portions of the Ohio Constitution.

PROPOSITION OF LAW NO. NINETEEN

A DEATH SENTENCE MUST BE APPROPRIATE AND PROPORTIONAL.

R.C. 2929.05(A) provides that when a sentence of death is imposed in a trial court, this Court must "determine . . . whether the sentence of death is appropriate." Part of that determination is to be based on "whether the sentence is excessive or disproportionate to the penalty imposed in similar cases."

The issue, as the United States Supreme Court has repeatedly emphasized, is how to balance the narrow discretion to impose a death sentence so as to avoid caprice with the broad discretion not to impose a death sentence so as to permit individualized consideration in the determination of whether the offender should live or die. Furman v. Georgia (1972), 408 U.S. 238 (narrow discretion); Lockett v. Ohio (1978), 438 U.S. 586.

There is nothing in the nature and circumstances of the offense that is mitigating and none will be advanced.

It is clear that Mr. Belton's formative years were spent in less than ideal conditions. The conditions at the Gompers high school are enough, by themselves, to provide ample mitigation.

There are other mitigating factors present. A Crim.R. 11(C) (3) voluntary guilty plea deserves some weight, since guilty pleas are traditionally accorded substantial weight in imposing a sentence. It follows that a no contest plea under a similar scenario has the same effect.

Crim.R. 11(C)(3) even allows the trial court to dismiss a death penalty specification, in the interest of justice, when the defendant enters a guilty plea, although the trial court did not do so here. A defendant's willingness to step forward and take responsibility for his actions, without any offer of leniency by the state, indicates a person who is remorseful for the crimes he has committed.. State v. Ashworth (1999) 85 Ohio St.3d 56, 72, see also State v. Turner, 105 Ohio St.3d 331, 2005-Ohio-1938, ¶ 99, State v. Newton, 108 Ohio St. 3d 13, 2006-Ohio 81 at ¶119; State v. Donald Ketterer, 111 Ohio St.3d 70, 2006-Ohio-5283, at ¶200.

Clearly, not every death penalty case is deserving of death. Mr. Belton recognizes that in State v. Steffen (1987), 31 Ohio St.3d 111, paragraph one of the syllabus, certiorari denied (1988), 485 U.S. 916, this Court held that R.C. 2929.05(A) proportionality review "is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed."⁴ It does not follow,

⁴Although appellant believes, and has argued above, that Steffen was wrongly decided on this point, he recognizes that it is, for now and in this Court, controlling.

however, that the mandated review of appropriateness is also so limited. Indeed, appropriateness, by definition, is not simply proportionality.

What then do we measure? This Court has reviewed a number of death sentences. Appellant submits that not one of those cases bears any significant relationship to this one. Proportionality review in the mandated form must, then, be conducted in something of a vacuum. The very lack of similar cases, then, indicates that this case is disproportionate.

The aggravated murder at issue in this case was brutal, cruel, and senseless. The killing was not necessary to effectuate the aggravated robbery. The victim was, by all accounts, a man of character and integrity. The crime is a tragedy.

But tragedy is not the measure of appropriateness. And it is an inappropriate case for death. Mr. Belton deserves punishment, and it is appropriate that the punishment be severe. It is not appropriate that he be executed.

PROPOSITION OF LAW NO. TWENTY

CUMULATIVE ERRORS MAY DEPRIVE A CRIMINAL DEFENDANT AND CRIMINAL APPELLANT OF A FAIR TRIAL 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, and should this Court conclude that the errors complained of in the various assignments of error were not individually prejudicial, it should recognize that their combined effect was prejudicial.

CONCLUSION

For all of the reasons set forth above, Mr. Belton's rights under the Constitution of the United States and the Ohio Constitution were violated and he was denied a fair trial and sentencing proceeding. Accordingly, this Court should adopt his Propositions of Law, vacate his death sentence, and either impose a life sentence, remand the case to the trial court for a new sentencing proceeding or a new trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellant was sent by regular U.S. Mail, postage prepaid, to Julia Bates, Lucas County Prosecuting Attorney, Lucas County Courthouse, 700 Adams Street, Toledo, Ohio 43624, counsel of record for appellee, State of Ohio, this 14th day of February 2013.



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