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

APPENDIX TO THE MERIT BRIEF OF APPELLANT, ANTHONY BELTON

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Notice of Appeal

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Judgment from which Appeal is Taken

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COURT OF APPEALS
2012 JUN 4 A 8:38
COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE SUPREME COURT OF OHIO

12-0902

STATE OF OHIO

Appellee

vs.

ANTHONY BELTON,

Appellant.

* Supreme Court Case No.:
*
* On Appeal from the
* Lucas County Court of
* Common Pleas
*
*
* Common Pleas
* Case No. CR08-2934

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2012 JUN -4 P 4:51
COMMON PLEAS COURT
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DEATH PENALTY CASE

NOTICE OF APPEAL OF APPELLANT, ANTHONY BELTON

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MAY 24 2012
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Notice of Appeal of Appellant, ANTHONY BELTON

Appellant, ANTHONY BELTON, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lucas County Court of Common Pleas pronounced, file-stamped, and journalized April 19, 2012. The R.C. 2929.03(F) Opinion was filed and journalized on April 19, 2012.

This is a capital case in which the offense occurred after January 1, 1995.

Respectfully submitted,

SPIROS P. COCOVES

JEFFREY P. NUNNARI

COUNSEL FOR APPELLANT,
ANTHONY BELTON

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing notice of appeal was delivered by hand to the office of the Lucas County Prosecuting Attorney the 23rd day of May 2012.

Spiros P. Cocoves
COUNSEL FOR APPELLANT,
ANTHONY BELTON

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FILED
LUCAS COUNTY
2012 APR 18 P 2:11
COMMON PLEAS COURT
BERNIE QUILTER
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IN THE COMMON PLEAS COURT, LUCAS COUNTY, OHIO

STATE OF OHIO Plaintiff.	*	CASE NO: G-4801-CR-0200802934-000
v.	*	ORDER
ANTHONY BELTON Defendant.	*	JUDGE RUTH ANN FRANKS

* * * * * * *

April 06, 2012. Court Reporter TRICIA WADSWORTH, Assistant Prosecutor JEFFREY D. LINGO, ROBERT A. MILLER and TIMOTHY F. BRAUN, PETER G. ROST and RONNIE L. WINGATE on behalf of the Defendant, and Defendant ANTHONY BELTON present in court.

The Three-Judge Panel resumed deliberations on Friday, April 6, 2012, at 9:40a.m.

At 2:53p.m. the Three-Panel returned a unanimous verdict finding that the aggravating circumstance that the Defendant, Anthony Belton, was found guilty of committing, outweighs any and all mitigating factors presented in this case by proof beyond a reasonable doubt.

Matter proceeded to sentence. The Three-Judge Panel has considered the record, oral statements as well as the principles and purposes of sentencing under R.C. 2929.11, and has balanced the seriousness and recidivism factors under R.C. 2929.12.

The Three-Judge Panel finds that on April 4, 2012, the Defendant, Anthony Belton, was found guilty by a Three-Judge Panel of the offense of Count One, Aggravated Murder, in violation of R.C. 2903.01(B) and (F); Specification One as to Count One - Aggravating Circumstance/Specification, in violation of R.C. 2929.04(A)(3); Specification Two as to Count One - Aggravating Circumstance/Specification in violation of R.C. 2929.04(A)(7); and Specification Three as to Count One- Firearm Specification, in violation of R.C. 2941.145; Count Two, Aggravated Robbery, in violation of R.C. 2911.01(A)(1), a felony of the first degree; Specification One as to Count Two - Firearm Specification, in violation of R.C. 2941.145; and

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Count Three, Aggravated Robbery, in violation of R.C. 2911.01(A)(3), a felony of the first degree; and Specification One as to Count Three - Firearm Specification, in violation of R.C. 2941.145.

The three judge panel further has found that Aggravating Circumstance Specification One, in violation of R.C. 2929.04(A)(3) and Aggravating Circumstance Specification Two, in violation of R.C. 2929.04(A)(7), both of which were attached to the Count One of the Indictment, Aggravated Murder, in violation of R.C. 2903.01(B) and (F), arose from the same act or indivisible course of conduct by the Defendant and therefore were merged prior to the mitigation hearing proceeded. Further the State of Ohio elected to proceed on Aggravating Circumstance Specification Two, in violation of R.C. 2929.04(A)(7).

The three judge panel further has found that Count 2, Aggravated Robbery, in violation of R.C. 2911.01 (A)(1), a felony of the first degree and Count 3, Aggravated Robbery, in violation of R.C. 2911.01 (A)(3), a felony of the first degree, are merged for sentencing purposes.

The three judge panel further has found that the Firearm Specifications attached to Count One, Count Two and Count Three, in violation of R.C. 2941.145, are merged for sentencing purposes.

Having merged Count 2, Aggravated Robbery, in violation of R.C. 2911.01 (A)(1), a felony of the first degree and Count 3, Aggravated Robbery, in violation of R.C. 2911.01 (A)(3), a felony of the first degree, the three judge panel finds, pursuant to 2929.14(B), that the shortest prison term possible will demean the seriousness of the offense and will not adequately protect the public, and therefore the three judge panel imposes a greater term as to the offense of Aggravated Robbery.

The three-judge panel further finds that the Defendant, Anthony Belton has committed the worst form of the offense and poses the greatest likelihood of recidivism and therefore the three judge panel imposes the maximum sentence for the offense.

It is therefore ORDERED that the Defendant, Anthony Belton, having been found guilty by the three-judge panel of aggravated robbery in violation of 2911.01(A)(1) as charged in the second count of the indictment, a felony of the first degree, and having been found guilty by the three-judge panel of aggravated robbery in violation of 2911.01(A)(3) as charged in the third count of the indictment, a felony of the first degree, and having merged Count Two and Count Three for sentencing, it is therefore ORDERED that the Defendant, Anthony Belton serve a term of TEN (10) years in prison to the Ohio Department of Rehabilitation and Corrections in Orient, Ohio. An additional term is imposed as a mandatory and consecutive term pursuant to R.C. 2929.14D)(1) of THREE (3) years as the Firearm Specifications attached to count 1, count 2 and count 3, which have now been merged for a single consecutive prison term of THREE (3) years.

It is further ORDERED that as to the merged sentencing of Count 2 and Count 3, the Defendant is subject to 5 (FIVE) years of mandatory post-release control, if the Defendant would

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be released from imprisonment pursuant to R.C. 2967.28 and R.C. 2929.14.

Defendant notified that if post release control conditions are violated the adult parole authority or parole board may impose a more restrictive or longer control sanction or return a defendant to prison for up to nine months for each violation, up to a maximum of 50% of the stated term originally imposed. Defendant further notified that if the violation of post release control conditions is a new felony, a defendant may be both returned to prison for the greater of one year or the time remaining on post release control, plus receive a prison term for the new felony.

As to Count 1 of the indictment, aggravated murder and upon the specification that the that the aggravated murder was committed while the Defendant, Anthony Belton was committing or fleeing immediately after committing aggravated robbery and the Defendant, Anthony Belton was the principal offender in the commission of aggravated murder in violation of R.C. 2929.04(A)(7) , it is further ORDERED that the Defendant, Anthony Belton be put to death by lethal injection pursuant to 2949.22.

It is further ORDERED that the Defendant, Anthony Belton, be conveyed to the Ohio Department of Rehabilitation and Corrections or a different facility as specified and designated by the director of the Ohio Department of Rehabilitation and Corrections by the Lucas County Sheriff within 30 days thereof and the writ of execution of death penalty shall issue accordingly required pursuant to 2941.21.

It is further ORDERED and thereafter the defendant, Anthony Belton, be subsequently transferred to the Southern Ohio Correctional facility at Lucasville or to the facility designated by the director of the Ohio Department of Rehabilitation and Corrections and that the Defendant, Anthony Belton, shall be kept at this facility until August 1st, 2012 at midnight. On that date and that time and in that place in accordance with 2949.22 the sentence of death shall be imposed upon the Defendant, Anthony Belton, by lethal injection. The application of the drug or combination of drugs shall be continued until such time as Defendant, Anthony Belton is dead.

Defendant notified that under federal law 18 USC 922(g) and state law, as a result of a felony conviction or a misdemeanor offense of violence conviction against a family or household member, defendant shall never be able to ship, use, receive, purchase, own, transport, or otherwise possess a firearm or ammunition and violation is punishable as a felony offense.

Defendant found to have, or reasonably may be expected to have, the means to pay all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution as authorized by law. Defendant ordered to reimburse the State of Ohio and Lucas County for such costs. This order of reimbursement is a judgment enforceable pursuant to law by the parties in whose favor it is entered. Defendant further ordered to pay the cost assessed pursuant to R.C. 9.92(C), 2929.18 and 2951.021. Notification pursuant to R.C. 2947.23 given.

Defendant given notice of appellate rights under R.C. Section 2953.08. Defendant found indigent and appointed the following appellate counsel of record: SPIROS P. COCOVES and

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JEFFREY P. NUNNARI.

Defendant is ORDERED conveyed to the custody of the Ohio Department of Rehabilitation and Corrections.

Credit for 1332 days is granted as of April 6, 2012, along with future custody days while defendant awaits transportation to the appropriate state institution. In accordance with R.C. Section 2929.03(F) of the Ohio Revised Code, this Three-Judge Panel will file a separate written opinion within fifteen days hereof setting forth the Court's specific findings of the aggravating circumstances proven beyond a reasonable doubt and the existence or non-existence of mitigating factors, and the Court's reasons why the aggravating factors outweighs the mitigating factors beyond a reasonable doubt.

JUDGE RUTH ANN FRANKS

JUDGE JAMES D. JENSEN

JUDGE GENE A. ZMUDA

Opinion Relating to the Judgment Being Appealed

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LUCAS COUNTY

2012 APR 19 P 2:53

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

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IN THE COMMON PLEAS COURT OF LUCAS COUNTY, OHIO

STATE OF OHIO,	*	CASE NO. CR 200802934
Plaintiff,	*	OPINION
V.	*	
ANTHONY BELTON,	*	JUDGE RUTH ANN FRANKS JUDGE JAMES JENSEN
Defendant.	*	JUDGE GENE ZMUDA

On April 2, 2012, the Defendant, Anthony Belton, waived his right to trial by jury[1] and the matter then proceeded to trial before a three judge panel. At the commencement of the trial, pursuant to Ohio Rule of Criminal Procedure 11(C)(3), the Defendant withdrew his former pleas of not guilty and entered pleas of no contest to all the charges and specifications contained in the Indictment.

Upon the acceptance of the Defendant's no contest pleas to all charges and specifications contained in the Indictment, and in accordance with Crim.R. 11(C)(3) and R.C. §2945.06, the State of Ohio presented evidence, which included witnesses, stipulations by the State and the Defendant, and exhibits. At the completion of the evidence on April 4, 2012, and after

[1] On, March 27, 2012, the Defendant had previously knowingly, intelligently and voluntarily waived his right to trial by jury and consented to be tried by a three judge panel.

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addressing any objections to the exhibits offered by the State of Ohio, the parties presented argument concerning whether the evidence established, beyond a reasonable doubt, the offense of Aggravated Murder or a lesser offense contained in Count One. Additional argument was presented concerning whether the evidence established beyond a reasonable doubt the two separate aggravating circumstance specifications and the attached firearm specification. Counsel further presented argument concerning whether the evidence established beyond a reasonable doubt the separate charges of Aggravated Robbery contained in Count Two and Count Three and the separate firearm specifications attendant to each charge of Aggravated Robbery.

Lastly, counsel for the Defendant renewed their motion, pursuant to Crim.R. 11(C)(3), that the aggravating circumstance specifications identified as Specification One, in violation of R.C. §2929.04(A)(3) and Specification Two, in violation of §2929.04(A)(7), which are attached to Count One of the Indictment, be dismissed in the interest of justice.

At the conclusion of closing argument, the three judge panel commenced its deliberations. The first matter addressed was Defendant's motion to dismiss the aggravating circumstance specifications, pursuant to Crim.R. 11(C)(3). After careful consideration, the three judge panel unanimously found the motion not well taken and denied. The three judge panel then began to consider all the evidence, in conjunction with the applicable law, to determine whether the State had met its burden of proof relative to each charge and each attached specification.

After concluding its deliberations, the three judge panel announced its unanimous findings and verdicts: As to Count One, Defendant is guilty of Aggravated Murder, in that the State of Ohio had proven beyond a reasonable doubt all of the elements of Aggravated Murder in

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violation of R.C. 2903.01(B) and (F), in that the Defendant, on or about the 13th day of August, 2008, in Lucas County, Ohio, did purposely cause the death of Matthew Dugan while committing or attempting to commit Aggravated Robbery.

The three judge panel further unanimously found the Defendant guilty of Specification One, attendant to Count One of the Indictment, in that the State of Ohio had proven beyond a reasonable doubt that the Aggravated Murder was knowingly committed by the Defendant for the purpose of escaping detection, apprehension, trial, or punishment for another offense, committed by the offender in violation of R.C. 2929.04(A)(3) .

The three judge panel further unanimously found that the State of Ohio had proven beyond a reasonable doubt all of the elements of Specification Two, attendant to Count One of the Indictment, that is, that the Aggravated Murder was knowingly committed while the offender was committing or fleeing immediately after committing Aggravated Robbery and the Defendant, Anthony Belton was the principal offender in the commission of Aggravated Murder in violation of R.C. 2929.04(A)(7).

The three judge panel further unanimously found that the State of Ohio had proven beyond a reasonable doubt all of the elements of Specification Three attendant to Count One of the Indictment, that is the Firearm Specification in violation of R.C. 2941.145.

The three judge panel further unanimously found that the State of Ohio had proven beyond a reasonable doubt all of the elements as set forth in Count Two of the Indictment, Aggravated Robbery, in violation of 2911.01 (A)(1), a felony of the first degree, in that the Defendant, on or about August 13, 2008, in Lucas County, Ohio, in committing a theft offense, did knowingly have a deadly weapon, to wi: a firearm, on or about the Defendant's person or

under his control, and did either display the weapon, brandish it, indicated that the offender possessed it, or used it to facilitate the offense.

The three judge panel further unanimously found that the State of Ohio had proven beyond a reasonable doubt all of the elements of Specification One attendant to Count Two of the Indictment, the Firearm Specification in violation of R.C. 2941.145.

The three judge panel further unanimously found that the State of Ohio had proven beyond a reasonable doubt all of the elements as set forth in Count Three of the Indictment, Aggravated Robbery, in violation of 2911.01 (A)(3), a felony of the first degree, in that the Defendant, on or about August 13, 2008, in Lucas County, Ohio, in committing a theft offense, or in fleeing immediately after committing the offense, did knowingly inflict serious physical harm on another.

Lastly, the three judge panel unanimously found that the State of Ohio had proven beyond a reasonable doubt all of the elements of Specification One attendant to Count Three of the Indictment, the Firearm Specification in violation of R.C. 2941.145.

Prior to proceeding to the mitigation hearing, counsel for the State of Ohio and the Defendant, agreed that Count 2, Aggravated Robbery, in violation of R.C. 2911.01 (A)(1), a felony of the first degree and Count 3, Aggravated Robbery, in violation of R.C. 2911.01 (A)(3), a felony of the first degree, are merged for sentencing purposes.

Counsel for the State of Ohio and the Defendant further agreed that the Firearm Specifications attached to Count One, Count Two and Count Three, in violation of R.C. 2941.145, are merged for sentencing purposes.

Lastly, the State of Ohio stated to the three judge panel that, although the Defendant was

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found guilty of Aggravating Circumstance Specification One, in violation of R.C. 2929.04(A)(3) and Aggravating Circumstance Specification Two, in violation of R.C. 2929.04(A)(7), both of which were attached to the Count One of the Indictment, Aggravated Murder, in violation of R.C. 2903.01(B) and (F), the State of Ohio, represented that the two Aggravating Circumstance Specifications arose from the same act or indivisible course of conduct and therefore are merged. The State elected to proceed on Aggravating Circumstance Specification Two which states:

> The Aggravated Murder was knowingly committed while the Defendant, Anthony Belton was committing or fleeing immediately after committing Aggravated Robbery and the Defendant, Anthony Belton was the principal offender in the commission of Aggravated Murder in violation of R.C. 2929.04(A)(7).

Prior to proceeding with the mitigation hearing, the Defendant waived his rights to the presentment and consideration of a pre-sentence report and a mental examination pursuant to R.C 2929.03(D)(1).

Additionally, before commencing with the mitigation hearing on April 4, 2012, the three judge panel inquired of lead counsel and co-counsel for Defendant whether each counsel was fully prepared to proceed with the hearing. After both counsel for the Defendant answered in the affirmative, the mitigation hearing commenced.

Counsel for the Defendant indicated to the three judge panel that they would present evidence relative to: R.C. 2929.04 (B)(4), "[t]he youth of the offender"; R.C. 2929.04(B)(5), "[t]he offender's lack of a significant history of prior criminal convictions and delinquency adjudications", and ; 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".

At the commencement of the mitigation hearing, the State of Ohio moved for the

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admission of certain exhibits admitted during the no-contest phase and the testimony related to those exhibits. These exhibits and related testimony were admitted without objection by the Defendant. Having reserved its right to present rebuttal evidence, the State of Ohio then rested.

The Defendant presented evidence of mitigation through the testimony of Dr. Robert Stinson, a forensic psychologist; Mark Rooks, an investigator for the State Public Defender's Office; Kim Harold, the mother of the Defendant; Linda Berry, the great aunt of the Defendant, and Matthew Martin, a counselor at the Lucas County Correction Center. Defendant also presented exhibits A through V, which were admitted[2].

Prior to resting by the defense, the Defendant was advised of his right to remain silent and that such silence would not be used against him for any purpose. Defendant was further advised of his right to make a statement, either sworn or unsworn. After conferring with his counsel, Defendant declined his right to make a statement. The Defendant then rested.

In rebuttal, the State of Ohio called, Dr. David Connell, a clinical psychologist. The State of Ohio also presented Composite Exhibit 200, which was admitted without objection. The State then rested.

Counsel for the State of Ohio and the Defendant then presented their closing arguments.

After the closing arguments by counsel, the three judge panel commenced its deliberations on April 5, 2012. The panel adjourned in the evening hours and resumed their

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[2] The only objection raised by the State was to Defendant's Exhibit S, which was identified as "Belton time line" The State objected to the summary of events listed after each date. The Court found the objection well taken and ruled that the dates contained in Exhibit S would be considered, however the summaries of the events would not be admitted.

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deliberations on April 6, 2012.[3] During the seven hours of deliberations, the three judge panel applied all relevant law to its deliberations and upon a thoughtful and complete scrutiny of the mitigating factors which were set forth in this case, and after weighing the aggravating circumstance against the mitigating factors, the three-judge panel unanimously made a finding, beyond any reasonable doubt, that the aggravating circumstance that the Defendant, Anthony Belton, had been found guilty of committing, outweighs any and all mitigating factors shown to be present in this case.

The three judge panel now submits this Opinion in accordance with Ohio Revised Code 2929.03(F).

FACTUAL BACKGROUND AND FINDINGS BY THE THREE JUDGE PANEL AS TO SPECIFICATION TWO, IN VIOLATION OF R.C. 2929.04(A)(7)

The aggravating circumstance which the State of Ohio elected to proceed on is:

> The aggravated murder of Matthew Dugan was knowingly committed while the Defendant, Anthony Belton was committing or fleeing immediately after committing aggravated robbery and the Defendant, Anthony Belton was the principal offender in the commission of aggravated murder.

The evidence relevant to this aggravating circumstance is as follows. After arming himself with a firearm, which he knew was loaded with ammunition and contained a live round in the chamber and bullets in the clip, the Defendant, on August 13, 2008, entered the BP

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[3] Deliberations commenced at 6:34 p.m on April 5, 2012. Deliberations were adjourned at 8:42 p.m. The three judge panel resumed deliberations at 9:40 a.m. on April 6, 2012, and concluded deliberations at 2:53 p.m.

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Station carry-out, located at 3306 Secor Road, Toledo, Ohio to commit the aggravated robbery. Video cameras in the BP carry-out, memorialized the Defendant's callous and violent actions on that morning.

According to the time recorded on the video cameras, at approximately 6:03:50 a.m.,[4] the Defendant first entered the carry-out, to commit the aggravated robbery, however the Defendant left when he saw another customer in the carry-out. Less than two minutes later at 6:05:07 a.m.[5], the Defendant reentered the carry-out of the BP station and walked to the coolers and retrieved two cold drinks and placed them on the counter next to the cash register where the clerk, Matthew Dugan was standing. After the Defendant placed the cold drinks down on the counter, a customer walked in to the carry-out. Just as in the first attempt to commit the aggravated robbery by the Defendant, when he became aware that another customer was in the carry-out, the Defendant exited the carry-out for the second time.[6]

After the Defendant had left the carry-out, Matthew Dugan picked up the cold drinks left by the Defendant, and put them back in a cooler. In explaining to the detectives why he did not commit the offense when customers were present in the carry-out, the Defendant indicated that he did not want one of the customers to try to be a "hero".

Even after two aborted attempts to commit the aggravated robbery, the Defendant did not choose to terminate his desire to commit the aggravated robbery at the carry-out. Approximately

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[4] The parties do not dispute the time reflected on the video recording was off the actual time by approximately 50 minutes. For consistency sake, and given the actual time is not relevant to any determinative issue, the three judge panel shall reference the recorded time on the video.

[5] State's Exhibit 88.

[6] Id.

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five minutes later, at 6:10:41 a.m.[7], the Defendant entered the carry-out for the third time to commit the aggravated robbery.

Just as the Defendant had done in the second aborted aggravated robbery, the Defendant again walked back to the coolers and removed two cold drinks and placed them on the counter, near the cash register where Matthew Dugan was standing. On this third occasion, the Defendant found himself and Matthew Dugan were the only people in the carry-out.

As Matthew Dugan began to assist in the sale of the drinks, the Defendant produced the loaded 9 millimeter semi-automatic firearm and thrust it at Matthew Dugan. Seeing the firearm, Matthew Dugan leaned away from the firearm and reflexively drew his hands to his body and chest area. The video depicts the shock and fear in Matthew Dugan's response to the Defendant.

Although there is no audio in the video, the video clearly shows that Matthew Dugan was totally compliant with every demand made by the Defendant. Matthew Dugan opened the cash register and took all the cash out of the drawer and immediately handed it to the Defendant. Matthew Dugan was then ordered by the Defendant to retrieve prepaid cell phone cards [8]. Matthew Dugan again did not resist in any fashion as the Defendant continued to point the loaded firearm at him. Matthew Dugan turned his back to the Defendant and walked to the counter area and retrieved the Page Plus prepaid cell phone cards .

After handing the Defendant the prepaid cell phone cards, Matthew Dugan was once again ordered by the Defendant to retrieve something from the same counter area. As Matthew

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[7] Id.

[8] The Page Plus prepaid cell phone cards were found on the Defendant when he was arrested following the homicide. The evidence further established that the Defendant had a Page Plus cell phone at the time of the offense.

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Dugan continued to comply with the Defendant's demands and turned his body to retrieve the demanded item, the Defendant leaned forward, raised the firearm, pointed the gun directly at the back of Matthew Dugan's head and fired his nine millimeter hand gun.[9] Matthew Dugan immediately fell to the floor and died within minutes. The Defendant then merely walked out of the gas station and proceeded to an awaiting motor vehicle.

MITIGATING FACTORS

1. The nature and circumstances of the offense

The three judge panel weighed the nature and circumstances of the offense for any mitigating factors. After weighing all the evidence, the three judge panel unanimously finds no mitigating factors exist concerning the nature and circumstances of the aggravated murder of Matthew Dugan.

2. The history, character, and background of Anthony Belton

The Defendant was born in Toledo, Ohio, on November 23, 1985, to Kim Harold and Anthony Belton, Sr. Although defense expert, Dr. Robert Stinson, a forensic psychologist,

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[9] Dr. Barnett, the deputy coroner who performed the autopsy on Matthew Dugan, noted "* * * a stippling pattern on the skin of Matthew Dugan, beginning at the hairline and reaching to the level where the shirt he was wearing began. The stippling pattern is roughly in a rectangular pattern from the nape of the neck to shirt line, measuring 4 3/4 inches on the left, 2.5 inches on the right, and 3.0 inches in width on the midline, and extending over a width of 10.0 inches." State's Exhibit 23. Based upon the stippling pattern, Dr. Barnettt opined that the muzzle of the firearm was no more that 24 inches from Matthew Dugan's head when the Defendant fired the 9 millimeter hand gun. See Dr. Scala-Barnett's testimony and State's Exhibit 23.

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testified that the Defendant had a complicated birth process, the three judge panel has found no credible evidence to support that conclusion.

Some time after the Defendant's birth, Anthony Belton, Sr. joined the Marines. The Defendant's father saw the Defendant and Ms. Harold only during leaves from his military duties. During one such leave, the Defendant's mother became pregnant with their second son, Aaron, who was born on January 5, 1987.[10] Because Defendant's father infrequently saw the Defendant, the Defendant's mother was the primary care provider.

During the early years of Defendant and his brother, Aaron, their mother acknowledges that she was using illicit drugs and living a chaotic life. Ms. Harold further indicated that during that time, several family members offered to take care of the Defendant and Aaron. However, Ms. Harold refused. Anthony Belton Sr. indicated that it was Ms. Harold's drug use and life style that caused him to no longer have a relationship with her.[11]

The Defendant and his younger brother, Aaron lived with their mother until their mother, Ms. Harold was incarcerated and placed in the Lucas County's Correctional Treatment Facility, to address Ms. Harold's drug addiction, provide her positive life skills and the tools to maintain her sobriety. When Defendant's mother was incarcerated, the Defendant and his brother, Aaron were sent to San Diego, California to live with their father.

At the time of the move, the Defendant was approximately 12 years old and his brother, Aaron was approximately 10 years old. In describing how the Defendant and he reacted to being

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[10] The Defendant has a third brother named Chris Belton. Chris Belton's father is a cousin of Anthony Belton, Sr. Chris Belton was born in 1989.

[11] Defendant's Exhibit R.

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sent to California, Aaron stated that "* * * he and [the Defendant] were excited about going to California, believing it to be a 'cool' place.[12]"

The Defendant described the several years that he and his brother were living with his father in California, as follows: Defendant's "* * * father was living with a girlfriend, LaTisha and that the four of them got along well"[13]. The Defendant further stated that "* * * at age 13 his father and Latisha broke up. The breakup forced the family to move to a new neighborhood and new school. Though he got along well with LaTisha, her absence permitted [Defendant] and his father to further cement their bond".

The Defendant further indicated that when his father's new girlfriend, Michelle, moved in with her three young daughters, the Defendant, now 14 years old "* * * did not like Michelle from the start. [The Defendant] suddenly found that as the eldest child, he was expected to help take care of all the children in the home and was given new found chores that he did not appreciate." The Defendant stated that "Michelle also tried to be "motherly", which also caused him to recoil"[14].

In describing the discipline of his father, the Defendant stated that "* * * his father tried to correct his behavior by often punishing him. In fact, he states he was on punishment much of the time, which was effective in curtailing the amount of time [Defendant] could spend with fellow gang members. Defendant's father's punishment ranged from not allowing Anthony to watch TV, forcing him to stay in his room, whippings, and not permitting him to venture outside

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[12] Defendant's Exhibit Q.

[13] Defendant's Exhibit K

[14] Id.

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the house." Defendant further indicated that he "* * * believes the punishment went overboard, causing him to rebel. This only made the punishment more severe, but he simply adjusted to all the punishment to the point that it no longer had an effect"[15]

Relative to the Defendant's schooling in California, Defendant stated that he" * * * attended school at Wilson Academy in San Diego, California, and [Defendant] reports good attendance and good grades"[16]. As to his study habits, when the Defendant attended Gompers High School, the Defendant stated "* * * that he could do well in school if he chose, but that there were too many distractions to focus. He gave no thought to life after high school, feeling that his father would take care of him no matter the situation", because, his father " * * * never threatened to kick him out of the house"[17].

Defendant's brother, Aaron described his time at Gompers High School, in the following manner:

> "* * *]H]e enjoyed attended (sic) Gompers, because all his friend's (sic) from the neighborhood were enrolled there." Additionally, both Aaron and the Defendant indicated that there were several gangs at the school. Aaron further indicated that "* * * there was (sic) 2 or 3 gang riots every year at Gompers"[18]

It was the Defendant's physical assault of a female student at Gompers High School, which ultimately caused the Defendant and his brother, Aaron to return to Toledo, because the

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[15] Id.

[16] Id.

[17] Id.

[18] Defendant's Exhibit Q.

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mother of the female student threatened charges.[19] The Defendant and Aaron "* * * were sent back to his mother's home in Toledo before incurring more trouble"[20].

The Defendant's mother, Kim Harold, testified that when the Defendant and Aaron returned to Toledo, from California, the Defendant was approximately 17 years old and Aaron was approximately 15 years old. Ms. Harold further testified that when her sons had returned to Toledo, she had given up her past negative behavior, as well as her addiction to illicit drugs. Ms. Harold further testified that she was sober and employed full time.

Upon the Defendant's return to Toledo, his mother enrolled him at Roger's High School. However, the Defendant would not follow the rules and was subsequently expelled. The Defendant was then placed in Glass City Academy in order to secure his GED. Records from the academy indicate that during the school year of 2004-2005, the Defendant earned only 8 credits and only 4 credits were earned by the Defendant during the 2005-2006 school year. Disciplinary problems were noted in the Glass City Academy records. Among the disciplinary problems were that the Defendant was disruptive in the classroom. Defendant was disrespectful in the classroom. Defendant was disrespectful to class mates and insubordinate to staff members. The Defendant frequently did not attend school, and was finally suspended and told that if he came

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[19] In describing the incident, the Defendant indicated "* * * that although he was having problems in school and at home, he saw a future of remaining in San Diego in his father's home for as long as his father would have him. He no (sic) plans of returning to Toledo, but that changed after an incident at school. Anthony, who'd always had a short temper, was accused of assaulting a female classmate. He states that he slapped her three times, but only after she'd slapped him first" See Defendant's Exhibit K.

[20] Defendant's Exhibit K.

back to the school, he would be arrested.[21]

In November, 2005, the Defendant's great aunt, Linda Berry, who received her B.S. Degree in nursing and also received a psychiatric certification, took the Defendant to Connecting Point for an evaluation and counseling. Connecting Point records[22] reflect that the Defendant was diagnosed with dysthymia, which has been described as "chronic low grade depression"[23].

The records further indicate that the Defendant was having difficulty sleeping, concentrating, was often angry, lacked motivation, did not listen or follow through with projects, was forgetful, hyperactive and impulsive at times, had threatened others, ran away from home five times, had been excessively truant, defiant, blames others, is annoyed by others, sleeps in the day time, can have flight of ideas, wants to do things his way, and physically fights.[24]

The records go on to indicate that the Defendant has fair insight, poor judgment, poor frustration tolerance and driven by immediate gratification. The records further indicates that the Defendant may have been experiencing dysthymia since he was seven (7) years old.[25]

The records additionally reflect that Connecting Point attempted to address the needs of the Defendant, including job training and independent living, however, the Defendant was terminated from Connecting Point's services on March 22, 2006. The termination summary

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[21] Defendant's Exhibit F.

[22] Defendant's Exhibit, D.

[23] Defendant's expert, Dr. Robert Stinson, described dysthymia as "chronic low grade depression".

[24] Defendant's Exhibit D.

[25] Id.

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noted that in spite of the efforts of Connecting Point to assist the Defendant, the " [Defendant] repeatedly [was a] no call/no show or cancelled a lot of appointments which caused case closure."[26]

The evidence further establishes that the Defendant's mother also obtained employment for Defendant, but the Defendant, once again, chose to reject this help by failing to maintain his employment, just as he failed complete his education, and follow through with addressing any mental health issues he might have.

Defendant's expert, Dr. Stinson, a forensic psychologist, testified that the Defendant came from a dysfunctional family. In reciting the family history, Dr. Stinson noted, among other things, that there was illicit drug use by several family members, unstable living arrangements, molestation of Defendant's mother by her step father when she was a youngster, an unsuccessful suicide attempt by Defendant's mother, Defendant's mother was assaulted by her live-in boyfriend in Defendant's presence when the Defendant was approximately 11 years old, use by the Defendant of illicit substances[27], as well as the death of "Uncle George", which caused the Defendant great sorrow.

Although Dr. Stinson testified that the Defendant suffers from mixed bipolar disorder, the evidence supporting this testimony is inconclusive at best. Certainly, the Defendant has in the past exhibited signs of depression and was diagnosed at Connecting Point as having dysthymia.

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[26] Id.

[27] Defendant stated that he is a marijuana user and began using it when he was 15 or 16 years of age. He further stated that "[h]e witnessed his uncles and cousins using coke and crack* * *".[The Defendant further stated] that while he used pot, he refrained from trying cocaine or crack because he witnessed what those drugs did to family members." See Defendant's Exhibit K.

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However, after an exhaustive review of the evidence presented, including the admitted exhibits, the three judge panel does not find credible evidence supporting the diagnosis of mixed bipolar disorder.

The three judge panel finds that there is no doubt that certain family members of the Defendant were not positive role models in the Defendant's early upbringing. However, Defendant's early years were not void of other family members who attempted to give guidance, support and love to the Defendant. More often than not, whenever, Ms. Harold and her children were in need, offers of assistance were forthcoming. Numerous family members volunteered to take the Defendant and his brother, but their mother, Ms. Harold, would object. Even, the Defendant's father tried to convince Ms. Harold, when the Defendant was nine or ten years old, that the Defendant and Aaron would be better off living with him in California. Ms. Harold rejected this offer.

Defendant's great aunt, Linda Berry testified that she has been involved in the Defendant's life since his birth. Ms. Berry said she saw the Defendant on many weekends and every holiday. She even let the Defendant, his brother and mother reside at her home for a short time.

Ms. Berry testified that she was worried about the Defendant after he returned from California and experienced the sudden death of his Uncle George following a motorcycle accident. Being proactive, Ms Berry, who had previously been employed at Connecting Point, made arrangements for the Defendant to be evaluated. Ms. Berry further testified that the Defendant knows the difference between right and wrong and she was aware that if the defendant applied himself, he could do well in school.

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Although, residing in California , the Defendant's father contacted the school system in Toledo when the Defendant was in the first or second grade because the Defendant had numerous school absences and behavior problems[28]. "Anthony Sr. made attempts to discover the root of the cause of his son's problems at school by consulting with the school counselors, with Kim, and with Anthony Jr. but he never got an answer.[29]" Mr. Belton further stated that "* * * when [the Defendant] was 8 or 9, he tried to convince Kim that both children would be better off living with him in California, but Kim flatly refused.[30]" Additionally, when Mr. Belton lost his job in California, he traveled back to Toledo and secured a job at Target. He attempted to help the Defendant "get settled"and enrolled his son in Connecting Point. Mr. Belton said that "[h]e was involved in his son's life and did what he could to help[31]".

The evidence also reflects that Uncle George was a family member who the Defendant admired and was considered a father figure to the Defendant. There is no evidence to suggest that Uncle George was unstable or a bad role model. In fact, as previously noted, when Defendant's uncle died in a motorcycle accident, the loss greatly impacted the Defendant.

Dr. Stinson, along with family witnesses, agree that the Defendant knows right from wrong. The evidence also establishes that the Defendant is capable of getting passing grades in a school setting and conforming his behavior when he wants to. By the Defendant's own

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[28] Although Anthony Belton, Sr. did not testify in Court, his interview summaries were admitted into evidence as Defendant's Exhibit R, without objection.

[29] Defendant's Exhibit R, interview with Anthony Belton, Sr. on April 16, 2009.

[30] Id., interview with Anthony Belton, Sr. on December 8, 2009.

[31] Id.

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admission "* * *he could do well in school if he chose, but that there were too many distractions to focus. He gave no thought to life after high school, feeling that his father would take care of him no matter the situation", because, his father " * * * never threatened to kick him out of the house"[32].

From the evidence presented, the three judge panel finds that the history, character, and background of the Defendant surely had an impact on the Defendant. What is equally relevant is that the Defendant has been given opportunities throughout his life, however, he has continuously rejected them, either affirmatively or by failing to follow through with them.

The three judge panel gives some weight to these matters in mitigation. However, the three judge panel cannot conclude that these matters, including, but not limited to the depression suffered by the Defendant, served to control or compel the Defendant into committing the most violent of crimes.

3. Youth of the offender

The evidence establishes that the Defendant was 22 years of age on August 13, 2008. Clearly, the Defendant was chronologically young at that time. However, the three judge panel finds that the Defendant's youth had little, if anything, to do with his actions. There is no showing that the lack of experience or lack of judgment, usually associated with youth when one seeks to use such factor to mitigate, existed in this case. This was not the action of a youthful prank that turned tragic. It was a well thought out course of conduct. The three judge panel has examined all of the evidence presented as it relates to the Defendant's youth and has given such

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[32] Defendant's Exhibit K.

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factor little weight.

4. The defendant's lack of a significant history of prior criminal convictions and delinquency adjudications

The three judge panel finds that an examination of the Defendant's prior criminal history as an adult and juvenile reveals a lack of significant history of prior criminal convictions and delinquency adjudications. The three judge panel finds that this factor is entitled to some weight.

5. Any other mitigating factors that are relevant to the issue of whether the Defendant should be sentenced to death

Remorse of the Defendant

Defendant presented the remorse of the Defendant as a mitigation factor. Remorse is an emotional expression of personal regret felt by a person after he or she has committed an act which they deem to be shameful, hurtful, or violent.

In examining the conduct of the Defendant following the homicide on August 13, 2008, it reflects anything but remorse. The video demonstrates that the Defendant made no effort to aid or assist Matthew Dugan immediately following the shooting. Rather, the video shows the Defendant calmly and quickly exiting the carry-out.[33]

The evidence further establishes that after the Defendant left the BP station's carry-out, he did the following: hung out with his cousin; ate at Burger King; had someone cut his

[33] State's Exhibits 88 and 89.

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distinctive Mohawk haircut to change his appearance; took a nap; traveled to Westfield Shopping Mall and purchased tennis shoes; traveled back to the neighborhood to purchase marijuana; went to McDonald's to eat, and; traveled to the Ranch Street area where the Defendant was subsequently arrested.[34]

The evidence further establishes that when the Defendant was taken into custody only hours after the homicide, the newly purchased tennis shoes were in the trunk of the car which he and two other men were sitting in when police arrested them. Even when confronted by several police officers, the Defendant's focus was not on the violent and senseless crime which the Defendant had committed earlier that same day, but on the trivial claim of ownership by the Defendant of the newly purchased tennis shoes[35].

Another fact which sheds light on the absence of remorse of the Defendant are the Defendant's comments to Christopher Wilson, who was transported to the Toledo police station, along with the Defendant and Dymon Belton. These three men were put in temporary individual adjoining holding cells in the reporting room of the police department. Sergeant Cory Russell, who was writing a report in the room where the three men were being temporarily held, testified that after Dymon Bolton had been removed from the adjacent holding cell to speak to detectives, the Defendant told Christopher Wilson to spread the word that Dymon Bolton had "given him

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[34] State's Exhibit 90 A, Defendant's Exhibit T.

[35] At the time of the Defendant's arrest, the Defendant was removed from a motor vehicle. The new tennis shoes, which the Defendant had purchased with the money taken during the aggravated robbery, were in the trunk of that motor vehicle. The Defendant requested that the officers give him his new shoes before he was taken to the police station.

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up" and "couldn't keep his mouth shut"[36]. The Defendant went on to tell Mr. Wilson that because Mr. Bolton could not "keep his mouth shut", "* * * the detectives knew everything. They knew every word for word from what was said in the vehicle"[37]. The Defendant further ordered Mr. Wilson to have shirts made with the Defendant's face on the shirts. Defendant then told Mr. Wilson that people should wear the shirts at the Defendant's trial. Additionally, the Defendant instructed Mr. Wilson to send him money and naked pictures while he was in jail.

Additional evidence concerning the issue of remorse is displayed by the Defendant when he is left alone in an interrogation room. After giving numerous statements, in an attempt to exculpate himself from the events which had occurred on August 13, 2008, the Defendant, now alone in the room, stated out loud to himself "Murder----Can't do no murder, man. Rest of my 22 years is going down the fucking drain. Got yourself in some shit.[38] " This statement reveals that the Defendant is not remorseful that he took a life. The Defendant is only reflecting on how the homicide will effect his own life.

In support of remorse of the Defendant is the statement by Dymon Bolton when he was interviewed. Mr. Bolton indicated that after the offense, the Defendant said "I think I killed him" and added that "he didn't mean to do it."[39] Additionally, when Linda Berry was interviewed after the no-contest pleas proceeding had begun[40], she indicated that the Defendant "* * * told her he

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[36] See Sergeant Cory Russell's testimony.

[37] Id.

[38] State's Exhibit 90A.

[39] Defendant's Exhibit T.

[40] Ms. Berry was interviewed on April 3, 2012.

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didn't pull the trigger, that he was trying to do something to the safety. When asked why he leaned over the counter, he responded that he wanted the man to get him something. He describes it for her as the 'worst decision of my life'. He told her he is very remorseful for what he has done."[41]

The three judge panel has examined all of the evidence presented as it relates to the Defendant's remorse and has given such evidence very little weight.

6. Acceptance of responsibility for one's criminal conduct and cooperation with police

The evidence relevant to the Defendant's acceptance of responsibility and cooperation with police is reflected in the Defendant's many hours of questioning by the police of the Defendant. During the majority of hours of interrogation, the Defendant denied any involvement in the homicide. Defendant further denied having a firearm. Defendant further, explained away his possession of certain phone cards and cash when arrested and the cutting off of his Mohawk hair style after the offense. Then, the Defendant blamed the crime on "D" and proceeded to tell the detectives what "D" told the Defendant had happened at the carry-out. The Defendant continued to point the finger at "D" but indicated that he could get the gun and hoodie "D" had worn during the offense.

Subsequently, the detectives left the room and Sergeant Lou Vasquez came in and continued the questioning of the Defendant. The Defendant subsequently told the sergeant that he was the one who committed the offense. Defendant said "I didn't kill the man. I put the safety on to make the dude think that I had cocked the gun".

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[41] Defendant Exhibit V.

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The sergeant then told the Defendant that he needed to tell the police where the gun was. The Defendant's response was that he gave the gun back to "D" and "D" hid it in some bushes, between Ranch Street and Broer Street. The Defendant then agreed to go to the location.

Although the firearm was not found in any bushes in the area described by the Defendant, the murder weapon was recovered near by in a hole in the ground, which had been covered over with certain objects.

The three judge panel further considered the Defendant's pleas of no-contest to the charges and specifications, when deliberating concerning the mitigating evidence of the acceptance of responsibility for one's criminal conduct.

The three judge panel has examined all of the evidence presented as it relates to the Defendant's acceptance of responsibility for his criminal conduct and cooperation with police and has given such evidence modest weight.

7. **Adaptability to jail setting**

Evidence has been offered concerning the Defendant's adaptability to a jail setting. It is said that the Defendant has done well while incarcerated at the Lucas County Correction Center and therefore, it can be presumed that the Defendant will continue to adapt well in an institutional setting.

The defense called Matthew Martin, a counselor at the Lucas County Correction Center. He testified that the Defendant has had very few incidents while he has been incarcerated at the Lucas County Correction Center since August 13, 2008. A review of the disciplinary board

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hearing reports shows that the Defendant has been disciplined for conduct ranging from attacking a very vulnerable special needs inmate, possessing contraband and even challenging a shift commander to engage in a fight.[42] Additionally, records made by jail counselors also reflect

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[42] State's Exhibit 200, Disciplinary Board hearing reports which state that:

October 28, 2008 Defendant "* * * attacked a very vunerable (sic) special needs inmate".

February 8, 2009 Defendant placed a bar of soap in the door jam of his cell.

July 18, 2009 Defendant was in a physical altercation with another inmate. Defendant had hurt his hand and other inmate had a nose bleed.

July 27, 2009 Defendant started yelling obscenities at a shift commander. The Defendant at one point took off his shirt and put his shoes on and challenged the shift commander to fight. The Defendant called the shift commander more obscenities and said "I'm facing the death penalty. I aint got nothing to lose."

August 20, 2009 Defendant had towels covering his cell windows. Towels were taken down during rounds and Defendant continued to put the towels back up even after being told to not to place the towels over the windows.

August 27, 2009 Defendant's cell door was open, in contravention a sanction imposed against him and had been ordered not to exit his cell until August 30, 2009. When the Defendant was asked it he had been out of his cell, the Defendant smiled and said "yes".

June 14, 2010 Defendant, along with other inmates threw trash in the catwalk area. The Defendant and others were ordered to pick up the trash. The Defendant and others refused to follow the order.

December 5, 2010 During a shake down of Defendant's cell, a broom stick, minus the bristles, was found in the Defendant's cell.

March 15, 2011 During a shake down of Defendant's cell and a pat down of Defendant, correction officer found contraband which was a single pill identified as vistaril.

September 2, 2011 While moving inmates to a multipurpose room based on a flood in the correction facility, the Defendant ran over to fight with another

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the type of incidents which have concerned counselors in the Lucas County Correction Center.[43] Mr. Martin further testified that the Defendant was made a trustee, but a Captain removed the Defendant from the position, based upon the charges that Defendant was facing.[44]

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inmate. After separating the two inmates, Defendant was transported to the hospital for an examination of a bite to his left eye.

September 11, 2011 During a shake down, a correction officer witnessed the Defendant attempt to conceal 2 pills in a towel that was wrapped around the bottom of a table leg. The 2 pills were secured and examined by the nursing staff. The nurse indicated that neither the Defendant nor any other inmate in 6-West is prescribed a medication that resembles the two pills.

[43] "Anthony is becoming a hard placement and has had issues in each module on the 5th floor. To avoid any problems with inmate and officers he is being reclassified to 6SD3."See State's Exhibit 200Y.

In reference to the Defendant's behavior, the counselor wrote "It is the belief of this counselor that Mr. Belton is being manipulative in an attempt to get what he wants." See State's Exhibit 200X.

When the Defendant was denied a request to move to another floor, the Defendant told the counselor "He will get into a fight so he can be moved."See State's Exhibit 200, dated 3/25/09.

The Defendant received a large envelope. During a mail pass, the counselor found marijuana and tobacco inside Defendant's magazine. See State's Exhibit 200CC.

The Defendant wanted to be moved to the 6th floor because "CSLR Katie was up there. Defendant informed that he would not get any special treatment from her and Defendant said that he could touch her. The counselor said no he would not. Defendant then reached across the desk to try and touch the counselor's arm. Counselor told him not to touch her. Officer saw what the Defendant did and yelled at the Defendant. The counselor noted that the Defendant "is very touchy-feely with female staff". "When speaking with Defendant extreme caution should be used."See State's Exhibit 200, dated 9/17/09.

The Defendant said inappropriate comments concerning female counselors. "Inmate should not be around female counselors for precautions".See State's Exhibit 200, dated 10/16/09.

[44] A review of the exhibits does not support the fact that the Defendant was made a trustee. The record reveals that the Defendant asked why he could not be a trustee on April 27, 2009. He was told that "His bond is set at 2.5 million and his charge is Agg. Murder". (See Exhibit 200,

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The three judge panel has weighed all of the evidence presented as it relates to the Defendant's adaptability to a jail setting and has given such evidence some slight amount of mitigation value.

FINDING BY THE THREE JUDGE PANEL

In arriving at its unanimous verdict, each judge on the three judge panel considered and weighed all the appropriate matters required by law. Each judge on the three judge panel considered only the one specific aggravating circumstance, identified in the Indictment as Specification Two, in violation of R.C. 2929.04(A)(7). Each judge on the three judge panel did not consider the aggravated murder of Matthew Dugan as an aggravating circumstance.

Upon full and complete scrutiny of the mitigating factors which were set forth in this case, and after weighing the aggravating circumstance against the mitigating factors, the three judge panel makes a unanimous finding, beyond any reasonable doubt, that the aggravating circumstance that the Defendant, Anthony Belton was found guilty of committing outweighs any and all mitigating factors shown to be present in this case. Individually or collectively, the mitigating factors pale in weight to the aggravating circumstance. It is therefore, the duty of the

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dated April 27, 2009.) Additionally, on June 24, 2009, the Defendant asked to be a trustee. (See Exhibit 200, dated June 24, 2009.) Lastly, on August 19, 2009, the Defendant asked to be a trustee. (See Exhibit 200, dated August 19, 2009.)

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Court, under the provisions of Ohio Revised Code Section 2929.03 (D)(3) to impose the sentence of death upon Defendant, Anthony Belton.

April 19, 2012

JUDGE RUTH ANN FRANKS

JUDGE JAMES JENSEN

JUDGE GENE ZMUDA

cc: Jeffrey Lingo, Assistant Lucas County Prosecutor
Robert Miller, Assistant Lucas County Prosecutor
Peter Rost, Lead Counsel for Defendant, Anthony Belton
Ronnie Wingate, Co-Counsel for Defendant, Anthony Belton

SCANNED

Case Number: G-4801-CR-0200802934-000
STATE OF OHIO V. ANTHONY BELTON

PRAECIPE

TO THE CLERK:

Within three days of journalization, please serve upon all parties notice of the judgment in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket (see below).

April 19, 2012

JUDGE RUTH ANN FRANKS

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Judgments, Orders, and Opinions

Relevant to the Issues on Appeal

FILED
LUCAS COUNTY
2008 NOV 17 P 4:05
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IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

STATE OF OHIO	*	**CASE NO. CR 200802934**
PLAINTIFF,	*	**JUDGE RUTH ANN FRANKS**
VS.	*	**ORDER**
ANTHONY BELTON	*	
DEFENDANT,	*	

****

This cause is before the Court on the following pretrial motions of Defendant, Anthony Belton: **1)** Demand for Discovery; **2)** Motion for Bill of Particulars; **3)** Motion for Appropriation of Funds for Expert Assistance to be "Taxed as Costs"; **4)** Motion to Make State's Evidence Available for Independent Testing; **5)** Motion for Appointment of Mitigation Specialist; **6)** Motion for Individual Sequestered Voir Dire; **7)** Motion to Compel Disclosure of Exculpatory and Impeachment Evidence; **8)** Motion for Disclosure of any and all Agreements and/or Benefits and/or "Deals" involving Prosecuting Witnesses; **10)** Defendant's Motion to Dismiss Capital Components of this Case Pursuant to Constitutional and International Laws Violation; **11)** Defendant's Motion for Disclosure of Witness Statements Prior to Trial; **12)** Supplemental Motion for Individual Voir Dire on Death Penalty; publicity and Other Issues; **13)** Motion to Prohibit Any Reference to the First Phase as the "guilt" phase; **14)** Motion for an Order Directing that a Complete Copy of the Prosecutor's File be Made and Turned Over to the Court for Review

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and to be Sealed for Appellate Review, if Necessary; **15)** Motion to Compel Law Enforcement Officials to Turn Over to Prosecuting Attorneys and To Advise Them of all Information Acquired During the Course of the Investigation of this Case; and The Court will individually address each motion.

1) DEMAND FOR DISCOVERY

The record in the case subjudice establishes that the State of Ohio is complying with the discovery demands of Defendant and is providing "open file" discovery.

Pursuant to Ohio Crim. R. 12 and 16, the State is ordered to continue to provide discovery as outlined under all relevant case law and rules. Based upon the foregoing, the Demand for Discovery is found moot.

2) MOTION FOR BILL OF PARTICULARS

The record in the case subjudice establishes that the State of Ohio was order to file has a Bill of Particulars on or before October 3, 2008. The State has complied with this order. Based upon the foregoing, the Motion for Bill of Particulars is found moot.

3) MOTION FOR APPROPRIATION OF FUNDS FOR EXPERT ASSISTANCE TO BE "TAXED AS COSTS"

Upon a showing by the Defendant that there exists a "reasonable necessity" for funds for expert assistance, the Court finds the motion well taken and granted.

4) MOTION TO MAKE STATE'S EVIDENCE AVAILABLE FOR INDEPENDENT TESTING.

The Defendant requests that any and all physical evidence that has bee tested and/or an examination has been conducted, and/or reports have been generated in the case subjudice be

provided to the Defendant's experts for testing. The Court finds the motion well taken and granted with the following prerequisites:

> Counsel for Defendant shall file a motion with the Court which specifically identifies 1) the specific evidence which the defense is requesting to independently test; 2) the name of the individual/expert who will conduct the test; 3); the procedure to be followed in order to maintain the integrity of the evidence and chain-of-custody of the specific evidence tested, and; 4) the cost of the testing, if the Defendant is requesting funds for said testing.

Upon review of the Defendant's motion, which must comply with the above listed prerequisites, the State of Ohio may file opposition to the independent testing. Said matter shall then be set for hearing on the State's objection.

5) MOTION FOR APPOINTMENT OF MITIGATION SPECIALIST

The Defendant having shown that there exists a "reasonable necessity" for the appointment of a mitigation specialist, the Court finds the motion well taken and granted.

6) MOTION FOR INDIVIDUAL SEQUESTERED VOIR DIRE

In support of this motion, the defendant argues that because this is a capital case, prospective jurors must be questioned individually during voir dire.

Independent questioning of prospective jurors during voir dire is not required. State v. Mapes (1985), 10 Ohio St.3d 108, 115. " The determination of whether voir dire in a capital case should be conducted in sequestration is a matter of discretion within the province of the trial court". Id. at paragraph three of the syllabus.

In this case, the Court, along with the assistance of counsel, will conduct individual voir dire to death-qualify the jury and to question the prospective jurors regarding any pretrial publicity surrounding this case. However, this Court sees no reason to conduct individual voir dire on any other issues. Therefore, the Court grants in part and denies in part the Motion for Individual Sequestered Voir Dire.

7) MOTION TO COMPEL DISCLOSURE OF EXCULPATORY AND IMPEACHMENT EVIDENCE

After a careful review of the memoranda of counsel and the relevant law, the Court finds the motion well taken in that the State of Ohio shall disclose exculpatory evidence as required by Brady v. Maryland (1963), 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194, its progeny, including but limited to Giglio v. United States (1972), 405 U.S. 150, and the Code of Professional Conduct.

8) MOTION FOR DISCLOSURE OF ANY AND ALL AGREEMENTS AND/OR BENEFITS AND/OR "DEALS" INVOLVING PROSECUTING WITNESSES

The law is clear that the State of Ohio must reveal any agreement, benefit and/or deals entered into between the State and/or the State's agents and prosecution witnesses. Any consideration goes directly to the credibility of the witness and therefore must be disclosed pursuant to Criminal Rule 16 and Rule 12(B)(4).

Based upon the relevant law, the Court finds the motion well taken, in that the State is ordered to reveal to the Defendant, pursuant to Criminal Rule 16, Rule 12 (B)(4) and relevant case law: 1)any considerations/agreements/benefits and/or deals given to prosecution witnesses; 2)promises made to prosecution witnesses, and/or; 3)agreement entered into between the State of

Ohio and any prosecution witness in exchange for the aid and/or testimony relative to the charges for which the Defendant is facing.

Based upon the foregoing, the Court finds the Motion for Disclosure of Any and All Agreements and/or Benefits and/or "Deals" Involving Prosecuting Witnesses well taken and granted.

10) DEFENDANT'S MOTION TO DISMISS CAPITAL COMPONENTS OF THIS CASE PURSUANT TO CONSTITUTIONAL AND INTERNATIONAL LAWS VIOLATION

In support of his motion to dismiss the indictment, the Defendant argues the Ohio's death penalty statutes, R.C. 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05, violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Sections 1, 2, 5, 9, 10, and 16 Article I, of the Ohio Constitution. More specifically, the Defendant argues that Ohio's death penalty scheme is unconstitutional in that it (1) fails to employ the least restrictive means to achieve deterrence and societal protection; (2) imposes cruel and unusual punishment; (3) is arbitrary and capricious because prosecutors exercise discretion in prosecuting capital cases; (4) violates the Defendant's right to effective assistance of counsel; (5) does not require a new jury during the sentencing phase of the trial; (6) does not provide for adequate guidelines for deliberation; (7) requires the results of a mental examination to be admitted in the mitigation hearing; (8) encourages guilty pleas pursuant to Crim. R. 11(C)(3); (9) does not require the jury to identify what mitigating factors are found and state why the aggravating factors outweigh the mitigating factors; (10) does not provide for proper appellate review of death sentences; (11) does not provide at appellate level a proper remedy for arbitrary results; (12) precludes the consideration of mercy; (13) does not require the

trial court to determine that imposition of death is the only appropriate penalty; (14) permits imposition of death penalty on a less than adequate showing of culpability; (15) fails to provide for a proper standard of proof in guilty and penalty phase; (16) fails to properly narrow the class of persons eligible for the sentence of death; and (17) fails to properly allocate the burden of proof during the mitigation phase.

In capital cases, when issues of law have been considered and decided by the Supreme Court of Ohio and are raised anew in a subsequent capital case, it is proper to dispose of these issues summarily. State v. Poindexter (1988), 36 Ohio St. 3d 1, syllabus. The Supreme Court of Ohio has previously addressed all of the issues which the Defendant raises in support of his motion to dismiss. See State v. LaMar, 95 Ohio St.3d 181, 2002 Ohio 2128, 767 N.E.2d 166, P 23; State v. Carter (2000), 89 Ohio St.3d 593, 607, 2000 Ohio 172, 734 N.E.2d 345 ; State v. Steffen, 31 Ohio St.3d 111, 31 OBR 273, 509 N.E.2d 383, paragraph one of the syllabus; State v. Jenkins (1984), 15 Ohio St. 3d 164; State v. Maurer (1984), 15 Ohio St. 3d 239; State v. Buell (1986), 22 Ohio St. 3d 124; State v. Williams (1986), 23 Ohio St. 3d 16; State v. Steffen (1987), 31 Ohio St. 3d 111; Poindexter, supra; State v. Roe (1989), 41 Ohio St. 3d 18; State v. Bradley (1989), 42 Ohio St. 3d 136; State v. Hicks (1989), 43 Ohio St. 3d 72; State v. Coleman (1989), 45 Ohio St. 3d 198; State v. Johnson (1989), 46 Ohio St. 3d 96;

The Court further rejects the Defendant's claim that Ohio's death-penalty statutes violate international law and treaties to which the United States is a party. See State v. Davis, 116 Ohio St. 3d 404, 456 (Ohio 2008); State v. Bey (1999), 85 Ohio St.3d 487, 502, 1999 Ohio 283, 709 N.E.2d 484.

Based upon the foregoing, the Court finds the Motion to Dismiss Capital Components of

this Case Pursuant to Constitutional and International Laws Violation not well taken and denied.

11) DEFENDANT'S MOTION FOR DISCLOSURE OF WITNESS STATEMENTS PRIOR TO TRIAL

The Defendant requests that this Court order the State of Ohio to disclose, prior to trial, all statements of witnesses whom the prosecution intended to call at trial or in rebuttal. In State v. Landrum (1990), 53 Ohio St.3d 107, the Supreme Court of Ohio held, at page 119:

> "Under Crim. R. 16(B) (1) (g) and (B) (2), defendants are not entitled to pretrial discovery of witnesses' statements. Crim. R.16 requires that an accused be given a copy of the statement only if the trial judge determines there are inconsistencies between the testimony and the prior statement."

Based upon the relevant law, the Court finds the motion not well taken and denied.

12) SUPPLEMENTAL MOTION FOR INDIVIDUAL VOIR DIRE ON DEATH PENALTY; PUBLICITY AND OTHER ISSUES

As previously noted by this Court in ruling on Defendant's Motion for Individual Sequestered Voir Dire, independent questioning of prospective jurors during voir dire is not required. State v. Mapes (1985), 10 Ohio St.3d 108, 115. " The determination of whether voir dire in a capital case should be conducted in sequestration is a matter of discretion within the province of the trial court". Id. at paragraph three of the syllabus.

In this case, the Court, with the assistance of counsel, will conduct individual voir dire to death-qualify the jury and to question the prospective jurors regarding any pretrial publicity surrounding this case. However, this Court sees no reason to conduct individual voir dire on any other issues. If the Defendant, through counsel, can point to additional matters which require sequestered voir of the potential jurors, the Court shall revisit its ruling. Therefore, the Court

grants in part and denies in part the Supplemental Motion for Individual Voir Dire on Death Penalty; Publicity and Other Issues.

13) MOTION TO PROHIBIT ANY REFERENCE TO THE FIRST PHASE AS THE "GUILT" PHASE

In support of his motion, the Defendant argues that the use of the term "guilt phase" as to the first phase of the trial would create an unfair inference that the purpose of the first phase is to find the defendant guilty.

The Court finds defendant's motion well taken and granted. The parties are ordered to refer to the first phase as the "trial phase".

14) MOTION FOR AN ORDER 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 of Ohio is required to disclose all evidence favorable to the defense pursuant to Criminal Rule 16. Additionally, the United States Supreme Court, in Brady v. Maryland, (1963) 373 U.S. 83, held that the defense is entitled to disclosure of evidence favorable to the accused if the evidence is material either to guilt or punishment. Also see State v. Patterson, (1971) 28 Ohio St. 2d 181. Lastly the prosecutor is obligated to make such disclosure pursuant to D.R. 7-103.

It is clear that the relevant law is void of any requirement that the review of the prosecutor's file be made by the Court, void of any allegation of a failure to comply with Criminal Rule 16. Based upon the foregoing, the defendant's motion is found not well taken and denied.

15) MOTION TO COMPEL LAW ENFORCEMENT OFFICIALS TO TURN OVER TO PROSECUTING ATTORNEYS AND TO ADVISE THEM OF ALL INFORMATION ACQUIRED DURING THE COURSE OF THE INVESTIGATION OF THIS CASE.

The Court finds Defendant's Motion to Compel Law Enforcement Officials to Turn Over to Prosecuting Attorneys and to Advise Them of All Information Acquired During the Course of The Investigation of This Case well taken and granted.

November 17, 2008

Judge Ruth Ann Franks

cc: Robert A. Miller
Dean Mandros
Peter Rost
Ronnie Wingate

Case Number: G-4801-CR-0200802934-000
STATE OF OHIO V. ANTHONY BELTON

PRAECIPE

TO THE CLERK:

Within three days of journalization, please serve upon all parties notice of the judgment in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket (see below).

November 17, 2008

JUDGE RUTH ANN FRANKS

PETER G. ROST, Attorney for Defendant
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FILED
LUCAS COUNTY

2009 JAN -5 P 3: 25

CLERK OF COURT

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

STATE OF OHIO	*	**CASE NO. CR 200802934**
PLAINTIFF,	*	**JUDGE RUTH ANN FRANKS**
VS.	*	**ORDER**
ANTHONY BELTON	*	
DEFENDANT,	*	

****

This cause is before the Court on the following pretrial motions of Defendant, Anthony Belton:**16)** Motion To Compel Disclosure Of Aggravating Factors and Information Relating to Mitigating Factors; **17)**; Motion to Prohibit the State's Use of Peremptory Challenges to Exclude Venire Persons With Concerns About Imposing the Penalty of Death, and; Defendant's Request for Funds for Video/Audio Documentation. The Court will individually address each motion.

16) MOTION TO COMPEL DISCLOSURE OF AGGRAVATING FACTORS AND INFORMATION RELATING TO MITIGATING FACTORS

The Defendant requests that the prosecutor produce any information in its files of any nature that bears directly or indirectly of any aggravating and/or mitigating factors.

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Pursuant to Ohio Criminal Rules 12 and 16 and the relevant law, the State is ordered to produce to Defendant's counsel all materials which are required to be produced pursuant to statute, rule and case law which bears which directly or indirectly on any aggravating and/or mitigating factors. Based upon the foregoing, the Defendant's motion is found well taken and granted.

17) MOTION TO PROHIBIT THE STATE'S USE OF PEREMPTORY CHALLENGES TO EXCLUDE VENIRE PERSONS WITH CONCERNS ABOUT IMPOSING THE PENALTY OF DEATH

The issues raised in defendant's motion were addressed in State v. Esparaza (1988), 39 Ohio St.3d 8. The Ohio Supreme Court held

> "In Lockhart v. McCree (1986), 476 U.S. 162, 176-177, the United State Supreme Court held that prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors in capital case, i.e., "Witherspoon-excludables", are not distinctive, identifiable groups for the requirement that a jury represent a fair cross-section of the community. The court thus upheld the practice of death qualifying a jury. Those persons who unequivocally oppose the death penalty do not constitute an "identifiable group" for fair cross-section purposes, even less so do those persons, like the six jurors identified by appellate here, who have some reservations and concerns about the death penalty but state that they are able to put those feelings aside and follow the instructions of the trial court. "The essential nature of the peremptory challenge is that it is one exercised without being subject to the court's control." Swain, supra, at 220. "[I]t must be exercised with full freedom or it fails at its full purpose.'" Lewis v. United States (1982), 146 U.S. 370, Id. at p. 14.

The Court further notes that the Ohio Supreme Court reaffirmed it's holding in Esparaza when the defendant in State v. Bey, 85 Ohio St. 3d 487, (Ohio 1999) claimed that this trial court erred in denying his motion to prohibit the use of peremptory challenges in order to exclude jurors who express concerns about capital punishment. The Ohio Supreme Court held that "* * * the state may use a peremptory challenge based on opposition to the death penalty. State v. Ballew (1996), 76 Ohio St. 3d 244, 253, 667 N.E.2d 369, 379; Seiber, 56 Ohio St. 3d at 13, 564 N.E.2d at 419." Id. at 501.

Based upon the foregoing, the Court finds Defendant's Motion to Prohibit the State's Use of Peremptory Challenges to Exclude Venire Persons With Concerns About Imposing the Penalty of Death not well taken and denied.

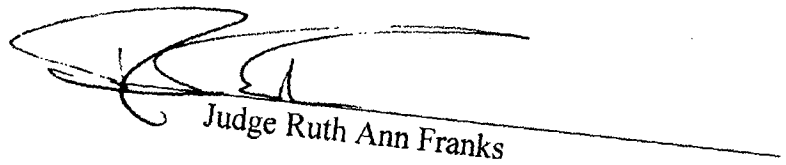
REQUEST FOR FUNDS FOR VIDEO/AUDIO DOCUMENTATION

The Defendant requests that the Court provide funds to visually and audibly document the alleged crime scene. The importance of documenting the scene is based on the fact that it is likely that the location, as it existed on the date of the alleged offense, shall not remain the same when the matter proceeds to trial. Specifically, the Court has been informed that the new owner of the property intends to demolish the existing structure within the next several weeks.

Based upon the representation by counsel for the Defendant, that it will cost Three Hundred Fifty Dollars ($350.00) to properly preserve through video and audio the alleged crime scene, the Court finds the Defendant's Request for Funds for Video/Audio Documentation well taken and granted. The Court allocates the sum of no more than Three Hundred Fifty Dollars

($350.00) for such expense.

January 5, 2009



Judge Ruth Ann Franks

cc: Robert A. Miller
Dean Mandros
Peter Rost
Ronnie Wingate

Case Number: G-4801-CR-0200802934-000
STATE OF OHIO V. ANTHONY BELTON

PRAECIPE

TO THE CLERK:

Within three days of journalization, please serve upon all parties notice of the judgment in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket (see below).

January 5, 2009

JUDGE RUTH ANN FRANKS

PETER G. ROST, Attorney for Defendant
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Toledo OH 43604

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FILED
LUCAS COUNTY
2009 JAN -5 P 3: 25
COURT

FILED
LUCAS COUNTY
2009 JUN 30 P 2:39
COMMON PLEAS COURT

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

STATE OF OHIO	*	**CASE NO. CR 200802934**
PLAINTIFF,	*	**JUDGE RUTH ANN FRANKS**
VS.	*	**ORDER**
ANTHONY BELTON	*	
DEFENDANT,	*	

****

This cause is before the Court on the following pretrial motions of Defendant, Anthony Belton:**18)** Motion in Limine to Prohibit Reference to the Nature and Circumstances of the Offense as a Factor to be Considered in Mitigation Unless and Until Offered by Defendant; **19)**; Motion in Limine to Limit the State's Argument at Mitigation to the Aggravating Circumstances Proven at the Trial Phase, and; **20)** Motion to Prohibit References to the Jury that a Death Penalty Verdict is only a Recommendation and/or such a Verdict is in Anyway Non-Binding.

Prior to ruling on said motions, the Court clearly believes that the motions identified as Numbers 18, 19 and 20 are filed prematurely. No verdict in the case sub judice has been

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rendered by a fact finder which would make these motions ripe for ruling. However based upon the Defendant's request that this Court rule on the three motions "in the event that the case sub judice reaches the mitigation phase", the Court shall rule on same.

18) MOTION IN LIMINE TO PROHIBIT REFERENCE TO THE NATURE AND CIRCUMSTANCES OF THE OFFENSE AS A FACTOR TO BE CONSIDERED IN MITIGATION UNLESS AND UNTIL OFFERED BY DEFENDANT

The law is clear that the admissibility of disputed evidence and/or argument by counsel can be determined through a motion in limine. The general rule regarding motions in limine is well established:

> "As related to trial, a motion in limine is a precautionary request, directed to the inherent discretion of the trial judge, to limit the examination of witnesses by opposing counsel in a specified area until its admissibility is determined by the court outside the presence of the jury." State v. Spahr (1976), 47 Ohio App.2d 221, paragraph one of the syllabus.

A motion in limine may be used as an equivalent of a motion to suppress evidence and or argument by counsel, which is either not competent or improper because of some unusual circumstances; or as a means of raising objection to an area of inquiry to prevent prejudicial questions and statements until the admissibility of the questionable evidence can be determined during the course of the trial. See, Riverside Methodist Hosp. Assn. v. Guthrie (1982), 3 Ohio App.3d 308. A preliminary ruling on a motion in limine is a tentative, interlocutory, precautionary hearing and finality does not attach when the motion is granted. Jackson v Fisher-Titus Medical Center, et al, Huron App. No. H-04-046, 2006-Ohio-186, at ¶ 8, [citations omitted].

It is the argument by Defendant's counsel that "[u]nless and until Defendant utilizes the nature and circumstances of the offense as a mitigating factor, the State may not make reference to them nor may this Court instruct the jurors that the nature and circumstances of the offense may be mitigating factors". Defendant's memorandum page 2.

In addressing the evidence which is relevant at a mitigation proceeding, the Ohio Supreme Court stated in State v. Hill (1996), 75 Ohio St.3d 195, 1996 Ohio 222, 661 N.E.2d 1068, that

> "We will not interpret Ohio's capital sentencing statute to require a jury to make its recommendation between life and death in a factual vacuum. * * * We will not sanction a procedure by which counsel for a criminal defendant is provided full opportunity to vigorously argue the full range of mitigating evidence * * * while his adversary, the prosecutor, is precluded from vigorously arguing the entire scope of facts surrounding the act of murder of which the defendant has been convicted. * * * In short, a capital defendant in Ohio is not statutorily or constitutionally entitled to protection during the sentencing process from the facts he himself created in committing the crime." Id. at 201, 661 N.E.2d 1068.

Further in State v. Ketterer, 111 Ohio St. 3d 70, (Ohio 2006), the Ohio Supreme Court held:

> " A capital penalty-phase hearing is not limited to evidence that pertains only to the aggravating circumstances. See State v. Wogenstahl, 75 Ohio St.3d at 352-354, 662 N.E.2d 311; State v. Gumm (1995), 73 Ohio St.3d 413, 1995 Ohio 24, 653 N.E.2d 253, syllabus. Further, "[a] trial court may properly allow repetition of much or all that occurred in the guilt phase pursuant to R.C. 2929.03(D)(1)." State v. Vrabel, 99 Ohio St.3d 184, 2003 Ohio 3193, 790 N.E.2d 303, P 73. Accord State v. DePew (1988), 38 Ohio St.3d 275, 282-283, 528 N.E.2d 542 (Revised Code "appears to permit repetition of much or all that occurred during the guilt stage"). Id. at 88.

This Court further points out that the nature and circumstances of the offense are not an aggravating circumstance. This fact is acknowledged by the State of Ohio in its memorandum in opposition to the instant motion. The State of Ohio further acknowledges and agrees that it cannot and will not argue in a mitigation hearing that the nature and circumstances of the offense are an aggravating circumstance.

Based upon the foregoing, the Court finds the Motion in Limine to Prohibit Reference to The Nature and Circumstances of the Offense as a Factor to be Considered in Mitigation Unless and Until Offered By Defendant not well taken and denied.

19) MOTION IN LIMINE TO LIMIT THE STATE'S ARGUMENT AT MITIGATION TO THE AGGRAVATING CIRCUMSTANCES PROVEN AT THE TRIAL PHASE

As previously noted, a capital penalty-phase hearing is not limited to evidence that pertains only to the aggravating circumstances. See State v. Wogenstahl, 75 Ohio St.3d at 352-354, 662 N.E.2d 311; State v. Gumm , supra,, syllabus. Further,

> "[a] trial court may properly allow repetition of much or all that occurred in the guilt phase pursuant to R.C. 2929.03(D)(1)." State v. Vrabel, 99 Ohio St.3d 184, 2003 Ohio 3193, 790 N.E.2d 303, P 73. Accord State v. DePew (1988), 38 Ohio St.3d 275, 282-283, 528 N.E.2d 542 (Revised Code "appears to permit repetition of much or all that occurred during the guilt stage"). State v. Ketterer, 111 Ohio St. 3d 70, 88 (Ohio 2006)

The Court also finds the Ohio Supreme Court's holding in State v. Gumm, 73 Ohio St. 3d at 419, syllabus, relevant to the instant motion. The Court in Gumm held:

> "Subject to applicable Rules of Evidence, and pursuant to R.C. 2929.03(D)(1) and (2), counsel for the state at the penalty stage of a capital trial may introduce and comment upon (1) any evidence raised at trial that is relevant to the aggravating circumstances specified in the indictment of which the defendant was found guilty, (2) any other testimony or evidence relevant to the nature and circumstances of the aggravating circumstances specified in the indictment of which the defendant was found guilty, (3) evidence rebutting the existence of any statutorily defined or other mitigating factors first asserted by the defendant, (4) the presentence investigation report, where one is requested by the defendant, and (5) the mental examination report, where one is requested by the defendant. Further, counsel for the state may comment upon the defendant's unsworn statement, if any. (R.C. 2929.03[D], construed; State v. DePew [1988], 38 Ohio St. 3d 275, 528 N.E.2d 542, affirmed and followed.)"

Lastly, as previously noted in this Court's ruling on Defendant's preceding motion, the law is clear that:

> [The Ohio Supreme Court] will not sanction a procedure by which counsel for a criminal defendant is provided full opportunity to vigorously argue the full range of mitigating evidence * * * while his adversary, the prosecutor, is precluded from vigorously arguing the entire scope of facts surrounding the act of murder of which the defendant has been convicted. * * * In short, a capital defendant in Ohio is not statutorily or constitutionally entitled to protection during the sentencing process from the facts he himself created in committing the crime." State v. Hill , supra at 201.

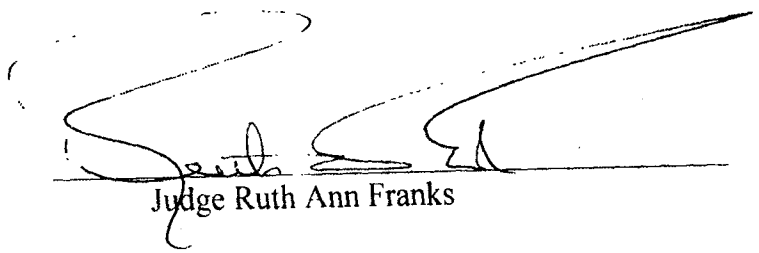
Applying the relevant law to the issues raised in Defendant's motion, the Court finds Defendant's Motion in Limine to Limit the State's Argument at Mitigation to the Aggravating Circumstances Proven at the Trial Phase not well taken and denied.

20) MOTION TO PROHIBIT REFERENCES TO THE JURY THAT A DEATH PENALTY VERDICT IS ONLY A RECOMMENDATION AND/OR SUCH A

VERDICT IS IN ANYWAY NON-BINDING

The Court finds the Motion to Prohibit References to the Jury That a Death Penalty Verdict is Only a Recommendation and/or Such a Verdict is In Anyway Non-Binding well taken and granted.

January 30, 2009



Judge Ruth Ann Franks

cc: Robert A. Miller
Dean Mandros
Peter Rost
Ronnie Wingate

Case Number: G-4801-CR-0200802934-000
STATE OF OHIO V. ANTHONY BELTON

PRAECIPE

TO THE CLERK:

Within three days of journalization, please serve upon all parties notice of the judgment in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket (see below).

January 30, 2009

JUDGE RUTH ANN FRANKS

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FILED
LUCAS COUNTY

2009 APR -8 P 2: 25

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

STATE OF OHIO	*	**CASE NO. CR 200802934**
	*	
PLAINTIFF,	*	**JUDGE RUTH ANN FRANKS**
	*	
VS.	*	**ORDER**
	*	
ANTHONY BELTON	*	
	*	
DEFENDANT,	*	

****

This cause is before the Court on the following pretrial motions of Defendant, Anthony Belton: **24)** Motion for Supplemental Discovery; **26)** Motion to Prohibit the Prosecutor from Arguing and the Court from Giving Instructions Regarding Statutory Mitigating Factors Not Raised by the Defendant; **27)** Motion for Instruction that the Defendant Bears No Burden of Proof at the Mitigation Phase; **28)** Motion to Recognize Mercy as a Mitigating Factor; and **29)** Motion to Allow the Defense to Argue Last at the Mitigation Phase.

24) MOTION FOR SUPPLEMENTAL DISCOVERY

The Defendant requests, pursuant to Criminal Rule 16(A) and (B) of the Ohio Rules of Criminal Procedure for disclosure and examination of all scientific material pertaining to DNA testing performed in the case sub judice. The Defendant's motion applies to "* * * all DNA testing that has been, is currently being, or will be performed in the instant case"[1]. In summary

[1] Defendant's Motion for Supplemental Discovery, p. 2.

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the Defendant requests a copy of:

1) complete copy of the case file including all records and photographs made by the laboratory in connection with the case;
2) a copy of all standard operating protocols used in connection with testing in the instant case;

3) all records that document the treatment and handling of biological evidence in the instant case, from the initial point of collection up to the current disposition;

4) a list of all commercial software programs used in the DNA testing in the instant case, including name of software program, manufacturer and version used in the instant case;

5) copies of the results produced by the software that are dependant on the instructions contained in macros, and copies of any macros used;

6) copies of all data files used and created in the course of performing the testing and analysis of the date in the instant case;

7) copies of all allelic frequency tables relied upon in making the statistical estimates in the instant case;

8) copies of all documentation of corrective actions maintained by the laboratory that performed DNA testing in the instant case;

9) copies of all licenses or other certificates of accreditation held by the DNA testing laboratory;

10) copies of background information concerning each person involved in conducting and/or reviewing the DNA testing performed in this case.

The Court finds the Defendant's Motion for Supplemental Discovery well taken and granted.

26) MOTION TO PROHIBIT THE PROSECUTOR FROM

ARGUING AND THE COURT FROM GIVING INSTRUCTIONS REGARDING STATUTORY MITIGATING FACTORS NOT RAISED BY THE DEFENDANT

In addressing the core of the issue raised by the Defendant, the Ohio Supreme Court held in State v. DePew, 38 Ohio St. 3d 275, (Ohio 1988):

> "If the defendant chooses to refrain from raising some of or all of the factors available to him, those factors not raised may not be referred to or commented upon by the trial court or the prosecution. When the purpose of these sections is understood, it is clear that such comment is appropriate only with regard to those factors actually offered in mitigation by the defendant. This is especially apparent when the purpose is considered in conjunction with the mandate found in R.C. 2929.04(B) that "* * * the court, trial jury, or panel of three judges shall consider, and weigh [***44] Against the aggravating circumstances * * *" the listed factors that are presented by way of mitigation. If evidence on any of the factors is not offered by the defendant or if any of the factors would not, in fact, be useful in mitigation, then it would be impossible to weigh those factors against the aggravating circumstances.
>
> Further support for this conclusion may be found by reading R.C. 2929.04(C) in conjunction with R.C. 2929.04(B). Subsection (C) provides that "[t]he defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section * * *."Thus, it is the defendant who has the right to present and argue the mitigating factors. If he does not do so, no comment on any factors not raised by him is permissible. Likewise, where the defendant does not raise a particular mitigating factor, that factor need not be considered in the opinions of the trial court and the appellate court or in the process of weighing mitigating factors against the aggravating circumstances." Id. at 289-290.

Also see State v. Hutton, 100 Ohio St. 3d 176 (Ohio 2003); State v. Steffen, supra, at 116-117, 31 OBR at 278, 509 N.E. 2d at 390; State v. Byrd (1987), 32 Ohio St. 3d 79, 81, 512 N.E. 2d 611, 615; State v. Stumpf (1987), 32 Ohio St. 3d 95, 100-101, 512 N.E. 2d 598, 604-605.

Based upon the foregoing, the Court finds Defendant's Motion to Prohibit the Prosecutor from Arguing and the Court from Giving Instructions Regarding Statutory Mitigating Factors Not Raised by the Defendant well taken and granted.

27) MOTION FOR INSTRUCTION THAT THE DEFENDANT BEARS NO BURDEN OF PROOF AT THE MITIGATION PHASE

ORC 2929.03(D)(1) is relevant to the instant motion and states in pertinent part:

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

The Defendant argues that the requirement that he bears the burden of proving the existence of any mitigating factors, is unconstitutional. Likewise, the defendant in State v. Seiber, (June 8, 1989), 10th App. Dist., Franklin Co. App. No. 87AP-530, 1989 Ohio App. LEXIS 2225, argued that ORC 2929.03(D)(1) is unconstitutional based upon the requirement that the defendant has the burden of going forward in mitigation to establish a factor by a preponderance of the evidence. In addressing this argument by the defendant in Seiber, the Court held:

> In [State v]. Jenkins [(1984), 15 Ohio St. 3d 164], at 171-172, the Supreme Court of Ohio explained that the "burden of going forward" placed upon a defendant by P.C. 2929.O3(D)(1) in fact requires that the defendant establish the existence of any mitigating factors by a preponderance of the evidence. In Jenkins, the court relied in part upon the committee comment to the former R.C. 2929.03 which provided that "'*** [m]itigation must be established

by a preponderance of the evidence ***.'" Id. at 171.

[The defendant] has set forth the same argument advanced by the appellant in State v. Stumpf (1987), 32 Ohio St. 3d 95, 102:

"*** Jenkins sets forth the correct interpretation of R.C. 2929.O3(D)(1), and we decline to modify it R.C. 2929.04(C), which must be read in pari materia with R.C. 2929.O3(D)(1), provides:

"'The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

"'The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.'

"In Kennedy v. Walcutt (1928), 118 Ohio St. 442, 455, 161 N.E. 336, 340, this court explained that '[t]he burden of proof imposed by law upon one who must prove the existence of a fact or a thing necessary to be proven in the prosecution or the defense of a lawsuit means the obligation to show it by proof.' (Emphasis added.) Further, as one leading commentator has summarized: 'The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence.' (Emphasis added.) McCormick, Evidence (3 Ed. Cleary Ed. 1984) 957, Section 339. Finally, as this court emphasized in Travelers' Ins. Co. v. Gath (1928), 118 Ohio St. 257, 261, 160 N.E. 710, 711, 'a preponderance of the evidence means the greater weight of the evidence. *** The greater weight may be infinitesimal, and it is only necessary that it be sufficient to destroy the equilibrium.['']

"Thus, reading R.C. 2929.O3(D)(1) together with R.C. 2929.04(C) demonstrates that it is incumbent upon a defendant to show the existence of mitigating factors; hence, as Jenkins holds, the

> defendant bears the burden of establishing such factors by a preponderance of the evidence. Of course, the burden of proving beyond a reasonable doubt that the aggravating circumstance(s) outweighs the mitigating factor(s) is on the state and never shifts." Id. at 102.
>
> Therefore, as the court held in Jenkins and reaffirmed in Stumpf, the defendant bears the burden of proving the existence of mitigating factors by a preponderance of the evidence. Accordingly, the placement of this burden upon a defendant is not unconstitutional." Id. at p. 35-37.

Applying the relevant law to the instant motion, the Court finds Defendant's Motion for Instruction that the Defendant Bears No Burden of Proof at the Mitigation Phase not well taken and denied.

28) MOTION TO RECOGNIZE MERCY AS A MITIGATING FACTOR

The Defendant, through the instant motion, argues that a jury in a sentencing phase of a death penalty case, should be instructed that mercy is a mitigating factor. Relevant to the instant motion is the holding in State v. Lorraine, 66 Ohio St. 3d 414, (Ohio 1993). The defendant in Lorraine contended that he was denied a fair trial because the trial court did not instruct the jury concerning mercy in the sentencing phase of the death penalty trial. It was additionally argued that the defendant was prejudiced because the trial court prohibited the defendant from asking the jury to err on the side of mercy.

In addressing these issues, the Ohio Supreme Court held:

> "This court has previously considered a similar issue. We held in

State v. Jenkins (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, paragraph three of the syllabus:

"The instruction to the jury in the penalty phase of a capital prosecution to exclude consideration of bias, sympathy or prejudice is intended to insure that the sentencing decision is based upon a consideration of the reviewable guidelines fixed by statute as opposed to the individual juror's personal biases or sympathies."

In California v. Brown (1987), 479 U.S. 538, 543, 107 S.Ct. 837, 840, 93 L.Ed.2d 934, 941, the court stated:

"An instruction prohibiting juries from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him."

While the court in Brown was specifically considering the issue of sympathy, its reasoning is applicable also to a plea for mercy.

Permitting a jury to consider mercy, which is not a mitigating factor and thus irrelevant to sentencing, would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious or unpredictable manner. Brown, supra, at 541, 107 S.Ct. at 839, 93 L.Ed.2d at 939; Gregg v. Georgia (1976), 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; Furman v. Georgia (1972), 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346. The arbitrary result which may occur from a jury's consideration of mercy is the exact reason the General Assembly established the procedure now used in Ohio.

R.C. 2929.03(D)(2) provides that "[i]f the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender."This statutory requirement eliminates the subjective state of mind the issue of mercy generally adds to a jury's deliberation.

Mercy, like bias, prejudice, and sympathy, is irrelevant to the duty

> of the jurors. Appellant's counsel therefore was not allowed to plead for mercy, although he was permitted to plead for appellant's life based upon the statutory mitigating factors. Accordingly, this proposition is not well taken." Id. 418.

Also see State v. Davis, 116 Ohio St. 3d 404, 435-436 (Ohio 2008); State v. Frazier, 115 Ohio St. 3d 139, 167 (Ohio 2007).

Applying the relevant law to the instant motion, the Court finds the Defendant's Motion to Recognize Mercy as a Mitigating Factor not well taken and denied.

29) MOTION TO ALLOW THE DEFENSE TO ARGUE LAST AT THE MITIGATION PHASE

It is the argument of Defendant that the defense in a mitigation hearing should be allowed to argue last to the fact finder. The defendant in State v. Rogers, 17 Ohio St. 3d 174 (Ohio 1985) similarly argued that he had:

> "* * * the right to open and close arguments during the sentencing phase of the trial. [The defendant argued] that since he has the burden of going forward with evidence of mitigation, he has the right to opening and closing arguments pursuant to R.C. 2315.01(F). While [the defendant] correctly recognizes his burden of going forward at the sentencing phase of a capital trial, the burden of persuasion remains on the state. The state must prove beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors before the jury can recommend the death sentence. See R.C. 2929.03(D). Thus, pursuant to R.C. 2945.10(F), which sets forth the order of proceeding in a criminal case, the state has the right to open and close arguments to the jury." Id. at 183.

Likewise the defendant in State v. Jenkins, 15 Ohio St. 3d 164, 215 (Ohio 1984) argued that a defendant has the right to open and close the final arguments in a mitigation hearing based

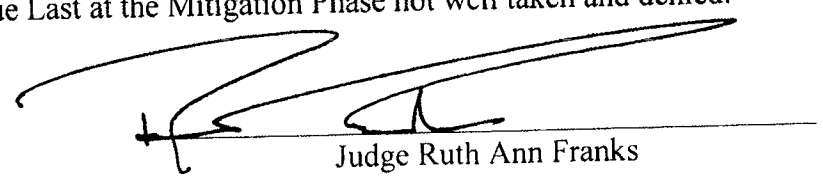
upon the fact that pursuant to R.C. 2929.03(D)(1), the defendant has the burden of going forward with evidence of any factors in mitigation of the imposition of the sentence of death. The defendant in Jenkins further argued that "R.C. 2315.01(C) and 2315.01(F) give the defendant the right to open and close because he would be '[t]he party who would be defeated if no evidence were offered on either side.'". Id. at. p. 214.

In finding no error by allowing the state to open and close the final arguments to the jury in the mitigation hearing, the Ohio Supreme Court in Jenkins held:

> "R.C. 2945.10(F) provides that: "[w]hen the evidence is concluded * * * the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury."
>
> * * *
>
> We agree with [the defendant's] assertion that the state cannot, in the sentencing phase, present proof of aggravating factors other than those of which the [the defendant] was found guilty of committing in the guilt phase of the trial. R.C. 2929.03(D)(1). However, by that same statute, the "prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances * * * outweigh the factors in mitigation of the imposition of the sentence of death." Therefore, because the state carries the burden of proof, we hold that it has the right to open and close during final arguments to the jury." Id. at p. 215.

Applying the relevant law to the instant motion, the Court finds Defendant's Motion to Allow the Defense to Argue Last at the Mitigation Phase not well taken and denied.

April 8, 2009



Judge Ruth Ann Franks

cc: Robert A. Miller
Dean Mandros
Peter Rost
Ronnie Wingate

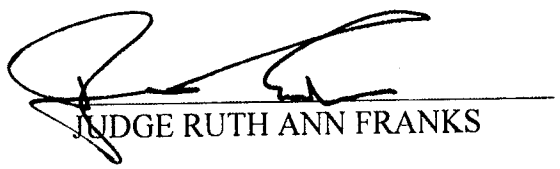
Case Number: G-4801-CR-0200802934-000
STATE OF OHIO V. ANTHONY BELTON

PRAECIPE

TO THE CLERK:

Within three days of journalization, please serve upon all parties notice of the judgment in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket (see below).

April 8, 2009



JUDGE RUTH ANN FRANKS

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2009 SEP -1 P 1:57
COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COMMON PLEAS COURT, LUCAS COUNTY, OHIO

STATE OF OHIO	*	CASE NO: G-4801-CR-0200802934-000
	*	
Plaintiff.	*	
	*	
v.	*	ORDER
	*	
	*	
ANTHONY BELTON	*	
Defendant.	*	JUDGE RUTH ANN FRANKS

* * * * * * *

This matter is set for pretrial on September 10, 2009 at 3:00 p.m.

At said pretrial the Court asks that counsel be prepared to present any additional oral and written arguments in support or opposition to Defendant's Motion for Determination of Constitutionality of R.C. 2929.03 and Criminal Rule 11(C)(3). In addition to counsel's arguments, the Court orders counsel to be prepared, both orally and in writing, to respond to the following questions at said hearing.

1. Do you agree or disagree that in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the United States Supreme Court clarified that the Sixth Amendment right to a jury trial on sentencing facts, recognized in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) entitles a defendant to jury fact-finding on all facts essential to the punishment at sentencing, even when the defendant pleads guilty?

Support your answer with case law.

2. If Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004),

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entitles a defendant to jury fact-finding on all facts essential to the punishment at sentencing, even when the defendant pleads guilty, do R.C. 2929.03 and Ohio Criminal Rule 11(C)(3) violate the constitutional rights of a defendant who wishes to plead guilty but does not wish to waive his or her Sixth Amendment rights?

Please support your answer with case law.

3. Because Ohio Criminal Rule 11(C)(3) requires that a defendant waive his or her Sixth Amendment rights, is this "automatic" waiver unconstitutional because it fails to effect a knowing, intelligent and voluntary waiver?

In other words, if a defendant wishes to plead guilty to the charges and specifications contained in a capital indictment, is the defendant's exercise of his Sixth Amendment rights to jury sentencing on the facts essential to the determination of death penalty eligibility compromised by conditioning the defendant's access to a guilty plea only upon the waiver of his or her Sixth Amendment rights?

Please support your answer with case law.

4. The State of Ohio has cited Leone v. State, 797 N.E.2d 743 (Ind. 2003); People v. Altom, 338 Ill. App. 3d 355, 788 N.E.2d 55, 272 Ill. Dec. 751 (Ill. App. 2003); Colwell v. State, 118 Nev. 807, 59 P.3d 463 (Nev. 2002); State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (S.C. 2005); and State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (S.C. 2004) in support of its argument that R.C. 2929.03 and Criminal Rule 11(C)(3) are constitutional.

How many of these cases were decided before Blakely and therefore fail to address the United States Supreme Court's determination that a defendant has an independent right to jury fact-finding during sentencing?

Relative to those cases decided before Blakely, please explain in detail their individual relevance or lack of relevance to the instant motion.

The State of Ohio refers to State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (S.C. 2004), which was decided after Blakely, however, the Supreme Court of South Carolina did not refer or distinguish Blakely in its opinion.

Compare and distinguish the South Carolina sentencing laws in capital cases and Ohio's capital sentencing laws.

Compare and distinguish the Indiana sentencing laws in capital cases and Ohio's capital sentencing laws.

Compare and distinguish Colorado's sentencing laws in capital cases and Ohio's capital sentencing laws.

Compare and distinguish Arizona's sentencing laws in capital cases and Ohio's capital sentencing laws at the time Ring v. Arizona, supra was decided.

5. The State of Ohio has cited State v. Ketterer (2006), 111 Ohio St.3d 70, 2006 Ohio 5283, in opposition to Defendant's instant motion. The State represents that the Ketterer Court considered the application of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)[1] .

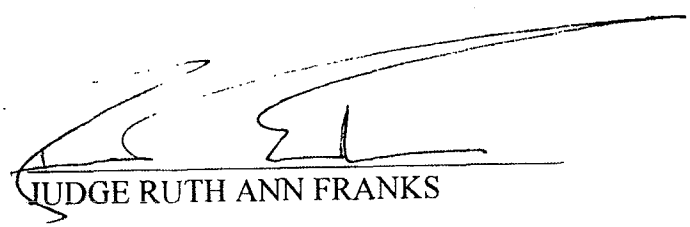
Where in the Ketterer opinion does the Court address the Blakely case?

Can the Ketterer decision be distinguished from the issues raised in the instant motion?

Does the Ketterer case answer the question of whether R.C. 2929.03 and Criminal Rule 11(C)(3) are unconstitutional?

Please support your answer with case law.

September 1, 2009



JUDGE RUTH ANN FRANKS

[1]See State's memorandum, p3,

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LUCAS COUNTY

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COMMON PLEAS COURT
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

State of Ohio,	*	Case No. CR 200802934
Plaintiff,	*	Judge Ruth Ann Franks
-vs-	*	JUDGMENT ENTRY
Anthony Belton,	*	
Defendant.	*	

This cause is before the court upon Defendant Anthony Belton's Motion for Determination of the Constitutionality of R.C. 2929.03 and Crim.R. 11(C)(3). Prior to ruling on the motion, the Court has carefully 1) read the memoranda of counsel; 2) listened to the arguments of counsel, and ; 3) read the relevant law.

Defendant has asked that this Court find R.C. 2929.03 and Crim.R. 11(C)(3) unconstitutional on the basis that said provisions violate his Sixth Amendment right to a jury trial as guaranteed by the United States Constitution.

Specifically, Defendant asserts that because R.C. 2929.03 does not provide a defendant who is charged with aggravated murder and specification(s) of aggravating circumstance(s) the right to enter a plea of guilty to the charge(s) and specification(s) of aggravating circumstance(s) and then proceed to mitigation before a jury. Thus, the Defendant argues that the statute violates a defendant's right to a jury.

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In support of his argument, Defendant refers to R.C. 2929.03(C)(2)(a) which provides:

> "(2) (a) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be one of the following:
>
> > (I) Except as provided in division (C)(2)(a)(ii) or (iii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment"[1].

The Defendant further refers to R.C. 2929.03(C)(2)(b) which addresses the mitigation proceeding. Specifically the statute provides that:

> "A penalty imposed pursuant to division (C)(2)(a)(I), (ii), or (iii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:
>
> > (I) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;
> >
> > (ii) By the trial jury and the trial judge, if the offender was tried by jury."

It is therefore argued that R.C. 2929.03 violates a defendant's Sixth Amendment right because the statute does not provide a defendant, who enters a guilty plea to aggravated murder and specification(s) of aggravating circumstance(s), the right to proceed to the mitigation hearing

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[1] R.C. 2929.03(C)(2)(a)(ii) & (iii) address aggravated murders wherein it is alleged that 1) the alleged victim was less than thirteen (13) years of age and/or when a sexual motivation specification is attached. Neither of these provisions are applicable to the case subjudice.

before a jury.

Additionally, Defendant argues that Crim.R. 11(C)(3) violate a defendant's right to a jury trial because if a defendant elects to enter a guilty plea to aggravated murder and the specification(s) of aggravating circumstance(s) , the criminal rule provides that :

> "(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.
>
> If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.
>
> If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.
>
> If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly."

In support of the motion, Defendant cites, among other cases, Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531,

159 L. Ed. 2d 403 (2004).

The United States Supreme Court, in Apprendi v. New Jersey, supra, 490, held that "* * * other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt". In 2002, the United States Supreme Court, in Ring v. Arizona, supra, clarified the holding in Apprendi by emphasizing that the Apprendi ruling applies to capital-sentencing schemes. Specifically, the Court in Ring, held that a trial judge may not make findings of fact on an aggravating circumstance necessary to impose the death penalty, as this determination is within the province of the jury. Id. at 609, 122 S.Ct. 2428, 153 L. Ed. 2d 556. In Blakely v. Washington at 303, the United States Supreme Court, in applying the rule in Apprendi, as well as citing Ring, held that the statutory maximum is "the maximum sentence a judge **may impose** solely on the basis of the facts reflected in the jury verdict **or admitted by the defendant**."(Emphasis added.)

In addressing the meaning of "statutory maximum" as referred to in Apprendi, the United States Supreme Court in Cunningham v. California, 549 U.S. 270, 283 (U.S. 2007) succinctly held:

> "Our precedents make clear . . . that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge **may** impose **solely** on the basis of the facts reflected in the jury verdict or **admitted by the defendant** . . . . In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . and the judge exceeds his proper authority." (Emphasis added.) Id., at 303-304, 124 S. Ct. 2531, 159 L. Ed. 2d

> 403 (quoting 1 J. Bishop, Criminal Procedure § 87, p 55 (2d ed. 1872)).

In ruling on the instant motion, the Court must examine the law in Ohio relative to capital charges. In Ohio, imposition of the death penalty for aggravated murder is precluded from being considered at the mitigation hearing unless one or more of the statutory aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8) are specified in the indictment and proved beyond a reasonable doubt **in the guilt phase**. As explained by the Ohio Supreme Court in State v. Wogenstahl, 75 Ohio St. 3d 344, 353 (Ohio 1996):

> "* * *in Ohio, a capital defendant is tried and sentenced in a two-stage process. During the first phase (commonly referred to as the 'guilt phase') the state must prove the defendant guilty beyond a reasonable doubt of the crime of aggravated murder, and must also prove the defendant guilty of at least one statutorily defined 'aggravating circumstance' as set forth in R.C. 2929.04(A)(1) through (8). **At the point in time at which the factfinder (either a jury or three-judge panel) finds the defendant guilty of both aggravated murder and an R.C. 2929.04(A) specification, the defendant has become 'death-eligible,' and a second phase of the proceedings (the 'mitigation' or 'penalty' or 'sentencing' or 'selection' phase) begins. R.C. 2929.03(C)(2) and (D)(1).**" (Emphasis added.)

It is therefore clear that Ohio's statutory scheme relating to a defendant who elects to proceed to trial before a jury or a three judge panel[2] in a capital case is "death eligible" if, and only if, the trier of fact at the completion of the first phase of the trial, commonly referred to as the "guilt phase", finds the defendant guilty of the offense of aggravated murder and the specification(s) of aggravating circumstance(s).

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[2] The Defendant may proceed to trial before a three-judge panel, only if he or she elects to knowing intelligently and voluntarily waive his right to a trial by a jury.

The only other way a defendant can be found to be "death eligible" in a capital case in Ohio is if the defendant enters a plea of guilty or no contest to the aggravated murder and the specification(s) of aggravating circumstance(s) pursuant to Ohio Criminal Rule 11(C)(3).

Ohio Criminal Rule 11(C)(3) addresses the procedure to be followed when a defendant in a capital case chooses to enter pleas of guilty or no contest to the aggravated murder and the specification(s) of aggravating circumstance(s). Ohio Criminal Rule 11(C)(3) requires that a court composed of three judges must "examine witnesses and hear any other evidence properly presented by the prosecution in order to make ... a determination" whether the defendant is guilty of aggravated murder or a lesser offense. State v. Green, 81 Ohio St.3d 100, 104-05, 1998 Ohio 454, 689 N.E.2d 556 (1998).

The Defendant argues that Criminal Rule 11(C)(3) violates Defendant's Sixth Amendment right to a jury because a defendant who elects to enter a guilty plea to aggravated murder and the specification(s) of aggravating circumstance(s) must proceed to mitigation before a three-judge panel.

In support of his motion, the Defendant cites People v. Montour (2007), 157 P.3d 489 (Colorado) which held "[i]n Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the United States Supreme Court clarified that the Sixth Amendment right to a jury trial on sentencing facts, recognized in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), [**5] and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), is a right independent of the right to a jury trial on the guilt phase."Id. at 492. As such, it is clear that the 6th Amendment to the United States Constitution "entitles a defendant to jury fact-finding on all facts essential to the punishment at sentencing even when he

pleads guilty." Id. 492.

In order to determine the relevancy of the holding in State v. Montour, supra, this Court must first examine Colorado's statutory scheme applicable to Colorado capital charges. Contrary to the law in Ohio, Colorado's statutory scheme does not require that an indictment charging a defendant with capital murder also contain the specification(s) of aggravating circumstance(s). If the defendant is found guilty of aggravated murder, the defendant then proceeds to a sentencing hearing in which the **court** determines if the State of Colorado has proved at this hearing the statutory aggravating factors beyond a reasonable doubt.[3] Clearly, Colorado's death penalty scheme which was the subject of Montour case, was constitutionally flawed because it **required judicial findings as to the aggravating circumstances** which made a Colorado defendant "death eligible"[4].

Contrary to the law in Colorado, Ohio's statutory scheme requires that the findings of the specifications which make a defendant "death eligible" be established beyond a reasonable doubt in the guilt phase **or** if the defendant elects to plead guilty or no-contest, he or she is admitting guilt to the specification(s) of aggravating circumstance(s) pursuant to Ohio Criminal Rule 11(C)(3) which make him or her "death eligible". Based upon the foregoing, this Court does not find that State v. Montour, supra is persuasive.

Additionally, when determining the merits of the Defendant's instant motion, the Court finds it critically important to note that the United States Supreme Court in Blakely v. Washington, supra, held

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[3] Id. at 495. Also see Colorado Rev. Statutes 18-1.3-1201(a)(1-5).

> "Our precedents make clear, however, that the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict **or admitted by the defendant**. See Ring, supra, at 602, 153 L. Ed. 2d 556, 122 S. Ct. 2428 ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting Apprendi, supra, at 483, 147 L. Ed. 2d 435, 120 S. Ct. 2348)); Harris v. United States, 536 U.S. 545, 563, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) (plurality opinion) (same); cf. Apprendi, supra, at 488, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (**facts admitted by the defendant**)."(Emphasis added.) Id. at 304.

In determining the "statutory maximum" for Apprendi purposes, Defendant argues that "[i]f a defendant enters a plea of guilty or no contest in a Capital case in Ohio, the 'statutory maximum penalty' that can be imposed is life imprisonment without parole"[5]. Therefore, Defendant argues that when applying the Apprendi-Ring-Blakey law, it is clear that Criminal Rule 11(C)(3) violates a defendant's 6th Amendment rights by denying him the right to a jury trial at the mitigation proceeding because imposition of the sentence of death is not the statutory maximum sentence the defendant is facing when guilty pleas are entered pursuant to Criminal Rule 11(C)(3).

Relative to Defendant's argument, the first issue which must be determined is whether Defendant's representation that the "statutory maximum penalty" facing a defendant who enters a plea of guilty or no contest in a capital case is life imprisonment without parole. In addressing this issue, this Court notes that in Ring v. Arizona (2002), 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556, the United States Supreme Court found that the Arizona capital statute which permitted the death penalty solely on a judicial finding of statutory aggravating circumstances

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[5] See Defendant's Supplemental Memorandum, filed September 21, 2009, p.5.

violated Apprendi. The Court in Ring held that because the aggravating factor found by the judge operated as "'the functional equivalent of an element of a greater offense,'" it required submission to a jury and proof beyond a reasonable doubt. Id. at 609, 122 S.Ct. 2428, 153 L.Ed.2d 556, quoting Apprendi, 530 U.S. at 494, 120 S.Ct. 2348, 147 L.Ed.2d 435, fn. 19."

Applying the Apprendi-Ring-Blakely law to O.R.C. 2929.03 and Crim.R. 11(C)(3), this Court finds that Ohio law **requires** that the specification(s) of aggravating circumstance(s) which make the defendant "death eligible" must first be set forth in the body of the indictment. The Ohio law further allows a defendant, pursuant to Criminal Rule 11(C) to admit his or her guilt to the aggravated murder charge and the specification(s) of aggravating circumstance(s) before a three-judge panel. By admitting the facts which form his or her guilt to the charge of aggravated murder and the specification(s) of aggravating circumstance(s), the defendant becomes "death eligible" at such time based upon the facts **admitted by the defendant**.

This Court notes that long before the Apprendi-Ring-Blakey law was articulated by our United States Supreme Court, it was settled law that "[a]t the point in time at which the factfinder (either a jury or three-judge panel) finds the defendant guilty of both aggravated murder and an R.C. 2929.04(A) specification, the defendant has become **'death-eligible,'** and a second phase of the proceedings (the 'mitigation' or 'penalty' or 'sentencing' or 'selection' phase) begins. R.C. 2929.03(C)(2) and (D)(1)." (Emphasis added.) State v. Wogenstahl, supra, at 353.

This Court notes that the State of Ohio cited, among several cases in support of its argument, the Ohio Supreme Court holding in State v. Ketterer (2006) 111Ohio St.3d70, 2006-Ohio-5283. In Ketterer, pursuant to Criminal Rule 11(C)(3), the defendant waived his right to jury trial and pled guilty to a three-judge panel to Count One of the indictment which charge the

defendant with aggravated murder in the course of an aggravated robbery which included three death specifications: specification one, R.C. 2929.04(A)(3) (murder to escape detection or apprehension), specification two, R.C. 2929.04(A)(7) (murder during an aggravated robbery), and specification three, R.C. 2929.04(A)(7) (murder during an aggravated burglary). The defendant also pled guilty to aggravated robbery in Count Two, aggravated burglary in Count Three, grand theft of a motor vehicle in Count Four, and burglary in Count Five. Following the State's presentation of evidence, the three-judge panel found the defendant guilty of all charges and specifications. The matter then proceeded to the mitigation phase before the three-judge panel. At the conclusion of the hearing, the three-judge panel sentenced the defendant to death and to prison terms, as well as fines, for the other felonies in Counts Two through Five.[6]

The defendant in Ketterer appealed his sentences and claimed, among other issues, that that he did not "knowingly, intelligently, and voluntarily" waive a jury trial and enter a guilty plea. The defendant further argued that the trial court denied his constitutional right to have a jury determine the penalty to be imposed and cited Ring v. Arizona (2002), 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556, interpreting Apprendi v. New Jersey (2000), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435, which reiterates a defendant's right to have a jury find the facts relevant to sentencing[7].

As to the defendant's arguments concerning the validity of his waiver to trial by jury and the claim that the procedure violates a defendant's Sixth Amendment right, the Ohio Supreme Court in Ketterer found that the defendant knowingly, intelligently, and voluntarily waived his

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[6] See State v. Ketterer, supra at p. 10-11.

[7] Id. at p. 13 and 121.

right to a jury trial as well as knowingly, intelligently, and voluntarily pleaded guilty as charged.

The Court noted that in each instance the defendant:

> "* * * acknowledged that he was waiving any right to have a jury decide what penalty to impose for the aggravated murder. Having freely relinquished his right, he cannot now argue that the trial court denied that right. 'When a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees.' Ruiz, 536 U.S. at 628, 122 S.Ct. 2450, 153 L.Ed.2d 586, citing Boykin v. Alabama (1969), 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274. Accord United States v. Bradley (C.A.6, 2005), 400 F.3d 459, 463 (a plea agreement 'most pertinently [waives] the right to a trial by jury').
>
> Further, the applicable statute, R.C. 2945.06, as well as Crim.R. 11(C)(3), contains no provisions permitting an accused charged with aggravated murder to waive a jury, request that three judges determine guilt upon a plea of guilty, and then have a jury decide the penalty. Instead, R.C. 2945.06 directs, 'If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses * * * [and determine guilt] and pronounce sentence accordingly.'
>
> Moreover, in State ex rel. Mason v. Griffin, 104 Ohio St.3d 279, 2004 Ohio 6384, 819 N.E.2d 644, we issued a writ of prohibition against a trial judge who had created' a hybrid procedure--a jury sentencing hearing to make certain findings upon which [the trial judge] would base his sentencing decision.' Id. at P 17. We held that by creating a nonstatutory procedure to convene a jury, the trial court "proceeded in a manner in which he patently and unambiguously lacked jurisdiction to act.'Id. For the foregoing reasons, we reject Ketterer's complaint about the failure of the trial court to convene a sentencing jury"[8].

This Court notes that the defendant in Ketterer did not raise the violation of his 6th Amendment rights until after he waived a jury, entered pleas of guilty and was subsequently sentenced to death by the three-judge panel. However, the Ohio Supreme Court had before it the

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[8] Id at P. 122-124.

issues now raised by the Defendant in the case subjudice and **did not** find O.R.C. 2929.03 and Crim.R. 11(C)(3) unconstitutional. Counsel for the State of Ohio therefore argues that Ketterer supports the State's claim that a defendant who admits his or her guilt before a three-judge panel and proceeds to sentencing before the panel of three judges is not denied his or her 6th Amendment right to jury trial.

Counsel for the Defendant further argues that even if a defendant enters pleas of guilty to aggravated murder and the specification(s) of aggravating circumstance(s), the defendant has a Sixth Amendment right to a jury at the mitigation hearing because factual determinations will be made at such hearing as to the imposition of the sentence. Defendant supports this argument by stating that new findings of fact occur at the mitigation hearing which significantly affect punishment. Therefore, Defendant argues that to deny a defendant the right to a jury to make such findings when a guilty plea is entered, violates the 6th Amendment right.

The holdings in Apprendi, Ring and Blakey do not stand for the proposition that only a jury can engage in the weighing process of the specification(s) of aggravating circumstance(s) which are admitted by the defendants during his or her guilty plea and any factors in mitigation at the mitigation hearing as outlined in Ohio. The trilogy of cases specifically held that if any fact increases the penalty for a crime beyond a statutory maximum, excluding a prior conviction, such issue must be submitted to a jury and proved beyond a reasonable doubt. Based upon the foregoing, the statutory scheme in Ohio clearly establishes the only finding of fact which increases the penalty of a defendant in Ohio who is facing a capital indictment are the specification(s) of aggravating circumstance(s) which must be established at the trial phase or are admitted to if the defendant elects to plead guilty or no contest pursuant to Ohio Civil Rule

11(C)(3).

The Court does note that, similar to the Defendant in the case subjudice, the defendant in James Ben Brownfield v. State of Alabama, (April 27, 2007), 859 So.2d 1181, 2007 Ala. Crim. App. LEXIS 79, 88-91, challenged the weighing process in a death penalty case and claimed that it was for a jury to determine the facts pursuant to Ring and Apprendi . The Alabama Court of Appeals held:

> As the Alabama Supreme Court stated in Ex parte Waldrop: "[T]he weighing process is not a factual determination. In fact, the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof. As the United States Court of Appeals for the Eleventh Circuit noted, 'While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard ... the relative weight is not.' Ford v. Strickland, 696 F.2d 804, 818 (11th Cir. 1983). This is because weighing the aggravating circumstances and the mitigating circumstances is a process in which 'the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence.' Tuilaepa v. California, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). Moreover, the Supreme Court has held that the sentencer in a capital case need not even be instructed as to how to weigh particular facts when making a sentencing decision. See Harris v. Alabama, 513 U.S. 504, 512, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995) (rejecting 'the notion that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required"' (quoting Franklin v. Lynaugh, 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988)) and holding that 'the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer').
>
> "Thus, the weighing process is not a factual determination or an element of an offense; instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, oobservable datum. See California v. Ramos, 463 U.S.

992, 1008, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) ('Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.'); Zant v. Stephens, 462 U.S. 862, 902, 103 S.Ct. 2733, 77 L. Ed. 2d 235 (1983) (Rehnquist, J., concurring in the judgment) ('sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does').

"In Ford v. Strickland, supra, the defendant claimed that 'the crime of capital murder in Florida includes the element of mitigating circumstances not outweighing aggravating circumstances and that the capital sentencing proceeding in Florida involves new findings of fact significantly affecting punishment.' Ford, 696 F.2d at 817. The United States Court of Appeals for the Eleventh Circuit rejected this argument, holding that 'aggravating and mitigating circumstances are not facts or elements of the crime. Rather, they channel and restrict the sentencer's discretion in a structured way after guilt has been fixed.' 696 F.2d at 818. Furthermore, in addressing the defendant's claim that the State must prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances, the court stated that the defendant's argument "'seriously confuses proof of facts and the weighing of facts in sentencing. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, see State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. [1950], 40 L.Ed.2d 295 (1974), and State v. Johnson, 298 N.C. 47, 257 S.E.2d 597, 617-18 (1979), the relative weight is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party.'

"696 F.2d at 818. Alabama courts have adopted the Eleventh Circuit's rationale. See Lawhorn v. State, 581 So. 2d 1159, 1171 (Ala.Crim.App. 1990) 'while the existence of an aggravating or mitigating circumstance is a fact susceptible to proof, the relative weight of each is not; the process of weighing, unlike facts, is not susceptible to proof by either party'); see also Melson v. State, 775 So. 2d 857, 900-901 (Ala.Crim.App. 1999); Morrison v. State, 500 So. 2d 36, 45 (Ala.Crim.App. 1985).

"Thus, the determination whether the aggravating circumstances

> outweigh the mitigating circumstances is not a finding of fact or an element of the offense. Consequently, Ring and Apprendi do not require that a jury weigh the aggravating circumstances and the mitigating circumstances."Ex parte Waldrop, 859 So. 2d at 1189-1190 (footnote omitted).

Likewise, the State of Indiana has also determined that the weighing process by a trial court during a mitigation hearing in a capital case does not deny a defendant his or her 6th Amendment right. In arriving at this determination, the Supreme Court of Indiana in Ritchie v. State, 809 N.E.2d 258, 266-268 (Ind. 2004), examined the holdings by other state courts concerning this issue. In particular, the Supreme Court of Indiana cited the Supreme Court of Delaware's holding in Brice v. State, 815 A.2d 314 (Del. 2003) which:

> "* * * addressed the post-Ring constitutionality of Delaware's death penalty statute. That state's statute assigns to the sentencing judge the sole responsibility for determining whether to impose the death penalty after weighing aggravating and mitigating factors. In the view of the Supreme Court of Delaware, this approach remains constitutional after Ring. Ring does not apply to the weighing phase because weighing does not increase the maximum punishment. Rather it resolved the punishment to be administered within the range fixed by the fact finding. It is designed to 'ensure that the punishment imposed is appropriate and proportional.' Id. at 322." Ritchie v. State, supra at 266.

The Court in Ritchie then examined the Capital sentencing scheme in California and noted that the analysis of the California Supreme Court is consistent with the view held by both the Supreme Courts in Indiana and Alabama. Specifically the Richie Court noted:

> "Under the California statute, if the jury finds a 'special circumstance' in the guilt phase, a penalty phase determines whether to impose death. People v. Prieto, 30 Cal. 4th 226, 133 Cal. Rptr. 2d 18, 66 P.3d 1123 (Cal. 2003), addressed the claim that an instruction of presumption of innocence must be given in

the penalty phase. The California Supreme Court rejected this claim and observed that Ring and Apprendi are satisfied by the California statutory scheme:

> Under the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole. Id. at 1147 (emphasis in original) (citations omitted). In explaining this conclusion, the California Supreme Court cited the U.S. Supreme Court's holding in Tuilaepa v. California, 512 U.S. 967, 972, 129 L. Ed. 2d 750, 114 S. Ct. 2630 (1994), that under the California framework, "the jury [in the penalty phase] merely weight the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.'" Id. We agree and think the same reasoning applies to the Indiana statute." Id. at 267.

Likewise, the Ritchie Court noted that the Nebraska Supreme Court held:

> "* * * that Ring affects 'only the narrow issue of whether there is a Sixth Amendment right to have a jury determine the existence of any aggravating circumstance upon which a capital sentence is based.' Nebraska v. Gales, 265 Neb. 598, 658 N.W.2d 604, 623 (Neb. 2003). Under Nebraska's post-Ring death penalty statute, the jury is not to determine mitigating circumstances or balance aggravators and mitigators. The Court contrasted the eligibility determination which the jury makes with the death selection process which Nebraska vests in the judge: **It is the determination of "death eligibility" which exposes the defendant to greater punishment, and such exposure triggers the Sixth Amendment right to jury determination as delineated in Append and Ring. In contrast, the determination of mitigating circumstances, the balancing of aggravating circumstances against mitigating circumstances, and proportionality review are part of the 'selection decision' in capital sentencing, which, under the current and prior statutes, occurs only after eligibility has been determined. These determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination. Accordingly, we do not read either Append or Ring to require that the determination of mitigating circumstances, the balancing**

> **function, or proportionality review be undertaken by a jury.** (Emphasis added.) Id. at 627-28 (citations omitted)". Id at 267.

The Ritchie Court also noted that the Maryland Supreme Court reached the same conclusion as the other cited courts. Specifically, the Ritchie Court noted:

> Maryland's death penalty statute allows imposition of a death sentence if the sentencing authority determines that aggravating circumstances outweigh any mitigating circumstances by a preponderance of the evidence. Oken v. State, 378 Md. 179, 835 A.2d 1105, 1147 (Md. 2003). In holding the preponderance of the evidence standard constitutional, the Court stated:
>
> 'As is readily apparent from the opinion of the Court, Ring only addresses the eligibility phase of the sentencing process. Those aggravating factors which narrow the class of death-eligible defendants for Eighth Amendment purposes must be found by a proper sentencing authority beyond a reasonable doubt in order to comply with the requirements of the Sixth Amendment. Contrary to the present assertions of Oken, Ring holds no implications for the selection phase of Maryland's sentencing process.'" Id. at 267.

The Indiana Supreme Court noted that the Nevada Supreme Court held the contrary view. Specifically, the Court noted:

> "In Johnson v. State, 118 Nev. 787, 59 P.3d 450 (Nev. 2002), that Court concluded that the weighing process is in part a factual determination, not merely discretionary weighing. Id. at 460. Although the Nevada Supreme Court observed that Ring expressly did not address any "Sixth Amendment claim with respect to mitigating circumstances," the court concluded that Ring required a jury finding as to weighing. Id. For the reasons already given we respectfully disagree". Id. at 267-68.

After applying the relevant law to the Indiana Death Penalty Statute, the Indiana Supreme Court in Ritchie concluded:

> "* * * we conclude that the Indiana Death Penalty Statute does not violate the Sixth Amendment as interpreted by Apprendi and Ring. Once a statutory aggravator is found by a jury beyond a reasonable

> doubt, the Sixth Amendment as interpreted in Ring and Apprendi is satisfied. Indiana now places the weighing process in the hands of the jury, but this does not convert the weighing process into an eligibility factor. The outcome of weighing does not increase eligibility. Rather, it fixes the punishment within the eligible range." Id. at 268.

Based upon the foregoing, and after applying the relevant law to the issues before the Court, this Court finds that R.C. 2929.03 and Crim.R. 11(C)(3) do not violate a Defendant's Sixth Amendment right to jury trial. Therefore, this Court finds Defendant Anthony Belton's Motion for Determination of the Constitutionality of R.C. 2929.03 and Crim.R. 11(C)(3) not well taken and denied.

November 30, 2009

Judge Ruth Ann Franks

cc: Robert A. Miller
Dean Mandros
Peter Rost
Ronnie Wingate

Case Number: G-4801-CR-0200802934-000
STATE OF OHIO V. ANTHONY BELTON

FILED
LUCAS COUNTY

2009 NOV 30 P 12: 21

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

PRAECIPE

TO THE CLERK:

Within three days of journalization, please serve upon all parties notice of the judgment in a manner prescribed by Civ. R. 5(B) ~~and note the~~ service in the appearance docket (see below).

November 30, 2009

JUDGE RUTH ANN FRANKS

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SCANNED

FILED
LUCAS COUNTY

2010 NOV -1 P 3: 25

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COMMON PLEAS COURT, LUCAS COUNTY, OHIO

STATE OF OHIO Plaintiff.	*	CASE NO: G-4801-CR-0200802934-000
v.	*	**NUNC PRO TUNC ORDER**
ANTHONY BELTON Defendant.	*	JUDGE RUTH ANN FRANKS

* * * * * * *

NUNC PRO TUNC ORDER dated October 25, 2010, to include "Defendant's oral motion for Reconsideration of the Motion for Determination of Constitutionality of R.C. 2929.03 & Crim. R. 11(C)(3), filed February 19, 2009 and subsequently denied on November 30, 2009, is found not well taken and denied."

Dated October 25, 2010. Court Reporter TRICIA WADSWORTH ordered. State of Ohio: DEAN P. MANDROS, ROBERT A. MILLER AND TIMOTHY F. BRAUN. PETER G. ROST and RONNIE L. WINGATE present on behalf of the defendant. Defendant, ANTHONY BELTON present in court.

Matter called for pretrial hearing and juror excuse session. Juror excuse session had. Defendant's oral motion for Reconsideration of the Motion for Determination of Constitutionality of R.C. 2929.03 & Crim. R. 11(C)(3), filed February 19, 2009 and subsequently denied on November 30, 2009, is found not well taken and denied. Matter scheduled for ruling on final pretrial hearing on Friday, October 29, 2010, at 10:00a.m.

Bond is continued.

JUDGE RUTH ANN FRANKS

E-JOURNALIZED

NOV - 3 2010

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958 N.E.2d 162 (Ohio 2011)

130 Ohio St.3d 326, 2011-Ohio-5456

The STATE ex rel. BATES, Pros. Atty.,

v.

COURT OF APPEALS FOR THE SIXTH APPELLATE DISTRICT.

No. 2011-1075.

Supreme Court of Ohio.

October 27, 2011

Submitted Sept. 6, 2011.

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Julia R. Bates, Lucas County Prosecuting Attorney, and Evy M. Jarrett, Assistant Prosecuting Attorney, for relator.

Michael DeWine, Attorney General, and Erin Butcher-Lyden and Damian W. Sikora, Assistant Attorneys General, for respondent.

PER CURIAM.

{¶ 1} This is an action for a writ of prohibition to prevent a court of appeals

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from proceeding with a delayed appeal from an order denying a pretrial constitutional challenge in a death-penalty case. Because the court of appeals patently and unambiguously lacks jurisdiction to proceed in the appeal when the order does not constitute a final, appealable order, we grant the writ.

Facts

{¶ 2} Relator, Anthony Belton, is charged with one count of aggravated murder with death-penalty specifications and two counts of aggravated robbery with firearm specifications in *State v. Belton,* Lucas Cty. C.P. No. CR 200802934. In February 2009, Belton filed a motion challenging the constitutionality of R.C. 2929.03 and Crim.R. 11(C)(3). Belton claimed that these provisions are unconstitutional because they preclude him from entering a plea of guilty without waiving his right to a jury trial during the sentencing phase of his capital case. On November 30, 2009, the common pleas court denied Belton's motion and upheld the constitutionality of R.C. 2929.03 and Crim.R. 11(C)(3).

[130 Ohio St.3d 327] {¶ 3} Nearly a year later, on October 25, 2010, 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." Belton later moved for reconsideration of the court's denial of his motion challenging the constitutionality of R.C. 2929.03 and Crim.R. 11(C)(3), and the court denied the motion.

{¶ 4} On March 8, 2011, respondent, the Sixth District Court of Appeals, dismissed Belton's appeal from the common pleas court's denial of his motion for reconsideration because " [t]here is no such thing as a motion for reconsideration of a final judgment in a criminal case" and " appellant appealed a void judgment entry denying his motion for reconsideration." *State v. Belton,* Lucas App. No. L-10-1347, 2011-Ohio-1141, 2011 WL 856975, ¶ 23, 25. In the context of that opinion, however, the court of appeals concluded that our decision in *State v. Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, " clearly contemplates that a constitutional challenge to Crim.R. 11(C)(3) and the corresponding statute must proceed via interlocutory appeal of a final order" and that Belton's October 25, 2010 " notice of intent to plea[d] transformed the November 30, 2009 judgment [upholding the constitutionality of Crim.R. 11(C)(3)] into a final order." *Belton* at ¶ 18, 25.

{¶ 5} On April 20, 2011, Belton filed a motion in the court of appeals for leave to file a delayed appeal from the common pleas court's November 30, 2009 order upholding the constitutionality of Crim.R. 11(C)(3) and R.C. 2929.03. To support his motion, Belton relied on the language from the court of appeals' opinion dismissing his appeal from the denial of his motion for reconsideration. The state opposed Belton's motion, but on June 8, 2011, the court of appeals granted the motion.

{¶ 6} On June 24, 2011, relator, Lucas County Prosecuting Attorney Julia R. Bates, instituted this action for a writ of prohibition to prevent the court of appeals from proceeding in Belton's delayed appeal and to compel the dismissal of the appeal. On July 19, the court of appeals filed an answer in which it admitted all the pertinent factual allegations of the prosecutor's complaint.

{¶ 7} This cause is now before the court for our S.Ct.Prac.R. 10.5 determination.

Legal Analysis

S.Ct.Prac.R. 10.5 Standard

{¶ 8} We must now determine whether dismissal, an alternative writ, or a peremptory writ is appropriate.

Dismissal, which the court of appeals requests in

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its answer, is required if it appears beyond doubt, after presuming the truth of all material factual allegations of the prosecutor's complaint and making all reasonable inferences in her favor, that she is not entitled to the requested [130 Ohio St.3d 328] extraordinary relief in prohibition. *State ex rel. Duke Energy Ohio, Inc. v. Hamilton Cty. Court of Common Pleas,* 126 Ohio St.3d 41, 2010-Ohio-2450, 930 N.E.2d 299, ¶ 13.

{¶ 9} If, however, after so construing the complaint, it appears that the prosecutor's prohibition claim may have merit, we will grant an alternative writ and issue a schedule for the presentation of evidence and briefs. *State ex rel. Mason v. Burnside,* 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, ¶ 8.

{¶ 10} Finally, if the pertinent facts are uncontroverted and it appears beyond doubt that the prosecutor is entitled to the requested extraordinary relief in prohibition, we will grant a peremptory writ. *Duke Energy* at ¶ 15.

Prohibition Claim

{¶ 11} To be entitled to the requested writ of prohibition, the prosecutor must establish that (1) the court of appeals is about to exercise judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Cordray v. Marshall,* 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, ¶ 25. It is uncontroverted that the court of appeals is exercising judicial power by accepting jurisdiction over Belton's delayed appeal from the common pleas court's order upholding the constitutionality of Crim.R. 11(C)(3) and R.C. 2929.03.

{¶ 12} For the remaining requirements, " [i]f a lower court patently and unambiguously lacks jurisdiction to proceed in a cause, prohibition * * * will issue to prevent any future unauthorized exercise of jurisdiction and to correct the results of prior jurisdictionally unauthorized actions." *State ex rel. Mayer v. Henson,* 97 Ohio St.3d 276, 2002-Ohio-6323, 779 N.E.2d 223, ¶ 12. " Where jurisdiction is patently and unambiguously lacking, relators need not establish the lack of an adequate remedy at law because the availability of alternate remedies like appeal would be immaterial." *State ex rel. Sapp v. Franklin Cty. Court of Appeals,* 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, ¶ 15.

{¶ 13} The dispositive issue is thus whether the court of appeals patently and unambiguously lacks jurisdiction over Belton's delayed appeal.

Patent and Unambiguous Lack of Jurisdiction

{¶ 14} Section 3(B)(2), Article IV of the Ohio Constitution establishes that courts of appeals " shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the court of record inferior to the courts of appeals within the district." " The Ohio Rules of Appellate Procedure provide two distinct means by which a criminal defendant [130 Ohio St.3d 329] may appeal from a *final order* of a trial court." (Emphasis added.) *State v. Silsby,* 119 Ohio St.3d 370, 2008-Ohio-3834, 894 N.E.2d 667, ¶ 10.

{¶ 15} Under the first method, " App.R. 3(A), which grants an appeal as of right, provides that such an appeal ' shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4.' App.R. 4(A), in turn, requires an appealing party to file within 30 days of the judgment or order appealed." *Id.* at ¶ 11. Belton did not fit under this category of appeal because, assuming that the November 30, 2009 order he is

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appealing constitutes a final, appealable order, he did not file a notice of appeal within 30 days of its entry.

{¶ 16} Pursuant to the second method, however, " if an appealing party does not comply with App.R. 4(A), App.R. 5(A) provides for an appeal by leave of the court." *Id.* at ¶ 12. " These appeals, which apply in only three classes of cases [including criminal proceedings], according to App.R. 5(A)(1), require the movant to ' set forth the reasons for the failure of the appellant to perfect an appeal as of right.' App.R. 5(A)(2). If a movant establishes sufficient reasons justifying the delay, the appellate court may, in its discretion, grant the motion, and the case proceeds as it would have if timely filed." *Id.*

{¶ 17} The court of appeals granted Belton's motion for delayed appeal pursuant to App.R. 5(A). But App.R. 5(A) presupposes the entry of a final, appealable order by the trial court. *Silsby,* 119 Ohio St.3d 370, 2008-Ohio-3834, 894 N.E.2d 667, at ¶ 10; see also *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (" It is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction"); *State v. Boyd* (July 28, 1994), Cuyahoga App. No. 65883, 1994 WL 393717 (court of appeals dismissed a criminal defendant's delayed appeal for lack of a final, appealable order).

{¶ 18} R.C. 2505.02 sets forth several types of final orders that may be appealed. The potentially pertinent categories here are those specified in R.C. 2505.02(B)(1), (2), and (4). These provisions provide:

{¶ 19} " (B) An order is a final order that may be

reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶ 20} " (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶ 21} " (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

{¶ 22} " * * *

{¶ 23} " (4) An order that grants or denies a provisional remedy and to which both of the following apply:

[130 Ohio St.3d 330] {¶ 24} " (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

{¶ 25} " (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

{¶ 26} The order denying Belton's constitutional challenge to provisions preventing him from pleading guilty without waiving his right to a jury trial during sentencing in his capital case is not a final, appealable order under R.C. 2505.02(B)(1) or (2) because the order did not affect a substantial right.

{¶ 27} A " substantial right" is " a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). A criminal defendant does not have a constitutional right to enter a guilty plea or to have it accepted by the court. See *Santobello v. New York* (1971), 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427; *North Carolina v. Alford* (1970), 400 U.S. 25, 38, 91 S.Ct. 160, 27 L.Ed.2d 162, fn. 11; *Sanders v. State* (2006), 280 Ga. 780, 782, 631 S.E.2d 344;

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State v. Tate, Summit App. No. 21943, 2005-Ohio-2156, 2005 WL 1026516, ¶ 13; *State v. Carty,* Cuyahoga App. No. 63534, 1993 WL 328743, *3.

{¶ 28} Instead, state law governs the exercise of the ability to plead guilty. *Alford* at 38, 91 S.Ct. 160, 27 L.Ed.2d 162, fn. 11; *Sanders* at 782, 631 S.E.2d 344.

{¶ 29} State law includes our holding in *Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, at ¶ 122-125, in which we rejected a claim that a capital defendant was denied his constitutional right to have a jury determine the penalty to be imposed because (1) the defendant waived his right to a jury trial and later pleaded guilty as charged, (2) R.C. 2945.06 and Crim.R. 11(C)(3) contain no provisions permitting an accused charged with a capital offense to waive a jury, request that a three-judge panel determine guilt upon a plea of guilty, and then have a jury decide the penalty, and (3) in *State ex rel. Mason v. Griffin,* 104 Ohio St.3d 279, 2004-Ohio-6384, 819 N.E.2d 644, a drug-trafficking case, we granted a writ prohibiting a trial judge from creating a hybrid, nonstatutory procedure comparable to the one requested by Belton.

{¶ 30} Therefore, Belton did not have a constitutional, statutory, common-law, or regulatory right that he was entitled to enforce, and thus there was no substantial right implicated by the common pleas court's rejection of his constitutional challenge to Crim.R. 11(C)(3) and R.C. 2929.03. See R.C. 2505.02(A)(1) and (B)(1). Moreover, the trial court's ruling that R.C. 2929.03 and Crim.R. 11(C)(3) are constitutional did not determine the action, i.e., the criminal case. R.C. 2505.02(B)(1). Consequently, neither R.C. 2505.02(B)(1) nor (2) authorizes the court of appeals' exercise of jurisdiction over Belton's delayed appeal.

[130 Ohio St.3d 331] {¶ 31} Nor does the order denying Belton's motion satisfy the requirement of R.C. 2505.02(B)(4) that the order grant or deny a provisional remedy. Under this provision, " for an order to qualify as a final appealable order, the following conditions must be met: (a) the order must grant or deny a provisional remedy, as defined in R.C. 2505.02(A)(3), (b) the order must determine the action with respect to the provisional remedy so as to prevent judgment in favor of the party prosecuting the appeal, and (c) a delay in review of the order until after final judgment would deprive the appellant of any meaningful or effective relief." *State v. Upshaw,* 110 Ohio St.3d 189, 2006-Ohio-4253, 852 N.E.2d 711, ¶ 15.

{¶ 32} R.C. 2505.02(A)(3) defines " provisional remedy" as " a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, [or] suppression of evidence." A " proceeding ancillary to an action" is " ' one that is attendant upon or aids another proceeding.' " *State v. Muncie* (2001), 91 Ohio St.3d 440, 449, 746 N.E.2d 1092, quoting *Bishop v. Dresser Industries, Inc.* (1999), 134 Ohio App.3d 321, 324, 730 N.E.2d 1079. An order rejecting a constitutional challenge in a capital or criminal proceeding is not a proceeding that is attendant upon or aids the criminal case. It is not a suppression hearing, R.C. 2505.02(A)(3), a petition for forced medication in a criminal case under R.C. 2945.38, *State v. Muncie* (2001), 91 Ohio St.3d 440, 746 N.E.2d 1092, or an order finding a criminal defendant incompetent to stand trial and committing the defendant to a mental institution for the restoration of mental competency, *State*

v. Upshaw, 110 Ohio St.3d 189, 2006-Ohio-4253, 852 N.E.2d 711. All of these proceedings were held to be ancillary to an underlying action and thus constituted a provisional remedy. By contrast, there is no legally recognized proceeding separate

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from the criminal proceeding itself for a court to determine the constitutional challenges to the rule and statute raised by Belton.

{¶ 33} Nor is Belton necessarily precluded from raising his claim on appeal should he attempt to enter a plea under the conditions he desires— a plea of guilty only insofar as he does not waive his right to a jury trial for the sentencing phase of the criminal case. Under current law, the trial court would have to reject such a hybrid plea as not legally authorized. And upon a plea of not guilty, Belton could raise his claim on appeal should he be convicted and sentenced. There would be no claim of structural error, as was the case with the pretrial order disqualifying a criminal defendant's retained counsel of choice in *State v. Chambliss,* 128 Ohio St.3d 507, 2011-Ohio-1785, 947 N.E.2d 651, to justify a finding that postjudgment appeal would not provide a meaningful or effective remedy. Indeed, pursuant to our holding in *Ketterer,* 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, at ¶ 122-125, there would be no error at all.

[130 Ohio St.3d 332] {¶ 34} Significantly, the court of appeals did not specify any provision in R.C. 2505.02 that justified its acceptance of Belton's delayed appeal. Instead, the court of appeals merely stated that the trial court's order upholding the constitutionality of the challenged provisions had been transformed into a final, appealable order by Belton's October 25, 2010 notice of intent to admit guilt in accordance with Crim.R. 11(C)(3) and to impanel a jury for the sentencing phase of the case. But our criminal rules and statutes do not authorize any such notice or plea. And even if they did, there is no provision that such a notice would automatically transform a nonfinal order into a final and appealable one without satisfaction of the criteria of R.C. 2505.02. Furthermore, any suggestion by the court of appeals that our decision in *Ketterer* recognizes the availability of an interlocutory appeal from a decision challenging the constitutionality of Crim.R. 11(C)(3) and other provisions that do not permit a capital defendant to plead guilty while retaining the right to a jury trial at sentencing is wholly without merit. We never addressed the availability of an interlocutory appeal in *Ketterer,* nor did we need to.

{¶ 35} Therefore, because the trial court's order denying Belton's constitutional challenge did not constitute a final, appealable order, the court of appeals lacked jurisdiction to grant Belton's motion for a delayed appeal from the interlocutory order.

Conclusion

{¶ 36} Based on the foregoing, the court of appeals patently and unambiguously lacks jurisdiction over the criminal defendant's delayed appeal from the interlocutory order in the capital case. Because the facts pertinent to the complaint are uncontroverted and the prosecutor's entitlement to the requested extraordinary relief is clear, we grant a writ of prohibition to prevent the court of appeals from further proceeding in Belton's delayed appeal and to compel the court of appeals to dismiss the appeal. No further submission of evidence and briefing is required. See *Sapp,* 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, at ¶ 14, 32.

Writ granted.

O'CONNOR, C.J., and PFEIFER, LUNDBERG STRATTON, O'DONNELL, LANZINGER, CUPP, and McGEE BROWN, JJ., concur.

Federal Constitutional Provisions

CONSTITUTION OF UNITED STATES

Current through 2010

Article VI. PRIOR DEBTS, NATIONAL SUPREMACY, OATHS OF OFFICE

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

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

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

CONSTITUTION OF UNITED STATES

AMENDMENTS

Current through 2010

Amendment V. Rights of Persons

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

CONSTITUTION OF UNITED STATES

AMENDMENTS

Current through 2010

Amendment VI. Rights of Accused in Criminal Prosecutions

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

CONSTITUTION OF UNITED STATES

AMENDMENTS

Current through 2010

Amendment VIII. Further Guarantees in Criminal Cases

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

CONSTITUTION OF UNITED STATES

AMENDMENTS

Current through 2010

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

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

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

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

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

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

State Constitutional Provisions

Ohio Constitution

Article I. Bill of Rights

Current through the November, 2011 General Election

§ 9. Bail; cruel and unusual punishments

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

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

History. As amended January 1, 1998

Ohio Constitution

Article I. Bill of Rights

Current through the November, 2011 General Election

§ 10. Trial for crimes; witness

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

History. As amended September 3, 1912

Ohio Constitution

Article I. Bill of Rights

Current through the November, 2011 General Election

§ 16. Redress in courts

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

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

Relevant Statutes and Rules

Ohio Statutes

GENERAL PROVISIONS

Chapter 1. DEFINITIONS; RULES OF CONSTRUCTION

Includes all legislation filed with the Secretary of State's Office through 12/26/2012

§ 1.51. Special or local provision prevails as exception to general provision

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.

Cite as R.C. § 1.51

History. Effective Date: 01-03-1972

Ohio Statutes

GENERAL PROVISIONS

Chapter 1. DEFINITIONS; RULES OF CONSTRUCTION

Includes all legislation filed with the Secretary of State's Office through 12/26/2012

§ 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.

(B)

If amendments to the same statute are enacted at the same or different sessions of the legislature, one amendment without reference to another, the amendments are to be harmonized, if possible, so that effect may be given to each. If the amendments are substantively irreconcilable, the latest in date of enactment prevails. The fact that a later amendment restates language deleted by an earlier amendment, or fails to include language inserted by an earlier amendment, does not of itself make the amendments irreconcilable. Amendments are irreconcilable only when changes made by each cannot reasonably be put into simultaneous operation.

Cite as R.C. § 1.52

History. Effective Date: 01-03-1972

Ohio Statutes

GENERAL PROVISIONS

Chapter 1. DEFINITIONS; RULES OF CONSTRUCTION

Includes all legislation filed with the Secretary of State's Office through 12/26/2012

§ 1.58. Reenactment, amendment, or repeal of statute

(A)

The reenactment, amendment, or repeal of a statute does not, except as provided in division (B) of this section:

(1)

Affect the prior operation of the statute or any prior action taken thereunder;

(2)

Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;

(3)

Affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal;

(4)

Affect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

(B)

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

Cite as R.C. § 1.58

History. Effective Date: 01-03-1972

Ohio Statutes

Title 29. CRIMES - PROCEDURE

Chapter 2901. GENERAL PROVISIONS

Includes all legislation filed with the Secretary of State's Office through 12/26/2012

§ 2901.05. Burden of proof - reasonable doubt - self-defense

(A)

Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

(B)

(1)

Subject to division (B)(2) of this section, a person is presumed to have acted in self defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.

(2)

(a)

The presumption set forth in division (B)(1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of, the residence or vehicle.

(b)

The presumption set forth in division (B)(1) of this section does not apply if the person who uses the defensive force uses it while in a residence or vehicle and the person is unlawfully, and without privilege to be, in that residence or vehicle.

(3)

The presumption set forth in division (B)(1) of this section is a rebuttable presumption and may be rebutted by a preponderance of the evidence.

(C)

As part of its charge to the jury in a criminal case, the court shall read the definitions of "reasonable doubt" and "proof beyond a reasonable doubt," contained in division (D) of this section.

(D)

As used in this section:

(1)

An "affirmative defense" is either of the following:

(a)

A defense expressly designated as affirmative;

(b)

A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence.

(2)

"Dwelling" means a building or conveyance of any kind that has a roof over it and that is designed to be occupied by people lodging in the building or conveyance at night, regardless of whether the building or conveyance is temporary or permanent or is mobile or immobile. As used in this division, a building or conveyance includes, but is not limited to, an attached porch, and a building or conveyance with a roof over it includes, but is not limited to, a tent.

(3)

"Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as a guest.

(4)

"Vehicle" means a conveyance of any kind, whether or not motorized, that is designed to transport people or property.

(E)

"Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary

doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs.

Cite as R.C. § 2901.05

History. Effective Date: 11-01-1978; 2008 SB184 09-09-2008

Ohio Statutes

Title 29. CRIMES - PROCEDURE

Chapter 2929. PENALTIES AND SENTENCING

Includes all legislation filed with the Secretary of State's Office through 12/26/2012

§ 2929.03. Imposition of sentence for aggravated murder

(A)

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

(1)

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

(a)

Life imprisonment without parole;

(b)

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

(c)

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

(d)

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

(e)

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

(2)

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

(B)

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

(C)

(1)

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

(a)

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

on the offender:

(i)

Life imprisonment without parole;

(ii)

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

(iii)

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

(iv)

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

(v)

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

(b)

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

(2)

(a)

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

(i)

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

(ii)

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

(iii)

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

(b)

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

(i)

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

(ii)

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

(D)

(1)

Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and

was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

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

(2)

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

(a)

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

(b)

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

(c)

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

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, life imprisonment with parole eligibility after serving thirty full years of imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment imposed as described in division (D)(2)(b) of this section or a

sentence of life imprisonment without parole imposed under division (D)(2)(c) of this section, the sentence shall be served pursuant to section 2971.03 of the Revised Code. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3)

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

(a)

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

(i)

Life imprisonment without parole;

(ii)

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

(iii)

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

(iv)

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

(b)

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

(E)

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

(1)

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

(a)

Life imprisonment without parole;

(b)

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

(c)

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

(d)

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

(2)

If the offender also is convicted of or pleads guilty to a

sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(F)

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

(G)

(1)

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

(2)

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

Cite as R.C. § 2929.03

History. Effective Date: 01-01-1997; 03-23-2005; 2007 SB10 01-01-2008

Ohio Statutes

Title 29. CRIMES - PROCEDURE

Chapter 2929. PENALTIES AND SENTENCING

Includes all legislation filed with the Secretary of State's Office through 12/26/2012

§ 2929.04. Death penalty or imprisonment - aggravating and mitigating factors

(A)

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

(1)

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

(2)

The offense was committed for hire.

(3)

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

(4)

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

(a)

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

(b)

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

(5)

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

(6)

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

(7)

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

(8)

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

(9)

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

(10)

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

(B)

If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1)

Whether the victim of the offense induced or facilitated it;

(2)

Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3)

Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law;

(4)

The youth of the offender;

(5)

The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6)

If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7)

Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C)

The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

Cite as R.C. § 2929.04

History. Effective Date: 05-15-2002

592, 599 N.E.2d 760 (1991).

Error at sentencing phase

When a reviewing court vacates the death sentence of a defendant imposed by a three-judge panel due to error occurring at the penalty phase, not otherwise covered by RC § 2929.06, and the reviewing court does not find the evidence to be legally insufficient to justify imposition of the death sentence, such reviewing court may remand the action to that trial court for a resentencing hearing at which the state may seek whatever punishment is lawful, including, but not limited to, the death sentence: State v. Davis, 38 Ohio St. 3d 361, 528 N.E.2d 925 (1988).

Where error occurs at the sentencing phase, the cause will be remanded for resentencing pursuant to State v. Penix, 32 OS3d 369: State v. Denson, 40 Ohio St. 3d 30, 581 N.E.2d 674 (1988).

Any egregious error in the penalty phase of a death penalty proceeding, including prosecutorial misconduct, will be cause to vacate the sentence of death with a subsequent remand to the trial court for a new sentencing procedure pursuant to RC § 2929.06: State v. Thompson, 33 Ohio St. 3d 1, 514 N.E.2d 407 (1987).

Hearing

A "full" mitigation hearing within the meaning of RC § 2929.03 is not required when an offender is resentenced pursuant to RC § 2929.06: State v. Denson, 66 Ohio App. 3d 833, 586 N.E.2d 1125 (1990).

Where a case is remanded for resentencing under RC § 2929.06, an evidentiary hearing pursuant to RC § 2929.03 is not required: State v. Penix, 66 Ohio App. 3d 671, 586 N.E.2d 127 (1989).

Limitation on resentencing options

When an accused is tried by jury and convicted of aggravated murder with specification, a death sentence may be imposed by the trial judge only upon recommendation of the same jury that tried the guilt phase of the proceedings, pursuant to the criteria set forth in RC § 2929.03. Thus, when a case is remanded to the trial court following vacation of the death sentence due to error occurring at the penalty phase of the proceeding, the trial court, in resentencing the offender, is limited to the sentences of life imprisonment with parole eligibility after serving twenty full years of imprisonment or life imprisonment with parole eligibility after serving thirty full years of imprisonment (RC § 2929.06, applied and construed): State v. Penix, 32 Ohio St. 3d 369, 513 N.E.2d 744 (1987); State v. Zuranski, 32 Ohio St. 3d 379, 513 N.E.2d 753 (1987).

Supreme Court's mandate

The trial court could not deviate from the Ohio Supreme Court's mandate based on an error in the trial transcript which the state did not bring to the attention of that court: State v. Brooks, 118 Ohio App. 3d 444, 693 N.E.2d 301 (1997).

[PENALTIES FOR FELONY]

§ 2929.11 Purposes of felony sentencing; discrimination prohibited.

See syllabus paragraphs from State v. Foster (2006 Ohio 856) set forth in the "Case Notes and OAG" section below under "Constitutionality".

(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. 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.

HISTORY: 146 v S 2. Eff 7-1-96.

Not analogous to former RC § 2929.11 (134 v H 511; 137 v S 119; 139 v S 199; 140 v S 210; 140 v H 265; 140 v S 4; 141 v H 284; 143 v H 51; 143 v S 258), repealed 146 v S 2, § 2, eff 7-1-96.

The effective date is set by section 6 of SB 2.

Cross-References to Related Sections

Additional fine for certain offenders; collection of fines; crime victims recovery fund, RC § 2929.25.
Considerations in imposing sentence for felony, RC §§ 2929.12, 2929.13.
Drug offenses, additional prison terms, RC § 4729.99.
Period of post-release control for certain offenders, RC § 2967.28.
Sentencing hearing, RC § 2929.19.
Victim's bill of rights pamphlet, RC § 109.42.
Violation sanction centers; ineligibility, RC § 2967.14.1.

Ohio Constitution

Equal protection, OConst art I, § 2.
Excessive fines, OConst art I, § 9.
Transportation for crime, OConst art I, § 12.

Ohio Rules

Sentence, CrimR 32.

Comparative Legislation

Penalties for felony:
18 USCS § 3571
CA—Cal Pen Code § 17
FL—Fla. Stat. § 775.082
IL—730 ILCS § 5/5-1-9
IN—Burns Ind. Code Ann. § 35-50-2-1
KY—KRS § 532.060
MI—MCLS § 750.503
NY—NY CLS Penal §§ 55.05, 55.10
PA—18 P.S. § 1103

Text Discussion

Criminal penalties for charging usurious interest. **6 Ohio Civ. Prac.** § 212.66
Felony, modification of sentence. **Ohio Crim. Prac. & Pro.** § 36.101
Specifications to indictment. **Ohio Crim. Prac. & Pro.** § 6.201

Ohio Statutes

Title 29. CRIMES - PROCEDURE

Chapter 2929. PENALTIES AND SENTENCING

Includes all legislation filed with the Secretary of State's Office through 12/26/2012

§ 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.

Cite as R.C. § 2929.11

History. Amended by 129th General Assembly File No. 29, HB 86, §1, eff. 9/30/2011.

Effective Date: 07-01-1996

Ohio Statutes

Title 29. CRIMES - PROCEDURE

Chapter 2945. TRIAL

Includes all legislation filed with the Secretary of State's Office through 12/26/2012

§ 2945.06. Procedure for trial by court

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which the cause is pending shall proceed to hear, try, and determine the cause in accordance with the rules and in like manner as if the cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of that court, and in case there is neither a presiding judge nor a chief justice, by the chief justice of the supreme court. The judges or a majority of them may decide all questions of fact and law arising upon the trial; however the accused shall not be found guilty or not guilty of any offense unless the judges unanimously find the accused guilty or not guilty. If the accused pleads guilty of aggravated murder, a court composed of three judges shall examine the witnesses, determine whether the accused is guilty of aggravated murder or any other offense, and pronounce sentence accordingly. The court shall follow the procedures contained in sections 2929.03 and 2929.04 of the Revised Code in all cases in which the accused is charged with an offense punishable by death. If in the composition of the court it is necessary that a judge from another county be assigned by the chief justice, the judge from another county shall be compensated for his services as provided by section 141.07 of the Revised Code.

Cite as R.C. § 2945.06

History. Effective Date: 10-19-1981

Ohio Rules

OHIO RULES OF CRIMINAL PROCEDURE

As amended through July 1, 2012

Rule 11. Pleas, Rights Upon Plea

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(D) Misdemeanor cases involving serious offenses. In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he

or she has the right to be represented by retained counsel, or pursuant to Crim.R. 44 by appointed counsel, waives this right.

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

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

(F) Negotiated plea in felony cases. When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea. If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity. The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

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

Ohio Rules

Ohio Rules of Evidence

Article 7. OPINIONS AND EXPERT TESTIMONY

As amended through July 1, 2012

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;

(C) 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.

History. Effective: July 1, 1980; amended effective July 1, 1994.

Note:

Staff Note - July 1, 1994 amendment

Rule 702. Testimony by Experts.The amendment is intended to clarify the circumstances in which expert testimony is admissible, a subject on which the language of the pre-amendment rule has proved to be uninformative and, at times, misleading. Because the intention is to reflect the Ohio Supreme Court's interpretations of the rule's pre-amendment language, no substantive change from prior law is intended. In particular, there is no intention to change existing Ohio law regarding the reliability of expert testimony.

As originally adopted, Evid. R. 702 employed the same language as is used in the Federal Rules of Evidence to define the admissibility of expert testimony. That language permits a witness with the appropriate expertise to testify as an expert if the testimony "will assist the trier of fact." Evid. R. 702 (1980); F.R. Evid., Rule 702.

The "assist the trier" standard has been the subject of widely varying interpretations in the jurisdictions that have adopted it. In Ohio, however, decisions by the Supreme Court have established that the phrase incorporates two distinct admissibility requirements in addition tot the witness's expertise.

First, as at common law, an expert's testimony "assist[s] the trier" only if it relates to a matter "beyond the ken" of the ordinary person. State v. Koss (1990), 49 Ohio St. 3d 213, 216 (expert testimony is not admissible "when such knowledge is within the ken of the jury"); State v. Buell (1980)k, 22 Ohio St. 3d 124, 131 (expert testimony is admissible if the subject is "sufficiently beyond common experience), cert denied, 479 U.S. 871 (1986); State v. Thomas (1981), 66 Ohio St. 2d 518, 521 (expert testimony is inadmissible if the subject is not "beyond the ken of the average lay person").

Second, the expert's testimony "Assist[s] the trier" only if it meets a threshold standard of reliability, as established either by testimony or by judicial notice. (The trier of fact remains free, of course to make its own assessment of reliability and to accept or reject the testimony accordingly once it has been admitted.) See State v. Bresson (1990), 51 Ohio St. 3d 123, 128 (prior case-law establishing reliability of test sufficed to show reliability as a general matter, and test was admissible on a case-specific showing regarding the tester's qualifications and the reliability of the specific test administration); State v. Williams (1983), 4 Ohio St. 3d 53, 59 (expert testimony as to test was admissible "[I]n view of the unrebutted evidence of reliability of [the test] in general, and of [the witness's] analysis in particular"). See also State v. Pierce (1992), 64 Ohio St. 3d 490, 494-501 (scientific evidence was admissible where unreliability in specific case was not shown and where balance of probative value and reliability against risk of misleading or confusing the jury did not warrant exclusion).

As to the reliability requirement, the Ohio cases have not adopted a definitive test of the showing required for expert testimony generally. The Ohio cases have, however, clearly rejected the standard of Frye v. United States (D.C. Cir. 1923), 293 F. 1013, under which scientific opinions are admissible only if the theory or test in question enjoys "general acceptance" within a relevant scientific community. See Williams, supra, 4 Ohio St. 3d at 58; Pierce, supra, 64 Ohio St. 3d at 496. See also Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993, ____ U.S. ____, 113 S. Ct. 2786 (similarly rejecting Frye and describing the reliability standard to be

employed under the federal counterpart to Evid. R. 702.)

Under Ohio law it is also clear that reliability is properly determined only by reference to the principles and methods employed by the expert witness, without regard to whether the court regards the witness's conclusions themselves as persuasive or correct. See Pierce, supra, 64 Ohio St. 3d at 498 (emphasizing that unreliability could not be shown by differences in the conclusions of experts, without evidence that the procedures employed were "somehow deficient"). See also Daubert, supra, 113 S.Ct. at 2797 (the focus "must be solely on principles and methodology, not on the conclusions they generate").

In view of the interpretation given to the "assist the trier" standard by the Ohio Supreme Court's decisions, the rule's original language has been at best uninformative, and it appears to have been affirmatively misleading in some cases. It has been unhelpful to courts and attorneys seeking guidance on the admissibility of challenged testimony, often in the midst of trial, because the language itself does not self-evidently convey the specific content that has been given to it by authoritative judicial interpretations.

Moreover, a review of intermediate appellate decisions suggests that the language has been misleading to at least some Ohio lawyers and courts. In particular, in some cases, the parties and the courts have relied on decisions from other jurisdictions that have given a different content to the phrase "assist the trier," and they have as a result mistakenly assumed that Ohio law is in accord with the law of those other jurisdictions.

The amendment is intended to enhance the utility of the rule, and to reduce the occasions for mistaken interpretation, by substituting a codification of the above-noted Supreme Court holdings in place of the vague and misleading "assist the trier" language. Thus, the amended rule expressly states the three existing requirements for the admissibility of expert testimony:

(1) The witness must be qualified to testify by reason of specialized knowledge, skill, experience, training, or education. Evid. R. 702(B), incorporating original Evid. R. 702.

(2) the witness's testimony must relate to matters beyond the knowledge or experience possessed by lay persons, or dispel a misconception common among lay persons. Evid. R. 702(A), codifying Koss, Buell, and Thomas, supra. (The reference to "dispel[ling] a misconception" is a codification of the specific holding in Koss, supra, 49 Ohio St. 3d at 216, that the permissible subject matter of expert testimony includes not only matters beyond common knowledge, but also matters of common but mistaken belief.)

(3) The witness's testimony must have its basis in reliable scientific, technical, or otherwise specialized knowledge. Evid. R. 702(C), codifying Bresson and Williams, supra. As to evidence regarding a "test, procedure, or experiment," reliability must be shown both as to the test generally (that is, the underlying theory and the implementation of the theory), Evid. R. 702(C)(1) and (2), and as to the specific application. Evid. R. 702(C)(3). See Bresson, supra; Williams, supra. See generally 1 P. Giannelli and E. Imwinkelried, Scientific Evidence 1-2 (2d ed. 1993).

Consistent with the intention to do no more than codify existing holdings on the admissibility of expert testimony, the amended rule does not attempt to define the standard of reliability but leaves that to further development through case law. The amendment also leaves unchanged Ohio's rejection of Frye as the exclusive standard of reliability. Similarly, the amendment does not purport to supplant existing case law as to the acceptable means for showing reliability, whether through judicial notice or testimony. Further, the law remains unchanged that the inquiry as to reliability is appropriately directed, not to the correctness or credibility of the conclusions reached by the expert witness, but to the reliability of the principles and methods used to reach those conclusions.

(While decisions under the federal rules of evidence are frequently inapposite to the interpretation of the Ohio rules, see Evid. R. 102, the federal counterpart to Evid. R. 702 has been interpreted as incorporating a reliability requirement. Daubert, supra. To that extent, the United States Supreme Court's discussion of the considerations that may be relevant to a reliability determination may also be helpful in construing the Ohio rule. See id., 113 S. Ct. at 2795-2796.)

Because the amendment is not intended to change existing law, the procedure for challenging and determining the admissibility of expert proofs likewise remains unchanged. As has been true under the original rule, there may be cases where the issues raised by a proffer of expert testimony can be most efficiently resolved by pre-trial hearing, briefing, and argument. In other cases, however, the issues can be resolved as adequately by objection and decision during trial. In either case, these have been, and will continue to be, matters that are determined by the timing of the parties' motions and by the scheduling and supervisory authority of the trial court.

Ohio Rules

RULES OF SUPERINTENDENCE FOR THE COURTS OF OHIO

As amended through October 1, 2012

Rule 20. Appointment of Counsel for Indigent Defendants in Capital Cases

I. Scope of rules

(A) Rules 20 through 20.05 of the Rules of Superintendence for the Courts of Ohio shall apply in cases where an indigent defendant has been charged with aggravated murder and the indictment includes one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code. These rules shall apply in cases where a juvenile defendant is indicted for a capital offense, but because of the juvenile's age, cannot be sentenced to death.

(B) The provisions for the appointment of counsel set forth in Sup. R. 20 through 20.05 apply only in cases where the defendant is indigent and counsel is not privately retained by or for the defendant.

(C) If the defendant is entitled to the appointment of counsel, the court shall appoint two attorneys certified pursuant to Sup. R. 20 through 20.05. If the defendant engages one privately retained attorney, the court shall not appoint a second attorney pursuant to this rule.

(D) The provisions of Sup. R. 20 through 20.05 apply in addition to the reporting requirements created by section 2929.021 of the Revised Code.

II. Appointment of counsel for indigent defendants in capital cases

(A) Trial counsel

At least two attorneys shall be appointed by the court to represent an indigent defendant charged with aggravated murder and the indictment includes one or more specifications of aggravating circumstances listed in R.C. 2929.04(A). At least one of the appointed counsel shall maintain a law office in Ohio and have experience in Ohio criminal trial practice. The counsel appointed shall be designated "lead counsel" and "co-counsel" and must meet the qualifications set forth in Sup. R. 20.01.

(B) Appellate counsel

At least two attorneys shall be appointed by the court to appeal cases where the trial court has imposed the death penalty on an indigent defendant. At least one of the appointed counsel shall maintain a law office in Ohio. Appointed counsel shall meet the qualifications for appellate counsel set forth in Sup. R. 20.01.

(C) Exceptional circumstances

If an attorney does not satisfy the requirements of divisions (A) or (B) of this section, the attorney may be certified as lead counsel, co-counsel, or appellate counsel if it can be demonstrated to the satisfaction of the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases that competent representation will be provided to the defendant. In so determining, the committee may consider all of the factors in Sup. R. 20.01 and any other relevant considerations.

III. Procedures for court appointments of counsel

(A) Appointing counsel

Only counsel who have been certified by the committee shall be appointed to represent indigent defendants charged with aggravated murder and the indictment includes one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code. Each court may adopt local rules establishing qualifications in addition to and not in conflict with those established by Sup. R. 20.01. Appointments of counsel for these cases should be distributed as widely as possible among the certified attorneys in the jurisdiction of the appointing court.

(B) Workload of appointed counsel

(1) In appointing counsel, the court shall consider the nature and volume of the workload of the prospective counsel to ensure that counsel, if appointed, could direct sufficient attention to the defense of the case and provide competent representation to the defendant.

(2) Attorneys accepting appointments shall provide each client with competent representation in accordance with constitutional and professional standards. Appointed counsel shall not accept workloads that, by reason of their excessive size, interfere with the rendering of competent representation or lead to the breach of professional obligations.

(C) Notice to the committee

(1) Within two weeks of appointment, the appointing court shall notify the committee secretary of the appointment on a form prescribed by the committee. The notice shall include all of the following:

(a) The court and the judge assigned to the case;

(b) The case name and number;

(c) A copy of the indictment;

(d) The names, business addresses, telephone numbers, and certification of all attorneys appointed;

(e) Any other information considered relevant by the committee or appointing court.

(2) Within two weeks of disposition, the trial court shall notify the committee secretary of the disposition of the case on a form prescribed by the committee. The notice shall include all of the following:

(a) The outcome of the case;

(b) The title and section of the Revised Code of any crimes to which the defendant pleaded or was found guilty;

(c) The date of dismissal, acquittal, or that sentence was imposed;

(d) The sentence, if any;

(e) A copy of the judgment entry reflecting the above;

(f) If the death penalty was imposed, the name of counsel appointed to represent the defendant on appeal;

(g) Any other information considered relevant by the Committee or trial court.

(D) Support services

The appointing court shall provide appointed counsel, as required by Ohio law or the federal Constitution, federal statutes, and professional standards, with the investigator, mitigation specialists, mental health professional, and other forensic experts and other support services reasonably necessary or appropriate for counsel to prepare for and present an adequate defense at every stage of the proceedings including, but not limited to, determinations relevant to competency to stand trial, a not guilty by reason of insanity plea, cross-examination of expert witnesses called by the prosecution, disposition following conviction, and preparation for and presentation of mitigating evidence in the sentencing phase of the trial. Lead counsel bears overall responsibility for the performance of the defense team and shall allocate, direct, and supervise the work in accordance with Sup. R. 20 through 20.04 and professional standards. In addition, all counsel bear a responsibility to comply with Sup. R. 20 through 20.04 and professional standards.

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Brain anatomy of persistent violent offenders: More rather than less

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Abstract

Most violent crimes in Western societies are committed by a small group of men who display antisocial behavior from an early age that remains stable across the life-span. It is not known if these men display abnormal brain structure. We compared regional brain volumes of 26 persistently violent offenders with antisocial personality disorder and substance dependence and 25 healthy men using magnetic resonance imaging volumetry and voxel-based morphometry (VBM). The violent offenders, as compared with the healthy men, had markedly larger white matter volumes, bilaterally, in the occipital and parietal lobes, and in the left cerebellum, and larger grey matter volume in right cerebellum (effect sizes up to 1.24, $P<0.001$). Among the offenders, volumes of these areas were not associated with psychopathy scores, substance abuse, psychotropic medication, or global IQ scores. By contrast, VBM analyses of grey matter revealed focal, symmetrical, bilateral areas of atrophy in the postcentral gyri, frontopolar cortex, and orbitofrontal cortex among the offenders as compared with the healthy men (z-scores as high as 5.06). Offenders with

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psychopathy showed the smallest volumes in these areas. The larger volumes in posterior brain areas may reflect atypical neurodevelopmental processes that underlie early-onset persistent antisocial and aggressive behavior.
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1. Introduction

Approximately 5% of males are characterized by a pattern of antisocial behavior that onsets in early childhood and remains stable across the life-span. These men are responsible for 50% to 70% of all violent crimes (Moffitt, 1993; Hodgins, 1994). They fulfill diagnostic criteria for conduct disorder (CD) in childhood and antisocial personality disorder (ASPD) in adulthood. In Finland, for example, men with ASPD are responsible for approximately 60 to 80% of the most serious violent offenses (Tiihonen and Hakola, 1994; Eronen et al., 1996a). A recent survey indicated that about half of all prisoners in Western countries fulfill diagnostic criteria for ASPD that require by definition a diagnosis of CD prior to age 15 (Fazel and Danesh, 2002). Substance misuse is almost always co-morbid with CD and ASPD.

Within this population of males characterized by an early onset and a stable pattern of antisocial behavior that persists across the life-span, a subgroup presents the personality traits of psychopathy. As adults, this subgroup commits even more violent offences than the others (Hare and McPherson, 1984). Reliable and valid diagnoses can be made using the Psychopathy Checklist Revised (PCL-R; Schroeder et al., 1985; Hare, 1991; Fulero, 1995). Psychopathy is not included as a diagnosis in the ICD-10 or DSM-IV, even though it fits the definition of a personality disorder. It is more severe in its manifestation than ASPD in that it requires the presence of the two traits, Arrogant and Deceitful Interpersonal Behavior and Deficient Affective Experience, in addition to a history of antisocial behavior. A great deal of research has been conducted using the PCL-R as a dimension, and the total score has been consistently found to be the best known predictor of violent behavior (Hemphill et al., 1998).

Men with ASPD have been reported to show reductions in frontal grey matter volumes as compared with healthy men, and similar volumes of frontal white matter (Raine et al., 2000). However, one third of the individuals with ASPD in this study had also a schizophrenia spectrum disorder. Men with psychopathy have been described as having an abnormally structured corpus callosum (Raine et al., 2003). A recent review, however, has highlighted that few structural differences have been identified in this population and that none have been replicated (Pridmore et al., 2005). In these studies, samples have been heterogeneous, inadequately characterized, poorly described, and not comparable. A recent study compared brain volumes, assessed with magnetic resonance imaging (MRI), of incarcerated offenders with personality disorders (75% of them diagnosed as psychopaths) and healthy men. No differences in frontal or temporal lobe volumes were observed. This study did not measure the grey or white matter separately (Dolan et al., 2002). We have previously compared offenders with ASPD and alcoholism and healthy men, and we observed no significant differences in prefrontal grey and white matter volumes (Laakso et al., 2002). To our knowledge, no other quantitative data have been reported on the neuroanatomy of persistent violent offenders with a history of antisocial behavior going back to at least mid-adolescence. It is not known if such men present abnormalities in brain structure. Given the paucity of replicated findings, we did not make hypotheses nor select specific regions for study. Rather, we used lobar analyses and voxel-based mophometry to compare the brain structures of persistent violent offenders who fulfill criteria for ASPD and healthy men in all brain regions. The sample of offenders was relatively homogeneous with respect to age of onset and history of antisocial behavior, persistence and severity of violent criminality, and absence of any history of severe mental illness.

2. Method

2.1. Participants

Healthy participants gave informed consent, and all data from offenders (MRI scans and case record files) were obtained retrospectively from hospital files. The procedure was approved by the ethical committee of Kuopio University Hospital. All participants were of Finnish origin. The healthy comparison group included 25 men – students, hospital staff and skilled workers – who were considered to be free of current or past substance misuse and other mental disorders on the basis of unstructured interview. Intelligence quotient (IQ) scores were not available from the comparison subjects. The offender group included 26 men with no history or current diagnosis of psychosis or schizotypal personality disorder who were consecutively admitted to a university forensic psychiatric

Table 1
Comparison of sociodemographic and clinical characteristics (mean± S.D.) of the healthy men and the violent offenders

	Healthy men (N=25)	Violent offenders (N=26)	Statistic	P-value
Age, years	34.6±10.8	32.5±8.4	t=0.783	0.438
Ethnicity, % white	100%	100%	Fisher exact test	1.000
Alcohol dependence, %	0	100%	Fisher exact test	<0.001
Polysubstance abuse, %	0	76.9%	Fisher exact test	<0.001
Total intracranial volume	1707±117	1654±108	t=1.664	0.102

hospital for a pre-trial assessment. All were charged with violent offences (2 murder, 10 manslaughter, 4 attempted murder or manslaughter, 1 assisting manslaughter, 6 assaults, 3 armed robberies). All had a history of recurrent violent acts, and all but two had previous convictions for violence. Data on handedness were not available. The characteristics of the participants are presented in Table 1. One of the offenders had a history of head injury leading to transient unconsciousness. None of the offenders had a diagnosis of mental disorder or behavioral disorder caused by previous brain damage.

Diagnoses were made by consensus using multiple sources of information including reports from multidisciplinary treatment teams, family members, colleagues from work, and medical and criminal files. All offenders fulfilled criteria for both DSM-IV ASPD and ICD-10 dissocial personality, and none fulfilled criteria for schizotypal personality disorder or any current or past psychotic disorder. All met the criterion for a maladaptive pattern of substance abuse related to alcohol abuse (DSM-IV, APA 1994) with early onset corresponding type 2 as described by Cloninger (Cloninger, 1987), and all fulfilled the DSM-IV and ICD 10 criteria for substance dependence with 20 fulfilling criteria for drug polysubstance dependence and 6 for alcohol dependence. Fifteen offenders had used amphetamine at least once (9 from the high psychopathy group and 6 from the low psychopathy group). Participants had no access to alcohol for 3 to 6 months prior to the brain scan and no access to illicit drugs for 1 to 7 weeks prior to the brain scan. (The different abstinence periods are explained by the fact that while storage and use of intoxicating amounts of alcohol by prisoners are difficult and rare in Finnish prisons, the delivery and use of illicit drugs is much easier and rather common.) Eleven of the offenders were free of psychotropic medication, and 15 were taking either benzodiazepine, antidepressant or antipsychotic medication (small doses used as anxiolytic or hypnotic).

2.2. Psychopathy ratings

The PCL-R was used to assess psychopathy (Hare, 1991). For detailed information, see http://www.niuva.fi/tuttex.html.

2.3. Magnetic resonance imaging

Comparisons between study groups were done by using voxel-based morphometry (VBM) and lobar volumetry. Lobar analyses provide quantitative information on brain volume alterations in large regions of interest. VBM addressed the significance of volume alterations in much more restricted areas that can be as small as a single voxel. The participants were scanned with a 1.0 T Impact (Siemens; Erlangen, Germany) using a standard head coil and a tilted T1-weighted coronal 3D gradient echo sequence (magnetization prepared rapid acquisition gradient echo: TR 10 ms, TE 4 ms, TI 250 ms, flip angle 12°, FOV 250 mm, matrix 256×192, 1 acquisition). The 3-D spatial resolution was 2.0 mm×1.3 mm×0.97 mm.

MR images were processed with SPM2 (http://www.fil.ion.ucl.ac.uk/spm/software/spm2) following an optimized protocol including: (a) generation of a whole brain customised template, (b) generation of customised prior probability maps, and (c) main VVBM steps to applied on original images. For detailed information, see Supplementary Material, doi:10.1016/j.pscychresns.2007.08.012.

2.4. Statistical analyses

In the analyses, the healthy men were compared with the 26 violent offenders with ASPD and to the subgroup of 12 offenders who fulfilled criteria for a diagnosis of psychopathy. Student's t-test, chi-square test and Fisher exact test were used to compare participants' sociodemographic and clinical characteristics. Analysis of covariance (ANCOVA) was used to evaluate the age-adjusted differences between the violent offenders and healthy men in the lobar volumetry analysis. Effect size (Cohen's d) was used to describe the robustness of the findings (Cohen, 1988). Within the offender group, univariate analysis of variance (full factorial model) was used to assess the contribution of variables such as PCL-R scores, IQ scores, duration of alcohol abuse, polysubstance abuse and use of current psychotropic medication to regional brain volumes. The association between PCL-R factor scores and regional brain volumes was assessed using Pearson's correlation analysis. In VBM, grey matter and white matter images

Table 2
Comparisons of sociodemographic and clinical characteristics (mean± S.D.) of the offenders with psychopathy and those with only ASPD

	Offenders with psychopathy (N=12)	Offenders with only ASPD (N=14)	Statistic	P-value
Mean age (in years)	33.0±8.6	32.1±8.5	t=0.256	0.800
Duration of alcohol abuse (in years)	19.6±10.0	18.3±8.9	t=0.356	0.725
Polysubstance abuse	100%	57%	χ^2=6.69	0.010
Mean global IQ score	94.7±8.6	88.7±8.8	t=1.740	0.095
Current psychotropic medication	67%	50%	χ^2=0.74	0.391
Mean score PCL-R total	34.6±3.1	25.9±2.8	t=7.566	<0.001
Mean score for Arrogant and deceitful interpersonal style	6.03±1.74	1.90±1.12	t=7.287	<0.001
Mean score for Deficient affective experience	7.83±0.58	6.14±1.10	t=4.782	<0.001
Mean score for Impulsive, irresponsible behavioral style	9.67±1.15	9.71±0.47	t=−0.142	0.889

The IQ of the offenders was assessed using the Wechsler Adult Intelligence Scale — revised (Wechsler, 1981).

were analyzed with an ANCOVA model (see Supplementary Material, MRI method paragraph for details, doi:10.1016/j.pscychresns.2007.08.012).

3. Results

Comparisons of the sociodemographic and clinical characteristics of the violent offenders and healthy men are shown in Table 1. As can be seen, no differences were observed between the violent offenders and healthy men as to age, ethnicity and intracranial volume. More of the violent offenders than the healthy men had a history of alcohol and polysubstance abuse. As presented in Table 2, the subgroup of offenders with psychopathy was similar to the other offenders with only ASPD as to age, duration of alcohol abuse, global IQ score, and the proportion taking medication. All of the offenders with psychopathy had a history of polysubstance misuse as compared with 57% of the other offenders. By definition, the offenders with psychopathy obtained higher total PCL-R scores, and also higher scores for the two factors assessing the personality traits of psychopathy, Arrogant and Deceitful Interpersonal Behavior and Deficient Affective Experience.

3.1. Regional brain volumes

The adjusted lobar regional brain volumes of offenders as compared with the healthy men are shown in Table 3. Regional volumes correlated strongly with each other (Pearson r up to 0.99), and 85% (161 of 190) of the correlations were statistically significant ($P<0.05$). Offenders displayed greater volumes in most areas than the healthy men, and the age-adjusted differences were statistically significant without Bonferroni corrections in the right cerebellar grey matter, left cerebellar white matter, and parietal and occipital white matter bilaterally. The violent offenders had much more occipital white matter than the healthy men, with effect sizes reaching 1.15 on the right and 1.24 on the left. These comparisons remained statistically significant after applying Bonferroni corrections for multiple comparisons. When the subgroup of violent offenders diagnosed as psychopaths were compared with the healthy men, the effect sizes were slightly larger than those observed in comparisons between all the offenders and the healthy men (0.69 for right cerebellar grey matter, $P=0.064$; 0.63 for left cerebellar white matter, $P=0.075$; 0.77 for right parietal white matter, $P=0.04$; 0.84 for left parietal white matter, $P=0.026$; 1.30 for right occipital white matter, $P=0.001$; and 1.51 for left occipital white matter, $P<0.001$). Since amphetamine use *per se* has been suspected to affect regional brain volumes (Thompson et al., 2004; Jernigan et al., 2005), we made separate analyses among amphetamine-naïve subjects. Those offenders who had never used amphetamine ($n=11$, 3 belonging to high psychopathy group and 8 to the low psychopathy group) displayed greater volumes in all 6 areas than the healthy men, and this difference was statistically significant in right occipital white matter (effect size 0.78, $P=0.033$) and left occipital white matter (effect size 1.03, $P=0.009$).

We further examined the six brain regions (right cerebellar grey matter, left cerebellar white matter, and parietal and occipital white matter bilaterally) where the offenders displayed greater volumes than the healthy men. Among the 26 violent offenders, associations between the adjusted volumes in these regions and total PCL-R total scores, global IQ scores, duration of alcohol abuse, presence of polysubstance abuse, and use of current psychotropic medication were not statistically significant. The only significant correlation between the adjusted brain volumes in these regions and PCL-R factor scores was observed between the score for Impulsive Irresponsible Lifestyle and left cerebellar white matter ($r=-0.52$, $P=0.006$; Bonferroni corrected significance level $P=0.05/6=0.008$). Correlations between regional brain volumes and scores for Arrogant and Deceitful Behavior

Table 3
Adjusted (native brain volume/total intracranial volume × 1000) brain volumes (mean±S.D.) in healthy men and violent offenders

		Healthy men (N=25)	Violent offenders (N=26)	Effect size[a]	Age-adjusted ANCOVA $F_{1,48}$	P[b]
Grey matter						
Frontal	Right	146.1±14.1	148.1±20.2	0.11	0.001	0.971
	Left	148.3±15.0	149.0±20.0	0.04	0.150	0.700
Temporal	Right	46.7±3.7	44.8±5.0	0.24	0.359	0.552
	Left	46.4±3.9	47.7±5.2	0.28	0.555	0.460
Parietal	Right	74.7±6.6	74.7±9.2	0.01	0.173	0.679
	Left	76.4±6.7	75.9±9.2	−0.05	0.450	0.505
Occipital	Right	58.2±5.0	57.6±7.7	−0.08	0.353	0.555
	Left	55.8±5.0	55.8±6.1	0.01	0.085	0.771
Cerebellar	Right	63.7±4.7	67.2±5.9	0.67	4.993	0.030
	Left	64.2±4.0	67.0±5.7	0.57	3.548	0.066
White matter						
Frontal	Right	159.1±13.3	163.9±12.8	0.37	1.693	0.199
	Left	163.3±11.6	167.5±13.1	0.35	1.585	0.214
Temporal	Right	17.1±2.5	16.89±3.2	−0.08	0.015	0.903
	Left	20.2±2.5	20.3±3.4	0.02	0.072	0.789
Parietal	Right	74.4±5.9	78.9±5.9	0.76	6.936	0.011
	Left	74.4±5.4	78.6±5.5	0.76	6.905	0.012
Occipital	Right	46.2±4.0	51.2±4.7	1.15	15.779	<0.001
	Left	42.8±3.4	47.7±4.4	1.24	18.727	<0.001
Cerebellar	Right	16.5±1.6	17.1±1.6	0.04	2.070	0.157
	Left	16.6±2.2	17.8±1.7	0.63	4.984	0.030

[a] Effect size is Cohen's d (Cohen, 1988).
[b] When Bonferroni correction for multiple comparisons is applied, the level of significance is P=0.0025.

were modest and positive (ranging from 0.12 to 0.25), and those between brain volumes and Deficient Affective Experience were modest and negative (ranging from −0.07 to −0.31). No statistically significant correlations were observed in the regional volumes vs. PCL-R scores in the other 14 brain regions.

Volumes of cerebrospinal fluid (CSF) were similar among offenders and healthy men, except in the left frontal region where offenders displayed larger volumes (F=5.68, P=0.021, age-adjusted ANCOVA).

3.2. Voxel-Based Morphomethy

The results of comparisons of the 26 violent offenders and 25 healthy men on voxel-based morphometry of the grey matter are presented in Table 4. The violent offenders were characterized by focal, and strikingly symmetrical areas of atrophy in the postcentral gyri, frontopolar cortex (superior and medial frontal gyrus), and orbitofrontal cortex as shown in Fig. 1. In addition, substantially smaller volumes were observed in the left posterior cingulate cortex and the right insula. In comparisons of the 12 offenders with psychopathy and the healthy men, the differences in these same areas remained significant (P<0.05 corrected), and the z-scores were slightly larger than those obtained for the comparisons between all offenders and the healthy men. A z-score of 5.59 was obtained for the difference between the offenders with psychopathy and the healthy men for left inferior parietal lobule, 4.34 for right parietal lobule, 4.25 for left frontopolar cortex, and 4.19 for right frontopolar cortex (P<0.05 corrected for false discovery rate). In the comparison between the offenders with psychopathy and the healthy men, markedly smaller densities were also observed in the left middle temporal gyrus (cluster size 1336 mm^3, x=−38, y=−78, z=20, z-score 4.06), and left parahippocampal gyrus (cluster size 3640 mm^3, x=−30, y=−58, z=−8, z-score 3.99). In comparisons of the 14 offenders with ASPD only compared with the healthy men or compared with offenders with psychopathy, no significant volume reductions were observed.

Areas of smaller grey matter volume in offenders who never used amphetamine (N=11) compared with controls (N=25) measured with voxel-based morphometry (P<0.001 uncorrected) were observed in the left orbital prefrontal cortex (cluster size 792 mm^3, x=−20, y=42, z=−22, z-score=4.27), in the left occipital gyrus (cluster size 1200 mm^3, x=−18, y=−58, z=10,

Table 4
Areas of smaller grey matter volume in violent offenders (N=26) compared with healthy men (N=25) measured with voxel-based morphometry (corrected for false discovery rate at P<0.05)

Cluster size mm^3	Regions	Stereotactic coordinates (mm)			Z score
		x	y	z	
13032	L Inferior Parietal Lobule	−52	−34	36	5.06
	L Inferior Parietal Lobule	−40	−42	46	4.50
	L Postcentral Gyrus	−44	−22	48	4.13
6576	R Inferior Parietal Lobule	44	−32	48	4.80
	R Postcentral Gyrus	30	−44	58	3.53
21384	L Posterior Cingulate	−18	−60	12	4.74
	L Precuneus	−14	−64	18	4.45
	L Precuneus	−10	−68	24	4.40
5960	L Superior Frontal Gyrus	−20	42	−22	4.73
	L Superior Frontal Gyrus	−22	60	12	3.94
	L Superior Frontal Gyrus	−14	64	20	2.97
6360	L Paracentral Lobule	−8	−28	46	3.98
	L Precuneus	−6	−52	40	3.47
	L Medial Frontal Gyrus	−2	−8	52	3.32
352	R Superior Frontal Gyrus	20	42	−20	3.97
2816	L Inferior Frontal Gyrus	−36	22	4	3.86
4488	R Medial Frontal Gyrus	12	64	6	3.86
	R Middle Frontal Gyrus	24	60	6	3.85
	R Superior Frontal Gyrus	28	56	14	3.68
1416	Fusiform Gyrus	56	−24	−30	3.73
3088	R Insula	32	22	8	3.59
	R Caudate	12	14	−4	3.25
848	L Superior Temporal Gyrus	−48	−60	28	3.50
416	L Middle Temporal Gyrus	−52	−56	0	3.43
1504	Lentiform Nucleus	−18	18	0	3.39
736	L Middle Temporal Gyrus	−38	−78	20	3.34
648	L Middle Frontal Gyrus	−30	−8	62	3.28
	L Middle Frontal Gyrus	−40	0	60	2.93
808	L Fusiform Gyrus	−48	−32	−18	3.26
	L Fusiform Gyrus,Grey	−58	−24	−26	3.09
	L Fusiform Gyrus	−50	−26	−24	3.06

Only those clusters larger than 250 mm^3 are shown.
L = left, R = right.
Reading example: the most significant voxel of the cluster has stereotactic coordinates of −52, −34, 36 and is located in the region of left Inferior Parietal Lobule. Within the same cluster there are two more peak of significance distant more than 8 mm from the former and located at −40, −42, 46 and at −44, −22, 48.

z-score=3.80), in the right postcentral gyrus (cluster size 920 mm^3, x=46, y=−30, z=46, z-score=3.75), in the left postcentral gyrus (cluster size 312 mm^3, x=−52, y=−36, z=36, z-score=3.65), in the right superior frontal gyrus (cluster size 392 mm^3, x=28, y=54, z=16, z-score=3.59), and in the right inferior temporal cortex (cluster size 416 mm^3, x=58, y=−22, z=−30, z-score=3.46). However, due to the low number of subjects in these subgroups, none of these comparisons survived FDR-correction. No areas of decreased grey matter were observed in the opposite comparison.

Table 5 and Fig. 2 present the results of voxel-based morphometry of white matter. Violent offenders were characterized by areas of increased white matter density in widespread regions, whereas decreased density of white matter was observed only in one location in right medial frontal gyrus when compared with healthy men. Areas of larger white matter volume in subjects with high psychopathy (N=12) compared with subjects with low psychopathy (N=14) measured with voxel-based morphometry (P<0.001 uncorrected) were observed in the right angular gyrus (cluster size 752 mm^3, x=48, y=−30, z=46, z-score=3.99), in the right inferior temporal gyrus (cluster size 416 mm^3, x=48, y=−22, z=−24, z-score=3.70) and in the left cerebellum (cluster size 632 mm^3, x=−14, y=−56, z=−44, z-score=3.69). However, due to the low number of subjects in these subgroups, none of these comparisons survived FDR-correction. No areas of decreased white matter were observed in the opposite comparison.

4. Discussion

To our knowledge, this study reports the first evidence that persistent violent offenders who fulfill the diagnostic criteria for ASPD are characterized by abnormal brain anatomy when compared with healthy men. Despite the fact that all 26 violent offenders had a history of substance dependence, lobar volumetry indicated that they had markedly larger grey matter volume in the right cerebellum and larger white matter volume in the right and left parietal lobes, right and left occipital lobes, and left cerebellum. The differences in these regions were even greater in comparisons of the offenders with psychopathy and healthy men. Voxel-based morphometry revealed that the violent offenders displayed symmetrical, bilateral areas of grey matter atrophy in the postcentral gyri, frontopolar cortex and orbitofrontal cortex and unilateral volume loss in the left posterior cingulate cortex and right insula as compared with the healthy men. These reductions in volume were even greater among the subgroup of offenders with a diagnosis of psychopathy.

The results of the present study concur with findings from two structural MRI investigations of adolescent boys with CD. In the present study, the violent offenders displayed distinct areas of reduced temporal gray matter compared with the healthy men consistent with the findings of Kruesi et al. (2004) of bilateral reductions in temporal grey matter among boys with CD. Consistent with Sterzer et al. (2005a), a significant reduction in volume of the insula was evident among

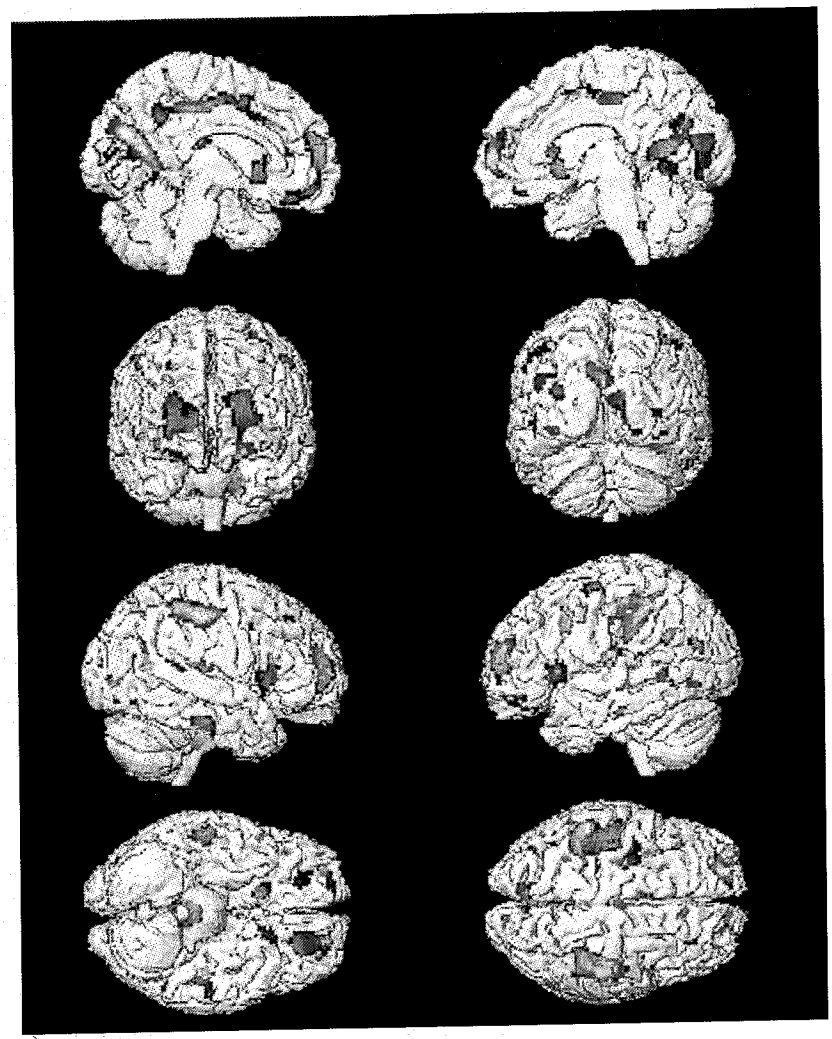

Fig. 1. Gray matter volume loss in subjects with antisocial personality disorder ($N=26$) compared with comparison subjects ($N=25$) (corrected for false discovery rate at $P<0.05$). Note the striking symmetry of smaller gray matter volumes in postcentral gyri, frontopolar cortex, and orbitofrontal cortex.

the persistent violent offenders as compared with the healthy men in the present study. In contrast to Sterzer et al. (2005b) and to much theorizing about the primary role that the amygdala may play in the development of psychopathy (Blair, 2005), no differences were detected in the volumes of the amygdala between the violent offenders and healthy men. We have previously observed negative correlations between the volumes of the hippocampus (Laakso et al., 2001) and the amygdala (Tiihonen et al., 2000) and total PCL-R scores among different sample of offenders. The offenders in the present study did, however, show reduced volume of the parahippocampal gyrus as compared with the healthy men.

Our findings are in line with results of a recent functional MRI study, which observed less activation in the limbic circuit (parahippocampal gyrus, orbitofrontal cortex, insula, and anterior and posterior cirgulate) during acquisition of fear among men with psychopathy as compared with healthy men (Birbaumer et al., 2005). Frontal cortex and, especially, orbitofrontal cortex are key areas in the regulation of violent and aggressive behavior (Grafman et al., 1996; Birbaumer et al., 2005). The finding of reduced grey matter volumes in these areas adds further support to hypotheses that the orbitofrontal cortex is malfunctioning among persistently violent offenders with a history of early-onset stable antisocial behavior (Anderson et al., 1999). Further, the findings concur with evidence showing that offenders with psychopathy present difficulties in neuropsychological tasks thought to be dependent on the integrity of the orbitofrontal cortex (Lapierre et al., 1995; Blair, 2004).

The increased white matter observed among the persistent violent offenders, as compared with the healthy men, was not due to the size of the corpus callosum (as can be seen in Fig. 2). This result does not concur with a

Table 5
Areas of larger white matter volume in violent offenders (N=26) compared with healthy comparison subjects (N=25) measured with voxel-based morphometry (P<0.001 uncorrected)

Cluster size mm^3	Regions	Stereotactic coordinates (mm)			Z score
		x	y	z	
784	R supramarginal gyrus	56	−36	38	4.62
928	L superior frontal gyrus	−10	62	2	4.10
	L superior frontal gyrus	−16	62	18	3.58
	L superior frontal gyrus	−20	64	4	3.23
360	R superior frontal gyrus	22	64	8	4.09
288	R occipital lobe	42	−78	20	3.90
272	R occipital lobe	48	−62	30	3.87
	R occipital lobe	42	−70	40	3.20
416	R occipital lobe	42	−82	−8	3.81
928	R occipital lobe	32	−58	−8	3.64
	R fusiform gyrus	34	−48	−12	3.28
936	R internal capsule	18	20	0	3.60

When FDR-correction was applied, only the cluster in the right supramarginal gyrus (z-score 4.62) remained statistically significant (P<0.05 FDR corrected). No areas of decreased white matter were observed in the opposite comparison.

previous finding of larger corpus callosum among men with psychopathy (Raine et al., 2003). The participants in this latter study, unlike the offenders in the present study, were not characterized by persistent violent offending and some had diagnoses of schizophrenia spectrum disorders. Further, Raine and colleagues (2003) did not examine any other areas of white matter except the corpus callosum, and they used region of interest volumetry, while we used voxel-based morphometry.

The violent offenders in the present study were characterized by long histories of substance abuse and all 26 met criteria for either polysubstance drug dependence (n=20) or alcohol dependence (n=6). Substance abuse is associated with decreased grey and white matter volume (Aasly et al., 1993; Liu et al., 1998; Agartz et al., 2003; Lyoo et al., 2006), and although these volume reductions reverse to some extent during abstinence, brain volumes do not normalize to the level of healthy individuals (Agartz et al., 2003). Our results on grey matter volume loss in the occipital lobe, posterior cingulate and medial frontal cortex are strikingly similar to those reported by Thompson et al. (2004) among methamphetamine users. Our results showed that this kind of grey matter volume loss was observed also among those offenders who had never used amphetamine, which suggests that observed focal GM volume decreases may be associated more with personality traits or other factors which lead to amphetamine abuse than with neurotoxic effects of amphetamine. It has been observed that methamphetamine use may be associated with larger temporal and occipital white matter volume (Thompson et al., 2004) and parietal grey matter volume (Jernigan et al., 2005). Chronic methamphetamine use has been observed to induce inflammation and glial proliferation (Escubedo et al., 1998) which may contribute to white matter volume increase. Our analysis on the subgroup of offenders who had never used amphetamine revealed that these offenders also had substantially larger volumes in posterior brain areas than the healthy men, which indicates that our findings are not entirely attributable to amphetamine use *per se*, but are associated with factors that place the individual at higher risk for amphetamine use. We hypothesize that the larger regional volumes observed in posterior brain areas reflect atypical neurodevelopmental processes which may underlie the development of early-onset and stable antisocial behavior. Substance abuse has been shown to disrupt the development of the cerebellum (Hauser et al., 2003). Males who display CD in childhood are known to be exposed earlier than other children to alcohol and drugs (Armstrong and Costello, 2002). It is reasonable to speculate that the violent offenders in the present study, all of whom fulfilled criteria for ASPD, CD and substance dependence, may have used large doses of alcohol and drugs at a young age leading to an interruption of synaptic elimination (or pruning) that occurs during adolescence (Blakemore and Choudhury, 2006). We speculate that the larger volumes of white matter that were observed in several brain regions among the violent offenders may be the result of environmentally or genetically triggered disruption of brain maturation. Boys with CD not only begin using alcohol and drugs at a young age, but in childhood, they experience higher rates of accidents and infections than other boys (Aarons et al., 2003), and the consequences of persistent physical fighting. In addition to these possible environmental factors that could disrupt brain maturation, a disruption could also result from genetic programming.

Polysubstance abuse is associated with diffuse grey matter loss (Aasly et al., 1993; Liu et al., 1998; Lyoo et al., 2006). Therefore, it is possible that even the focal reductions in grey matter volumes that we observed among the violent offenders may be attributable, at least in part, to substance abuse. However, it is remarkable that the lobar analysis indicated that the offenders displayed slightly larger grey matter volumes than the healthy men in most areas. It is highly unlikely that this finding could be explained by substance abuse. The offenders also had significantly greater CSF volumes in the left frontal lobe, which may be an indicator of a slight substance abuse-induced atrophy in this area.

It has been observed that brain volumes correlate positively with IQ (Haier et al., 2004). IQ test scores

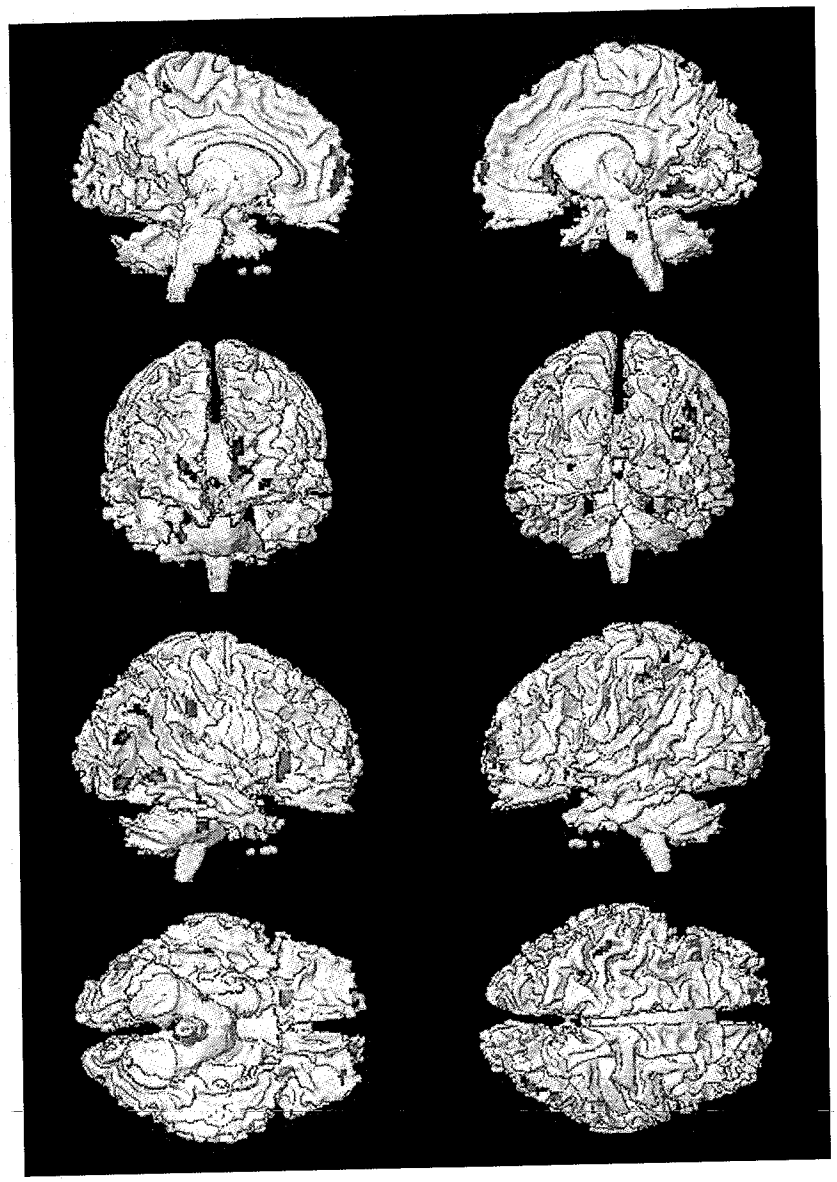

Fig. 2. Brain areas where violent offenders had larger white matter volumes than controls ($P<0.001$, uncorrected).

were not available for the healthy men and consequently analyses could not be adjusted for this important covariate. However, the reductions in regional brain volumes observed among the offenders are not likely attributable to lower IQ. The greatest differences in regional brain volumes were observed in comparisons between the subgroup of offenders with a diagnosis of psychopathy and the healthy men. Consistent with previous studies (Hicks et al., 2004), the offenders with psychopathy obtained IQ scores that were, on average, 6 points higher than those obtained by the other offenders who fulfilled diagnostic criteria for ASPD. Although no statistically significant linear correlations were observed between PCL-R scores and regional brain volumes, we cannot rule out a non-linear correlation, since all offenders had relatively high PCL-R scores (≥ 21, range 21–40). The observed negative correlation between Impulsive Irresponsible Lifestyle vs. left cerebellar white matter volume may be explained by heavier substance abuse (leading to slight atrophy among those offenders with high scores of Impulsive Irresponsible Lifestyle).

We observed no trend towards smaller total frontal lobe grey matter density among the persistently violent offenders as compared with the healthy men. This differs from previous reports of reduced frontal grey matter among men with ASPD (Raine et al., 2000) and among men labelled "unsuccessful psychopaths" (Yang et al., 2005). But, the participants in these previous studies were not characterized by persistent violent offending and one third of those with ASPD were also diagnosed with schizophrenia spectrum disorders.

The volume loss in postcentral gyri that we observed among the persistently violent offenders may be associated with their inability to recognize or anticipate the emotions of other people (Hare, 1998; Blair, 2003). This somatosensory area receives projections from the face and contributes to the mirror neuron system that is involved in experiencing empathy, expression of emotions, and social co-operation (Kohler et al., 2002). Volume reductions in frontopolar, orbitofrontal and parietal cortex, as well as insula and posterior cingulate cortex, may be determinants of psychopathy, since these regions are implicated in processing the experience of empathy and theory of mind (Farrow et al., 2001; Moll et al., 2001; Vollm et al., 2006) and in decision making and risk taking (Paulus et al., 2003).

A large number of brain regions have been proposed as possible determinants of early-onset persistent antisocial behavior. We reasoned that the evidence, however, was not sufficient to select any of these areas for study. Rather, we conducted whole brain analysis using voxel-based morphometry. The advantage of this approach is that no region-specific hypotheses are required, but the disadvantage is that, because of conservative statistics, differences of medium magnitude in small structures such as the amygdala may fail to reach statistical significance, resulting in a type 2 error. On the other hand, small local alterations may remain undetected in the lobar analysis which indicates the total volume of a relatively large brain area. In the lobar analysis, the use of the Bonferroni formula to correct the level of significance in order to avoid type 1 errors is also problematic since this formula should be used to correct for multiple comparisons that are independent from each other. This principle implies that it should not be used in the present study where lobar volumes were strongly correlated with each other. The differences, however, in the occipital white matter between the offenders and healthy men were very robust and would have survived even a vigorous Bonferroni correction.

The sample of persistent violent offenders that was studied was representative of violent offenders in Finland who show an early-onset pattern of antisocial behavior that is stable across the life-span. In Finland, approximately 70% of persons accused of a serious violent offense are required to undergo a pre-trial assessment in an inpatient unit of a forensic hospital (Eronen et al., 1996b) and it was from this population that we obtained our sample. Generally, the results of the present study concur with studies of adolescent boys with CD and adult offenders with a diagnosis of psychopathy, most of whom would be persistent violent offenders (Hare, 1991). Notably, in the present study the differences between the violent offenders and healthy men were even stronger for the subgroup with than without a diagnosis of psychopathy. The results of the present study do not concur with previous findings from men with ASPD who were not persistent violent offenders. This observation could be important for defining samples for future studies and underlines the necessity of precisely characterizing study samples.

In conclusion, the results of the present study indicate that persistent violent offenders with ASPD present markedly abnormal white and grey matter regional brain volumes as compared with healthy men. Substantially larger regional volumes in the posterior brain areas were observed among violent offenders with a history of antisocial behavior going back to childhood. These marked differences in brain structure may reflect atypical neurodevelopmental processes that are involved in the initiation and maintenance of persistent aggressive behavior.

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Appendix A. Supplementary data

Supplementary data associated with this article can be found, in the online version, at doi:10.1016/j.pscychresns.2007.08.012.

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Hippocampal Structural Asymmetry in Unsuccessful Psychopaths

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Background: *Structural and functional hippocampal abnormalities have been previously reported in institutionalized psychopathic and aggressive populations. This study assessed whether prior findings of a right greater than left (R > L) functional asymmetry in caught violent offenders generalize to the structural domain in unsuccessful, caught psychopaths.*

Methods: *Left and right hippocampal volumes were assessed using structural magnetic resonance imaging (MRI) in 23 control subjects, 16 unsuccessful psychopaths, and 12 successful (uncaught) community psychopaths and transformed into standardized space.*

Results: *Unsuccessful psychopaths showed an exaggerated structural hippocampal asymmetry (R > L) relative both to successful psychopaths and control subjects ($p < .007$) that was localized to the anterior region. This effect could not be explained by environmental and diagnostic confounds and constitutes the first brain imaging analysis of successful and unsuccessful psychopaths.*

Conclusions: *Atypical anterior hippocampal asymmetries in unsuccessful psychopaths may reflect an underlying neurodevelopmental abnormality that disrupts hippocampal-prefrontal circuitry, resulting in affect dysregulation, poor contextual fear conditioning, and insensitivity to cues predicting capture.*

Key Words: Hippocampus, psychopathy, MRI, trauma, neurodevelopment, asymmetry

Structural and functional brain imaging research is beginning to uncover significant neurobiological impairments in antisocial, violent, and psychopathic groups. Although the majority of these studies have implicated the prefrontal cortex (Henry and Moffitt 1997; Raine 2002), there is increasing interest in the role of temporolimbic structures such as the hippocampus in mediating antisocial and psychopathic behavior. At the general level of the temporal cortex, abnormal functioning has been found in antisocial, violent, and psychopathic groups using functional magnetic resonance imaging (fMRI; Raine et al 2001), single photon emission computerized tomography (SPECT; Amen et al 1996; Hirono et al 2000; Intrator et al 1997; Soderstrom et al 2002), and positron emission tomography (PET; Juhasz et al 2001; Seidenwurm et al 1997; Wong et al 1997).

Mesial temporal cortical abnormalities have been observed in antisocial and violent groups using PET (Volkow et al 1995). More specifically, abnormalities in the hippocampus have been reported in antisocial groups using PET (Raine et al 1997), SPECT (Soderstrom et al 2002), and fMRI (Kiehl et al 2001), whereas abnormal metabolism in the anterior amygdala-hippocampal complex has also been reported in repetitively violent offenders using magnetic resonance spectroscopy (MRS; Critchley et al 2000). In addition to these functional impairments, structural hippocampal impairments have also been reported in two studies of psychopathic individuals (Laakso et al 2000, 2001). This evidence for temporal and hippocampal impairments from brain imaging studies is broadly consistent with the larger body of evidence from electroencephalographic (EEG) and neuropsychologic studies implicating temporal lobe abnormalities in violent and antisocial groups (Raine 1993; Volavka 1995). Because the hippocampus is involved in the regulation of aggression (Gregg and Siegel 2001) and contextual fear conditioning (LeDoux 1996), abnormalities in the hippocampus and disruption of prefrontal-hippocampal circuitry could contribute to affect dysregulation and impulsive, disinhibited behavior of the type observed in psychopaths.

Asymmetries in hippocampal structure and function have also been reported. In structural terms, one study found that 6 of 10 violent forensic patients with a diagnosis of antisocial personality disorder had unilateral hippocampal atrophy with twice as many lateralized to the left than right hemisphere (Chesterman et al 1994). In functional terms, one PET study showed a significant asymmetry of hippocampal functioning in violent offenders, with 41 murderers showing reduced left but increased right hippocampal functioning compared with 41 matched control subjects (Raine et al 1997). This effect was a specific asymmetry, that is, left hippocampal activity was relatively smaller than the right rather than group differences occurring in either the left or right hippocampus. This asymmetry could not be accounted for by a history of head injury. Similarly, Soderstrom et al (2002) using SPECT found an association between reduced left (but not right) hippocampal activation and high psychopathy scores in violent offenders. On the other hand, no structural imaging study has tested the hypothesis that psychopaths have an unusual R > L hippocampal asymmetry.

Abnormal neurodevelopment has been hypothesized as a basis for antisocial, psychopathic behavior, but evidence supporting this hypothesis is limited (Raine et al 1995). The finding of a hippocampal structural asymmetry in psychopaths in the same direction as the R > L functional hippocampal asymmetry found in violent offenders would be of interest because such asymmetries may reflect an early disruption to normal neurodevelopmental processes (Bilder et al 1999) as opposed to a later environmental process that would be more likely to reduce the hippocampus bilaterally, or reduce the volume in one hemisphere only. Alternatively, because posttraumatic stress disorder (PTSD) has been associated with reduced hippocampal volume

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(Bremner et al 1997), early stress has been associated with attenuated development of the left hippocampus (Teicher et al 2003), and psychopaths tend to be disproportionately exposed to traumatic events such as child abuse (Robins 1999), abnormal hippocampal structure could instead be accounted for by trauma exposure or history of head injury. At a psychiatric level, schizophrenia has been associated with R > L structural hippocampal asymmetries (Keshavan et al 2002), and because there is comorbidity between antisocial behavior and schizophrenia-spectrum disorders (Volavka et al 1997), this also could be a confound.

Although hippocampal structural abnormalities in psychopaths are greatly underresearched, an even larger gap in the literature is the almost complete lack of knowledge on an intriguing group of "successful" psychopaths who escape detection for their crimes, compared with "unsuccessful" psychopaths who are detected and convicted. One previous study has shown that successful psychopaths lack the autonomic and executive function deficits that have been traditionally shown by adult institutionalized psychopaths, whereas "unsuccessful" psychopaths show these intrinsic psychophysiologic and neuropsychologic impairments (Ishikawa et al 2001). Despite this provisional evidence for the differentiation of successful and unsuccessful psychopaths, there have been no prior brain imaging studies assessing whether brain abnormalities are similarly specific to unsuccessful psychopaths. Because the hippocampus is involved in contextual fear conditioning (LeDoux 1996), antisocial individuals with hippocampal impairments could become insensitive to cues that predict punishment and capture and consequently be more likely to be apprehended. Consequently, hippocampal impairments may be expected to characterize unsuccessful, caught psychopaths, but not psychopaths who successfully evade detection.

This study attempts to extend prior findings of a R > L functional asymmetry in hippocampal functioning in caught, violent offenders to the same asymmetry in hippocampal structure in a community-based sample of psychopaths. Because all prior hippocampal abnormalities in psychopaths have been observed in unsuccessful, caught offenders, and because the one prior study of successful versus unsuccessful psychopaths observed psychophysiologic and neuropsychologic impairments in the latter but not the former group, it was hypothesized that any lateralized structural hippocampal abnormality would be specific to unsuccessful psychopaths. Prior trauma exposure, head injury, schizophrenia-spectrum disorder, and demographic factors were also assessed to test whether any hippocampal abnormality was independent of possible confounds.

Methods and Materials

Participants

Adult men were recruited from five temporary employment agencies in the greater Los Angeles area (Raine et al 2000). Participants were excluded if they were under 21 or over 45 years of age, nonfluent in English, claustrophobic, or had a pacemaker, metal implants, or history of epilepsy. Qualified participants were informed of the nature of the study and of the study's potential risks and benefits and gave written, informed consent. Before beginning data collection, a certificate of confidentiality was obtained from the Secretary of Health pursuant to Section 303(a) of Public Health Act 42. Participants were assured that any information they might provide about uninvestigated crimes could not be subpoenaed by any United States court or law enforcement agency. The study and all its procedures were approved by the Institutional Review Board at the University of Southern California.

We recruited 91 men into the study, of whom 84 received a structural MRI scan. Group classification was based on total scores from the Psychopathy Checklist—Revised (PCL-R; Hare 1991; described later), as well as history of criminal convictions derived from statewide court records and lifetime self-report (for full details, see Ishikawa et al 2001). Based on a neuroradiologic screen conducted blind to group membership and before image analysis, one participant was a priori excluded from the study because of major atrophy to the right superior temporal gyrus (Raine et al 2000). The final sample consisted of 12 successful psychopaths (i.e., top third of PCL-R scores [23 or more] with no convictions, mean PCL-R score = 27.7, range 23–31), 16 unsuccessful psychopaths (i.e., top third of PCL-R scores with convictions, mean PCL-R score = 31.5, range 23–40), and 23 control subjects (i.e., bottom third of PCL-R scores and no convictions, mean PCL-R score = 10.9, range = 2–14).

Psychopathy Assessment

Psychopathy was assessed with the PCL-R and supplemented by five sources of collateral data (Ishikawa et al 2001). The PCL-R consists of 20 items and reflects two factors: interpersonal and affective characteristics (Factor 1, e.g., glibness or superficial charm, pathologic lying, shallow affect) and antisocial behavior (Factor 2, e.g., need for impulsivity, stimulation seeking or proneness to boredom, juvenile delinquency). PCL-R ratings were made by a clinical Ph.D. student trained and supervised by the first author (AR). The five collateral sources for assessing psychopathy were 1) the Interpersonal Measure of Psychopathy (IM-P; Kosson et al 1997), which provides an interviewer's ratings of the participant's interpersonal behaviors and which has been validated for use with incarcerated and nonincarcerated samples; 2) self-reported crime as assessed by an adult extension (Raine et al 2000) of the National Youth Survey self-report delinquency measure (Elliott et al 1983); 3) official criminal records; and 4) data derived from, and behavioral observations made during, the Structured Clinical Interview for the DSM-IV mental disorders (SCID I; First et al 1995a) and (5) the SCID Axis II personality disorders (SCID II; First et al 1995b).

Diagnostic, Cognitive, and Demographic Assessments

The SCID I and II were administered by a clinical Ph.D. student who received systemized training in SCID assessment that included reliability checks with expert raters (Ventura et al 1998). Subjects also completed an alcohol use questionnaire to assess number of times alcohol was used in the past week and past month (Raine et al 2000). Because only 1 of 51 participants met full DSM-IV diagnostic criteria for PTSD, a dichotomous variable was created indicating whether the individual had ever been exposed to a life-threatening event that left him feeling fearful, helpless, or horrified (i.e., Criteria A of DSM-IV PTSD). Similarly, a dimensional measure of antisocial personality was created as a more sensitive indicator of antisocial tendency by summating SCID scores on individual DSM-IV APD symptoms.

Subtests of the WAIS-R (Wechsler 1981) were used to estimate verbal IQ (vocabulary, arithmetic, digit span), performance IQ (digit symbol, block design), and full scale IQ. Degree of right- versus left-hand preference was assessed using the abbreviated Oldfield Inventory (Bryden 1977), with high scores indicating a stronger preference for right-handedness. History of head injury was defined as head trauma resulting in hospitalization. Details

of group scores on psychiatric, cognitive, and demographic measures together with group comparisons are given in Table 1.

MRI Acquisition

Structural imaging of the hippocampus was conducted using a 1.5-T Philips (S15/ACS) MRI scanner. Three-dimensional images were reconstructed on a SPARC workstation, and segmentation was performed using semiautomated software (CAMRA S200 ALLEGRO; Cedar Software Corp., Mississanga, Ontario, Canada). The anterior commissure–posterior commissure (AC-PC) plane was identified through one midsagittal and four parasagittal scans (spin echo T1-weighted; repetition time [TR], 600 msec; echo time [TE], 20 msec). In the plane directly orthogonal to the AC-PC line, 128 three-dimensional T1-weighted gradient-echo coronal images (TR, 34 msec; TE, 12.4 msec; flip angle, 35°; slice thickness, 1.7 mm; matrix, 256 × 256; field of vision, 23 cm) were obtained.

Image Analysis

Morphometric analyses of the hippocampus were conducted using CAMRA S200 ALLEGRO software. All measurements were obtained by manual tracings performed by raters who were blind to group membership. Bilaterally, the anterior border of hippocampus was defined as the first slice in which the pes hippocampus appeared just caudal to the amygdala (Altshuler et al 1990; McNeil et al 2000). The posterior border was defined as the slice just rostral to where the crus of the fornix appeared as a continuous tract or in which the lateral ventricle body joined with the temporal horn of the lateral ventricles (Bogerts et al 1990; Laakso et al 2000; also the posterior boundary of the thalamus). Measurement of the hippocampus included the hippocampal body, dentate gyrus, uncus, fimbria, alveus, entorhinal cortex, and subiculum. The borders were defined by the surrounding white matter and cerebrospinal fluid, and, when present superiorly, the amygdala, tail of the caudate, optic tract, and lateral geniculate. Reliability of hippocampal volume measurements computed by intraclass correlations on 10 randomly picked cases was .71. Whole brain volume was defined as all cerebral gray and white matter excluding the ventricles, pons, and cerebellum. The pons was excluded by drawing a straight line between the two innermost points that form the superior border. The colliculi were excluded when they were no longer attached to the cerebral hemispheres.

Hippocampal Interpolation Procedure

To assess whether group differences in volume are specific to estimated hippocampal subregions (i.e., anterior, posterior), the slice-by-slice hippocampal measurements were transformed into standardized space. Cubic spline interpolation (Press et al 1992) was applied to the original data so that the total hippocampal volume for each subject, regardless of the original number of slices, was reconfigured to fit into 30 slices. Interpolation was conducted separately for the left and right hippocampus. The volume of each interpolated slice was then calculated in two steps. First, the thickness for each standardized slice was computed using the following formula:

$$(\text{original slice thickness} = 1.7\ \text{mm})$$

$$\times\ (\text{no. original slices})/(\text{standardized no. slices} = 30)$$

$$= \text{standardized slice thickness}$$

The area of each standardized slice was then multiplied by the standardized slice thickness to obtain the volume for each interpolated slice. Each slice volume was divided by whole brain volume to correct for individual differences in brain volume.

Data Analysis

Initial hypothesis testing was carried out using a 3 × 2 × 30 repeated-measures multivariate analysis of variance (MANOVA) comparing groups (i.e., control subjects, successful psychopaths, unsuccessful psychopaths) on hemisphere (i.e., right, left hemisphere) and slice (i.e., 1–30). Analyses in which hippocampal slices were summated were carried out using a 3 (group) × 2 (hemisphere) repeated-measures MANOVA. Main effects for group and group interaction terms (i.e., group × hemisphere, group × hemisphere × slice) were evaluated using Wilks's lambda. Omnibus tests were two-tailed with alpha set at .05, and effect sizes were calculated using eta^2. To maximize power while protecting against type II error, the highest level significant effect was followed up using the adjusted Bonferroni procedure: (between group $df = 2$) × (family wise alpha = .05) / (no. pairwise tests = 3) (Keppel 1991). Thus, alpha for all pairwise comparisons was .033.

Results

Psychopathy Group Analysis

The 3 × 2 × 30 repeated-measures ANOVA revealed a significant main effect of hemisphere [$F(1,48) = 14.25$, $p < .0001$] indicating increased right relative to left (R > L) hippocampal volumes across subjects. A group × hemisphere interaction [$F(2,48) = 3.97$, $p = .02$] indicated the hemisphere asymmetry differed across groups, whereas a significant group × hemisphere × slice interaction [$F(58,40) = 2.12$, $p = .007$] indicated that group differences in laterality were localized within the hippocampus. The main effect for group was not significant [$F(2,48) = .53$, $p = .59$].

To better focus the follow-up analyses of the three-way interaction, a laterality index was computed by subtracting left volume from right volume and dividing by total slice volume at each slice. Laterality scores were then plotted by group. Visual inspection (see Figure 1) indicated that group differences were localized to the anterior region of the hippocampus. Consequently, estimates of anterior and posterior hippocampal volumes were computed by summing slices 1–15 and 16–30, respectively, within the right and left hemispheres (i.e., right and left anterior hippocampal volumes, right and left posterior hippocampal volumes).

Using 3 × 2 repeated-measures MANOVA, group differences in volume across hemispheres were then separately tested for the anterior and posterior hippocampus. The group × hemisphere interaction was significant for the anterior hippocampus [$F(2,48) = 4.44$, $p = .017$, eta^2 = .16] and nonsignificant for the posterior hippocampus [$F(2,48) = 1.71$, $p = .19$]. Bonferroni-corrected pairwise tests indicated that unsuccessful psychopaths, relative both to successful psychopaths and control subjects, had significantly increased laterality (R > L) in the anterior hippocampus [$F(1,26) = 7.80$, $p = .01$ and $F(1,37) = 6.14$, $p = .018$]; however, successful psychopaths and control subjects did not differ [$F(1,33) = .29$, $p = .60$].

Subjects were classified according to whether they showed a hippocampal asymmetry that was higher or lower than the mean of the control subjects. A chi-square analysis indicated a significant relationship between subject grouping and high–low laterality score, $\chi^2 = 10.76$, $df = 2$, $p = .005$, eta = .46. Whereas 47.8% of control subjects and 41.7% of successful psychopaths

showed a relatively high R > L hippocampal asymmetry, all but one of the unsuccessful psychopaths, or 93.8%, showed an exaggerated R > L asymmetry.

To determine whether the laterality differences were being accounted for by an overall significant reduction in estimated left volume or an overall significant increase in estimated right volume, a series of pairwise comparisons (Student's *t* test) with right or left anterior hippocampal volume as the dependent variable were conducted. All comparisons were nonsignificant ($ps > .18$), indicating that the laterality difference resulted from a combination of slightly decreased left and slightly increased right hippocampal volume in the unsuccessful psychopaths relative to the other two groups.

Potential Confounds

As shown in Table 1, groups differed or tended to differ ($p < .10$) on age, substance use, history of head injury, degree of antisocial personality, trauma exposure, and schizophrenia-spectrum disorder, with one or other psychopathy groups scoring higher on these measures. To assess whether any of these variables met criteria as a mediator of the psychopathy–anterior hippocampal relationship (Baron and Kenny 1986), relationships were assessed between these measures and anterior hippocampal asymmetry. Correlational analyses with anterior hippocampal laterality score were nonsignificant for age ($p = .55$), SES ($p = .97$), and antisocial score ($p = .25$). Repeated-measures MANOVAs on left and right anterior hippocampal volumes and grouping variables failed to reveal group × hemisphere interactions for schizophrenia-spectrum ($p = .62$), trauma exposure ($p = .24$), head injury ($p = .50$), or substance use ($p = .47$). Consequently, no measures on which groups differed passed criteria for mediator status. Furthermore, within the unsuccessful psychopathy group, anterior hippocampal asymmetry was not significantly correlated with the number of incarcerations ($r = .275$, $p = .30$), indicating that the structural asymmetry was not a consequence of degree of institutionalization.

Discussion

Unsuccessful psychopaths have an exaggerated structural asymmetry in the anterior hippocampus (R > L) relative to both successful psychopaths and normal control subjects. These structural hippocampal findings are consistent with and extend prior functional findings of the same R > L hippocampal asymmetry in caught violent offenders during a cognitive activation challenge (Raine et al 1997). This hippocampal abnormality cannot be accounted for by confounds such as trauma exposure, schizophrenia-spectrum disorders, head injury, substance use, and other demographic and behavioral confounds. Findings lend support to a neurodevelopmental model of unsuccessful psychopathy (Raine et al 1995) and represent the first brain imaging analysis of successful and unsuccessful psychopaths.

Atypical brain asymmetries are thought in part to reflect disrupted neurodevelopmental processes (Best 1988). Such disruption probably occurs early in life because brain asymmetries first emerge during fetal development (Best 1988), and the overall degree of structural change attributable to environmental influences is limited by early morphogenesis (Bilder et al 1999; Zaidel 1999). Developmentally, the R > L structural asymmetry decreases somewhat with age in normal children (Szabo et al 1999), and consequently the greater R > L asymmetry in unsuccessful psychopaths may reflect an interruption to this normal developmental process. Our findings of an exaggerated R > L hippocampal asymmetry suggest, but do not prove, that unsuccessful psychopathy may be associated with disruption to early morphogenesis or normal brain maturation. A neurodevelopmental perspective of psychopathy is consistent with the facts that it has its roots early in life (Moffitt 1993a, 1993b), unfolds relatively consistently over childhood and adolescence (Lynam 1996), is impervious to conventional treatments (Rice 1997; Seto and Barbaree 1999), and is in part genetically determined (Dolan 1994). The fact that the morphologic change in the hippocampus in unsuccessful psychopaths was a relatively complex R > L asymmetry alteration dictates against simple, nondevelopmental processes such as discrete trauma or degenerative disease processes.

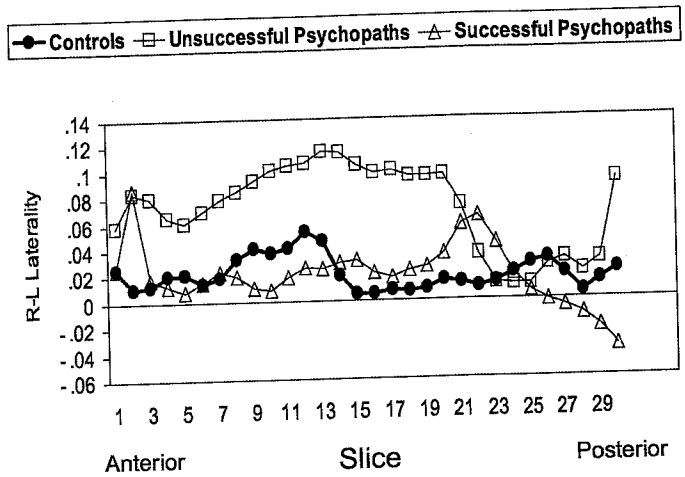

Figure 1. Right-left hippocampal laterality scores from interpolated slice volumes for the three groups. R, right; L, left.

The hippocampal laterality differences were not attributable to environmental influences such as trauma exposure, substance use, or head injury, factors that have previously been associated with hippocampal abnormalities (Agartz et al 1999; Tate and Bigler 2000). Environmental insults such as these would tend to result either in bilateral volumetric reductions of the hippocampus (DeBellis 2002) or in right hippocampal reductions (Agartz et al 1999; Laakso et al 2000). It could be argued that other stressful environmental conditions such as abuse could affect the hippocampus, but groups in this study experienced similar rates of childhood physical punishment and sexual abuse (Ishikawa et al 2001). Thus, it seems unlikely that environmental factors would produce the exaggerated asymmetry observed in the current study. This is instead suggestive of a more neurodevelopmental process underlying the structural asymmetry. Furthermore, although R > L hippocampal structural asymmetries localized to the anterior region have been found in both schizophrenia subjects and the high-risk relatives of schizophrenia patients (Keshavan et al 2002; Pegues et al 2003), and although unsuccessful psychopaths had higher rates of schizophrenia-spectrum disorders than control subjects, such comorbidity could not account for the hippocampal finding.

An important question concerns how hippocampal impairments predispose to unsuccessful psychopathy in particular. At a general level, research in cats has shown that the hippocampus regulates aggression via projections to midbrain periaqueductal gray and the perifornical lateral hypothalamus, structures important in mediating both defensive rage and predatory attack (Gregg and Siegel 2001). Aggressive male mice show size reductions in intra- and infrapyramidal mossy fiber terminal fields in the hippocampus (Hensbroek et al 1995; Sluyter et al

Table 1. Demographic and Psychiatric Measures of the Three Groups

	Unsuccessful Psychopaths (UP) (n = 16)		Successful Psychopaths (SP) (n = 12)		Controls (C) (n = 23)		Statistics	Group Comparisons
Demographic/Cognitive	M	SD	M	SD	M	SD		
Age	33.81	6.62	29.5	6.39	28.35	6.63	$F(2,48) = 3.38, p = .04$	C < UP
Socioeconomic status	31.81	7.40	30.67	10.65	37.36	10.54	$F(2,49) = 2.47, p = .09$	
IQ	96.44	14.69	97.25	13.18	105.09	16.93	$F(2,49) = 1.8, p = .18$	
Ethnicity	Caucasian	Other	Caucasian	Other	Caucasian	Other		
	5	11	6	6	14	9	$\chi^2(2,51) = 3.32, p = .19$	
	Present	Absent	Present	Absent	Present	Absent		
Head injury	6	10	8	4	6	16	$\chi^2(2,50) = 5.08, p = .08$	C < SP
	Right	Left	Right	Left	Right	Left		
Handedness	13	3	11	0	17	6	$\chi^2(2,51) = 3.44, p = .18$	
Psychiatric/Criminal	Present	Absent	Present	Absent	Present	Absent		
Substance abuse/dependence	14	2	8	4	7	16	$\chi^2(2,48) = 23.0, p = .0001$	C < SP, UP
APD	12	4	4	7	0	21	$\chi^2(2,48) = 23.0, p < .0001$	C < UP, SP
Trauma exposure	7	9	0	12	6	17	$\chi^2(2,51) = 6.92, p < .031$	SP < UP
Schizophrenia-spectrum disorder	5	11	3	8	1	21	$\chi^2(2,49) = 5.16, p < .08$	C < UP
	M	SD	M	SD	M	SD		
No. drinks/month	4.31	5.30	7.67	8.05	3.95	6.54	$F(2,47) = 1.35, p = .27$	
APD score	10.43	2.92	7.73	2.53	2.65	1.69	$F(2,49) = 55.4, p < .0001$	C < UP, SP SP < UP
Criminal charges	11.06	12.40	.42	.79	.09	.42	$F(2,48) = 13.44, p < .0001$	C, SP < UP
Criminal convictions	4.06	5.09	.00	.00	.00	.00	$F(2,48) = 11.18, p < .0001$	C, SP < UP
Self-report crimes	26.50	17.00	19.27	8.39	8.68	4.34	$F(2,48) = 12.78, p < .0001$	C < SP, UP

All group comparisons are $p < .05$.
APD, Antisocial Personality Disorder.

1994). Furthermore, rats with hippocampal lesions applied at birth but not at 18 weeks show increased aggressive behavior (Becker et al 1999), again suggesting a neurodevelopmental link between hippocampal abnormalities and aggression. Normal hippocampal functioning is critical for the retrieval of emotional memories and contextual fear conditioning (i.e., remembering the situational context of previously experienced aversive events; Fanselow 2000; LeDoux 1996). Unsuccessful psychopaths have repeatedly been found to show poor fear conditioning (Patrick et al 1994), and hippocampal impairments that disrupt learning the social context of a previously punished response would make such offenders relatively insensitive to environmental cues signaling danger and capture. In contrast, successful psychopaths who lack hippocampal impairments may have relatively normal contextual fear conditioning, making them more sensitive to cues predicting capture. Similarly, LeDoux (1996) has suggested that uncoupling of the hippocampus from the amygdala could result in the expression of emotions that are inappropriate to the social context and also in poor insight into emotional states, a perspective consistent with clinical features of caught psychopaths. Interestingly, a PET study of humans indicates that unpleasant emotions activate the left but not right hippocampus (Lane et al 1997), a finding conceptually consistent with the notion that unsuccessful psychopaths have relatively reduced left hippocampal structure and also reduced autonomic reactivity to a social-emotional stressor (Ishikawa et al 2001).

The anterior hippocampal asymmetries may be associated with unsuccessful psychopathy by signaling disruption to frontal-subcortical neural circuitry. In humans, the orbitofrontal cortex likely exerts control over the anterior hippocampus through entorhinal-hippocampal projections (Pansky et al 1988; Stuss and Benson 1986), whereas afferent connections have been mapped between the subiculum and ventral, dorsolateral, and rostral regions of the prefrontal cortex in cats (Scannell et al 1995). Animal research has also found that lesions to the septal-hippocampal-frontal system result in behavioral disinhibition and a hypersensitivity to immediate reward (Gorenstein and Newman 1980). Disruption to circuits involving the prefrontal cortex and hippocampus have been implicated in both disrupted emotion regulation and antisocial–aggressive behavior (Davidson 2000; Davidson et al 2000; Hoptman et al 2002; Raine 2002; Raine et al 2000), whereas frontal and executive function deficits are frequently identified in institutionalized psychopathic and antisocial individuals (Moffitt 1993b; Raine et al 1998). Prior research with the present sample has found that unsuccessful psychopaths demonstrate executive dysfunction compared with successful psychopaths (Ishikawa et al 2001), and hippocampal abnormalities may be most likely to predispose to aggressive, inappropriate, and psychopathic behavior when combined with prefrontal impairments that decrease behavioral inhibition. Disruption to prefrontal-hippocampal circuitry could therefore result in impulsive, disinhibited, unregulated, and reward-driven antisocial behavior that is more prone to

legal detection in the unsuccessful psychopath, but further work is needed to verify such prefrontal involvement in unsuccessful psychopaths.

Although we found that environmental factors could not explain the hippocampal asymmetry, and although it is possible that the exaggerated R > L asymmetry in unsuccessful psychopaths may have a genetic basis, environmental influences on neurodevelopment cannot be ruled out. Specifically, neonatal exposure to new environments in the first 3 weeks of life results a shift in hippocampal asymmetry in the direction of greater right volume in rats (Verstynen et al 2001). It is therefore conceivable that very early environmental factors not measured in this study could have contributed to the exaggerated hippocampal asymmetry in unsuccessful psychopaths.

Despite support for the notion that unsuccessful psychopaths differ from both their successful psychopathic counterparts and normal control subjects on hippocampal asymmetries, several limitations should be noted. First, sample sizes were modest, thus raising the risk of type II error; however, we were still able to detect structural abnormalities in laterality that are directionally consistent with our prior findings on asymmetrical hippocampal functioning in another antisocial sample. Second, the findings cannot be extrapolated to women because only male subjects were included in this study. Third, there is only partial overlap between the constructs of psychopathy, violence, and antisocial personality disorder; consequently it remains to be seen whether these findings generalize to antisocial constructs other than unsuccessful psychopathy. Fourth, the question of what factors predispose to successful forms of psychopathy requires further clarification. Finally, the neurodevelopmental hypothesis suggested here could not be directly tested due to the use of an adult sample and the cross-sectional nature of the study. Nevertheless, our results provide further support for the notion that successful and unsuccessful psychopaths are distinct subgroups with different autonomic, cognitive, and neuroanatomic deficits, provide initial findings from brain imaging research on these two subgroups, and more broadly support prior imaging, EEG, and neurocognitive research implicating the hippocampus–mesial temporal cortex in antisocial groups.

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Psychobiology of the Violent Offender

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ABSTRACT: The antecedents of violent crime may include childhood victimization, head injuries, and alcohol and drug abuse. Neuropsychological and neuropsychiatric findings suggest temporal and frontal lobe dysfunctions in violent offenders; these dysfunctions appear to be more pronounced in the dominant hemisphere. Recent studies implicate disturbances of central serotonergic functions in impulsive homicide and arson. These results provide an adequate rationale for larger interdisciplinary studies using neurochemical, neuropsychiatric/neuropsychological, and psychosocial methods on the same subjects.

KEYWORDS: psychiatry, violence, neurobiology, human behavior

It has been ten years since the biology of violence was reviewed in a chapter coauthored by one of the authors of this paper [*1*]. Much has happened in this field since that time. These new developments, important in themselves, have also led to new insights and permitted reevaluation of the preexisting literature. We have therefore decided to provide an updated review. This review has two main purposes: to inform the reader of recent developments and to address critically what we see as main obstacles to progress in the field.

It is becoming apparent that biological factors may be very important for understanding the etiology and prevention of violent crime. Biological factors have multiple links to psychological and social forces impinging on the individual. There is an increasing realization that violent criminal behavior results from *interactions* among these multiple factors. However, systematic studies of such interactions are not yet common. So far, the literature on the neurobiology of violent crime has been scattered across many fields. A specialized review focusing on electroencephalography (EEG) and aggression has recently appeared elsewhere [*2*]. In the present report, we will provide a broader summary of the literature.

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Antecedents of Violent Crime

Childhood Victimization

The hypothesis that abused children will become tomorrow's murderers has been with us for at least 25 years [*3*]. A history of childhood victimization was given by children who later killed [*4*] and by prisoners sentenced to death [*5*].

Similar data relating parental brutality to violent behavior in their offspring have been reported by other workers [*6–10*]. A large prospective cohort study [*11*] has demonstrated that males who had been abused and neglected as children had a somewhat higher frequency of arrests for violent offenses as adults than nonabused males.

Widom [*12*] has reviewed the literature on the intergenerational transmission of violence. It appears that while childhood victimization may contribute to the later development of criminal violence, other factors which add to or interact with victimization may also be involved. Being victimized as a child or just living in an abusive family may contribute to later development of violent behavior through a learning experience (modeling), or through brain injuries which result in neurological damage to the victimized child. However, the majority of abused children do not become violent criminals.

Perhaps the stressful experience of growing up in an abusive family or being victimized can be overcome without the development of later violence by persons with an intact central nervous system, but not by those who are neurologically impaired [*13*]. We must consider that abused children who have had brain injury develop an especially elevated predisposition for violent behavior. Studying these issues requires interactive models of causation of criminal violence.

An additional difficulty in interpreting the literature on childhood victimization is the possibility that abusive parents may suffer from psychiatric disorders that may be transmitted to the abused children. Some of these disorders may predispose the subject to violence. This genetically transmitted predisposition may explain a part of the increased propensity for violence in the abused children. This possibility has not been examined empirically.

Deviant Rearing Environment

Most studies associating childhood victimization with adult crime fail to consider the possibility that families may have many problems in addition to child abuse. Other factors such as parental substance abuse and psychiatric hospitalizations, or otherwise poor family functioning may account for the relationship seen between child abuse and adult crime. Ratings on a scale measuring the deviancy of the family rearing environment were significantly higher for the assaultive than for the nonassaultive psychiatric inpatients [*14,15*]. It may be prudent for those studying the relationship between childhood and adult violence to also consider the potential role of other family problems in this relationship.

One of the more important areas of research developed over the past decade is the role of serotonin in human aggression. We will discuss this research in some detail later in this review. At this point, it is appropriate to mention recent work in nonhuman primates linking a deviant rearing environment to enduring serotonin abnormalities [*16*]. Is it possible that an abnormality of the serotonin system is involved in the mechanism whereby a deviant rearing environment confers a propensity to adult human violence?

Medical and Neuropyschiatric History

Injuries and illnesses have been linked with later development of criminal violence. Increased use of general medical services was observed to predate the onset of delinquent behavior [*17*]. Medical and neurological problems such as heart disease, epilepsy, and

severe head injury were reported in 36% of killers in Iceland [*18*]. A history of *head injury* was reported in most prisoners [*19*]. Head injury may of course be a consequence rather than an antecedent of criminal violence: victims may fight back, injuring the perpetrator. In addition, perpetrators may have become victims of other crimes during which they have sustained head injuries. In a subsample of epileptic prisoners [*19*], 47% of head injuries which were related to the development of epilepsy (see below) were classified as "interpersonal"—presumably sustained in fights and assaults in which the person's role (aggressor or victim) remained unreported [*19*]. Lewis et al. [*5*] were able to show that, in 12 of their 14 cases (of juveniles on death row), head injuries had occurred at age 12 or earlier. Some of the injuries of the central nervous system may be prenatal or perinatal, as was suggested by a retrospective study of aggressive children [*20*]. Prospective studies are needed to replicate these findings.

A history of *seizures* was reported in homicide offenders [*4,21*]. A large survey showed that the prevalence of epilepsy among British male prisoners was almost twice as high as in the general population [*22*]. The prevalence of epilepsy among men entering the Illinois prison system was four times higher than that among comparable nonprisoners [*19*]. However, virtually no crimes are directly attributable to an ictal or postictal confusional state [*22,23*]. Furthermore, epileptic prisoners are not more likely to have committed violent crimes than nonepileptic ones [*19,24*]. There is no evidence that epileptics in general have elevated crime rates. Nevertheless, there may be special subtypes of epilepsy that are linked to violent crime, or perhaps even to specific subtypes of violent crime. If such relationships exist, they would be obscured rather than elucidated by studies of unselected large samples. For example, it is conceivable that the relationship between epilepsy and violent crime is only apparent in special populations, such as homicidal juveniles [*4*]. Alternatively, it is possible that it is specifically temporal lobe epilepsy which is linked to violence [*4*]. The ongoing discussion of that link is complicated by variations in the definition of the temporal lobe (psychomotor) symptoms. The definition used by Lewis and her group [*25*] may be too broad [*19,26–28*].

The putative specific link between temporal lobe epilepsy and violence was not supported by Gunn and Bonn [*29*], who reported that it was generalized idiopathic epilepsy rather than temporal lobe epilepsy (psychomotor) which was associated with convictions for violent crime. Relationships between seizure disorders and violence were discussed in a companion review of EEG findings and aggression [*2*].

Alcohol

Drinking has been associated with violent crime [*30–32*], but the nature of this association remains unclear. The percentage of prison inmates who drank daily prior to their offense was three times as high as that rate in the general population [*33*], but this relationship was not specific for violent offenses. Another study [*34*] examined the use of alcohol and drugs at the time of the offense, comparing homicide and nonviolent offenders. More homicide than nonviolent offenders used alcohol and drugs at the time of the offense [*34*].

Clinical observations suggest that alcohol may have qualitatively different and specific effects on mood in violent than in nonviolent individuals: dysphoric effects may prevail over relaxing, euphoric effects [*35,36*]. These clinical observations were not dose-controlled, however, so it is possible that the violent individuals simply drank more and that this dose discrepancy accounted for the differing effects on mood. On the other hand, it is also possible that organic brain dysfunction present in some violent individuals distorts the usual dose-response curve for alcohol. Certain cases of pathological intoxication may represent an extreme example of this effect. Brain damage reduces tolerance to alcohol [*37*]. Thus, it is possible that an interaction between acute alcohol effects and

underlying brain dysfunction accounts for a portion of the variance in criminal violence. Such an interaction has been proposed [*35*] but not tested.

Abram [*38*] studied the effect of co-occurring antisocial personality, alcoholism, and drug disorders on criminal careers. She found that it was drinking during or immediately prior to the crime (rather than the lifetime prevalence of alcoholism per se) that was associated with criminal behavior. Furthermore, she pointed out that studies demonstrating an alcohol-crime relationship have not controlled for associated psychopathology: the observed link may be an artifact of the association between alcohol and a third variable such as antisocial personality or drug abuse.

Drug Abuse

There is a clear association between drug abuse and crime in general [*39–41*]. A large percentage of drug users have been involved in non-drug-related criminal acts [*42,43*]. Addiction patterns covary with criminality: involvement in crime is higher during periods of active addiction than during periods of infrequent use or abstinence [*44*]. The majority (53 to 79%) of the men arrested in twelve major cities in the United States tested positive for illicit drugs, the most frequently detected being marijuana, cocaine, heroin, phencyclidine, and amphetamines [*41*].

The specific relationship between drug use and violent crime is less well documented. In a large multistate prison survey, Innes [*45*] noted that 35% of state prison inmates reported being under the influence of drugs at the time of their offense: 33% for violent offenders, 39% for property offenders, and 43% of drug offenders. Daily drug use in the month preceding their offense was elevated for all groups.

Abram [*38*] found a relationship between drug disorders and property crimes independent of antisocial personality disorder. As in the case of lifetime alcoholism measures, lifetime drug disorders were not related to violent crime. She explained the discrepancy with other reports by hypothesizing that the effect of drugs on violent crime is due to drug use around the time of the crime, and that this effect may be confounded by antisocial personality disorder, which was not controlled for in previous studies.

Violent behavior was reported in abusers of amphetamine [*46*], phencyclidine [*47*], and cocaine [*48*]. However, these observations were not controlled for the potential effects of antisocial personality disorder; this disorder is known to be associated with drug abuse and violent acts.

Psychosis

Careful interviews of violent offenders frequently reveal a history of symptoms suggestive of psychosis, including depression with or without suicidal ideation, delusional ideas of reference or persecution, or hallucinations [*4,5,13*]. These symptoms may be subthreshold in the sense that they are insufficient for a rigorous diagnosis of a distinct disorder. It is also possible that homicide offenders simply may not differ on psychiatric diagnosis from nonviolent offenders or community controls [*49*]. Reports of the psychiatric assessment of such offenders give widely divergent results [*50–54*]. The divergence may be explained by different (and frequently undisclosed) sampling methods and by the failure to use explicit diagnostic criteria.

Mood disorders may be implicated in violent criminal behavior, either directly or in combination with other factors [*55*]. Surveys of prisoner mental health suggest that lifetime and current prevalence of major depressive disorder may be elevated [*56*].[4] Findings of

[4]Bean, J., "The Prevalence of Mental Illness Among Inmates in the Ohio Prison System," draft report, Ohio Department of Mental Health, 1987.

current depression may, however, represent a response to incarceration, since another survey focusing on newly arrived inmates failed to find the elevation of depressive symptoms [57].

Lifetime prevalence of schizophrenia in prisoners may be similar to that of the general population [57],[4] or it may be somewhat elevated as reviewed by Jemelka et al. [58]. All these surveys included prisoners of all types (violent and nonviolent). Not surprisingly, the surveys found a very elevated prevalence of antisocial personality disorder and substance abuse or dependence in prisoners.

Antisocial Personality Disorder

This disorder is clearly related to crime, but its diagnostic criteria (DSM III-R) [59] rely heavily on lawbreaking behavior. Many offenders, by definition, fulfill these criteria and thus the use of this diagnosis in prisoners is not very helpful. Hare has been using the older term "psychopathy," which he rigorously redefined by a research checklist (Psychopathy Checklist, PCL) designed for use in criminal populations [60]. Using the PCL, Hare and his group determined that psychopaths commit a disproportionately large number of crimes (compared with other male criminals) [61]. Furthermore, the crimes of psychopaths are more violent than those of other criminals [62]. Psychopaths seldom commit crimes of passion, and their victims are most frequently strangers [63]. The PCL score predicted (with the effects of age and criminal variables controlled) the violation of conditional release [64]. There is some evidence suggesting that the effect of psychopathy on crime may be due to its interaction with other variables such as brain dysfunction [65], drug abuse [38], or intelligence [66]. Using an empirical measure of psychopathy, Heilbrun [66] determined that psychopathy was related to crime only in less intelligent prisoners. Thus, intelligence could be a variable which modulates the relationship between personality disorder and violent crime. In a follow-up paper [67], Heilbrun introduced additional modulating variables: cognitive control, empathy, and self-reinforcement. The interactions between these modulating variables and psychopathy yielded three models of violent crime. This very interesting heuristic work has not yet been replicated.

Neurobiologic Findings in Violent Offenders

Neuropsychiatric and Neuropsychological Findings

Diffuse (or Multisite) Brain Dysfunction

Most reports of diffuse brain dysfunction are based on empirical observations obtained as part of forensic assessments of criminal defendants. Results of *neurological examinations* are sometimes briefly mentioned [49], but it appears that such examinations are often done perfunctorily or not at all. However, one group performing detailed neurological examinations of juvenile homicide offenders described highly abnormal results [4,5]. The abnormalities were diverse, many of them consistent with consequences of head injuries reported by these prisoners. We have constructed a quantitative neurological examination scale [15] which showed high abnormality scores in assaultive psychiatric inpatients. These patients had a 35% rate of conviction for violent crime [14]. Among the assaultive patients, the subgroup of *persistent* repetitive assaulters appeared more neurologically impaired than the assaultive patients who responded to treatment by stopping their assaults [15].

Neuropsychological tests in violent offenders suggest multiple functional impairments; unfortunately there are few studies in this area. The Halstead-Reitan and Luria-Nebraska batteries showed more abnormality in a violent than in a nonviolent offender group;

however, the groups were small and the differences were not significant [*35*]. Clear impairment on the Halstead-Reitan battery was demonstrated in an uncontrolled study of juveniles on death row [*5*]. A specially constructed neuropsychological test battery discriminated between violent and nonviolent offenders [*68*].

Intellectual impairment has been reported in violent juvenile offenders [*5*]; however, test intelligence in adult violent offenders does not appear to be grossly impaired [*35*]. Violent offenders were reported to have lower intelligence quotient (IQ) scores than nonviolent offenders [*68,69*]. However, full-scale IQ scores in a sample of 243 indicted homicide offenders ranged from 53 to 140, with an average of 96 [*70*], which approximates the distribution in the normal population. As mentioned above, some studies have suggested that intelligence may modulate the relationship between personality disorder and violence [*66,67*].

Localized Brain Dysfunction

Temporal Lobes—Links between temporal lobe dysfunction and violence have been reported since the early days of clinical EEG [*21,71*]; these reports represent the first modern attempts at a biological explanation of human aggression. Electrical discharges in the deep structures of the temporal lobes were demonstrably associated with violent outbursts [*72*]. These valuable observations in a relatively small group of patients have enhanced our understanding of certain mechanisms of aggression in humans [*72*]. However, the contribution of these mechanisms to violent crime in general is probably quite small. The literature on temporal lobe epilepsy and violence has been discussed above in the section on medical and neuropsychiatric history and in a specialized review focusing on EEG [*2*].

Frontal Lobes—Frontal lobe functioning involves the "executive control" and regulation of behavior [*73,74*]. However, the current state of knowledge on the role of the frontal cortex in violent behavior is limited. Several authors offer theoretical perspectives on the role of the frontal lobes in the control, regulation, inhibition, or suppression of violent impulses [*75–77*]. There is little scientific evidence, however, to support or refute their formulations.

Volkow and Tancredi [*78*] employed positron emission tomography (PET) to examine the brain function of four violent psychiatric inpatients. Dysfunction of the frontal cortex was observed in two of the four patients, and temporal lobe dysfunction was present in all of them. Pontius and Yudowitz [*79*] employed a clinical narrative technique and a neuropsychological test (Trail Making, Part B) to study frontal lobe dysfunction in 30 young adult criminals. In their view, a subgroup (33%) of these men demonstrated "specifically immature action behavior indicative of (frontal lobe system) dysfunctioning." This conclusion, we feel, was more specific than warranted by the data. In another experiment, Pontius [*80*] studied eight white males who had committed violent acts (murder, attempted murder, or rape), allegedly evoked by specific stimuli (certain words, specific objects, and so forth) postulated to be iodiosyncratic triggers of aggression. She hypothesized a "seizure-like imbalance between frontal lobe and limbic systems," although no empirical measures of frontal lobe function were employed.

Yeudall [*81*] studied 25 aggressive psychopaths and 25 depressed criminal patients to examine the lateralization of neuropsychological impairments in psychiatric and criminal disorders. His findings suggested that the neuropsychological impairments of both groups were localized in the anterior regions of the brain, with dysfunction in the aggressive psychopaths more frequently lateralized to the dominant hemisphere. More recently, Heinrichs [*82*] reported that focal frontal cerebral lesions (confirmed through computerized tomography) were associated with violence in chronic neuropsychiatric patients.

Additional evidence of frontal dysfunction in habitually aggressive patients comes from EEG studies. Williams [*83*] has clearly demonstrated that persistent violent behavior was associated with EEG slowing over the frontal (and temporal) areas in a large sample of offenders. Frontocentral EEG slowing was also associated with habitual aggressivity in male adult drug abusers [*84*]. Gorenstein [*65*] provided data supporting a link between psychopathy and frontal lobe dysfunction. However, subsequent research [*62,85*] has failed to replicate this association.

Taken together, these studies suggest that frontal lobe dysfunction may play a role in violent behavior. However, the small sample sizes, lack of reliable and valid measures of frontal lobe functions, absent control or comparison groups, and confounded research designs limit the interpretation of these results.

Lateralized Hemispheric Dysfunction—Yeudall [*81*] reported that *adult* aggressive psychopaths had neuropsychologic impairments lateralized to the dominant hemisphere (predominantly anterior). However, neuropsychiatric impairment was predominantly lateralized to the nondominant hemisphere in the violent *adolescents* [*86*]. Tentative evidence for the lateralization of dysfunction to the left hemisphere was obtained by studies of dichotic listening in adult prison inmates [*87*]. The inmates were categorized (somewhat confusingly) as either murderers, violent offenders, or other offenders. The violent offenders (but not murderers) demonstrated a left ear advantage on one of the three dichotic listening tests; this can be intepreted as a left hemisphere dysfunction. Additional indirect support for a dysfunction of the dominant hemisphere comes from the observation that offenders tend to be left-handed more frequently than controls [*88*].

Taken together, these reports suggest that certain violent offenders may exhibit dysfunctions of the dominant hemisphere. This lateralization may depend on the offender's age. A summary of earlier literature on hemispheric dysfunction in antisocial behavior has been published [*89*].

Neurochemical Findings

Serotonin—Links between serotenergic transmission and aggression in animals have been known for many years [*90*]. In 1976, Asberg et al. [*91*] reported low levels of 5-hydroxyindoleacetic acid (5-HIAA), a principal serotonine metabolite, in the cerebrospinal fluid (CSF) of depressed patients who had committed violent (but not nonviolent) suicide attempts. Psychological links between aggression turned inwards and outwards have been proposed at least since Freud. An important biological link between these two phenomena was discovered by Brown et al. [*92*], who reported that aggressiveness (measured by questionnaires) was significantly and negatively related to CSF levels of 5-HIAA. Brown's subjects were military men. Aggression against others was associated with a history of suicidal behavior [*92*]. This trivariate relationship between aggression, suicide, and low CSF 5-HIAA levels has been confirmed in another sample [*93*].

It is clear that the study of serotonergic function in the central nervous system has great potential value for research into violent crime. Unfortunately, the only available measure of the central serotonergic function—CSF 5-HIAA—requires a spinal tap. This procedure is routine and very safe, but the current constraints on research using prisoners as subjects make it virtually impossible to obtain CSF from violent offenders in the United States. Thus, much of the recent work in this area was done by a Finnish-American team (led by Virkkunen and Linnoila), using voluntarily consenting Finnish homicide offenders [*93*] and fire setters [*94*] as subjects.

The homicide offenders [*93*] were categorized as "impulsive" if the victim was unknown to the offender, if there was no or only minor provocation, and the attack did not represent an attempt to rob the victim. The "nonimpulsive" offenders knew the victim, and there was evidence of premeditation. The principal finding was that the impulsive offenders

had lower CSF 5-HIAA levels than the nonimpulsive ones. Furthermore, the recidivistic offenders had lower CSF 5-HIAA than those who committed only one violent crime. Finally, the impulsive offenders with a history of suicide attempts had lower CSF 5-HIAA than the other offenders.

The fire setters in the second study [*94*] were all deemed impulsive, but no criteria for impulsivity in these offenders were provided (except that the arson was not committed for profit). The principal finding of this study was that the fire setters had lower CSF 5-HIAA levels than either of the two control groups: violent offenders and normal nonoffenders. The violent offender control group was drawn from a sample reported earlier [*93*]; it is not clear how many of these controls were deemed impulsive. Furthermore, the majority of the fire setters showed an abnormally low blood glucose nadir after an oral glucose challenge.

The subjects of these studies [*93,94*] were followed up after their release from prison to study recidivistic offending [*95*]. The blood glucose nadir after an oral glucose challenge and the CSF 5-HIAA (both measured before the subjects' release from prison) were related to recidivism. Linear discriminant analysis using these two measures as independent variables correctly classified 95% of the nonrecidivists, and 46% of the recidivists (6 of 13). This must be considered relatively good classification compared with other methods used to predict violent crime [*96*]. The results are particularly interesting since the discriminant function used only two variables, and both of them were selected *a priori* on a theoretical basis.

The findings of these three studies [*93–95*] must be interpreted with some caution. The numbers of subjects were relatively small, and the method of their selection somewhat unclear. Almost all the subjects were alcoholics committing their offenses under the influence of alcohol. It may not be possible to generalize the interesting biochemical findings to nonalcoholics or to offenses commited while sober.

Given these caveats, the results [*93–95*] suggest that serotonergic transmission may be impaired in certain violent offenders. This impairment may result in a reduction of impulse control. The serotonergic hypothesis is eminently testable; it provides a theoretical rationale for attempts at prevention and treatment of certain types of violence with serotonergic drugs and perhaps precursors.

Links between the recently reported putative impairment of the serotonin system and the earlier findings of frontotemporal damage in violent individuals remain nebulous. Patients with frontotemporal contusions, but not with diffuse cerebral contusions, showed decreased levels of CSF 5-HIAA soon after the injury [*97*]. If confirmed, this finding might provide such a link.

Serum Glucose

Hypoglycemia may elicit epileptiform and other EEG abnormalities [*98*], and it was used (with success) as a defense against a murder charge as early as 1943 [*71*]. The behavioral effects of hypoglycemia may include irritability and aggression, sometimes with amnesia; these effects may be partly mediated by an epileptiform mechanism.

Virkkunen and his colleagues have administered glucose tolerance tests to violent offenders with antisocial personality [*99*] and to impulsive fire setters [*94*]. They found a low blood glucose nadir in both offender groups (compared with controls). Insulin secretion in response to glucose load is reportedly enhanced in patients with antisocial personality [*100*], and this enhancement is probably related to the pronounced hypoglycemic responses to glucose in violent offenders. Furthermore, brain serotonin content is known to increase after the ingestion of carbohydrates [*101*]. Additional links between the metabolism of carbohydrates, insulin secretion, and brain serotonin are discussed elsewhere [*102*].

Critique of the Literature

The literature on psychobiology of the violent offender appears to lack a comprehensive theoretical base and has serious methodological difficulties. We will now discuss certain problems shared by many studies in this area.

Violent Crime as the Dependent Variable

Most psychobiological researchers studying violent offenders give surprisingly little thought to their principal dependent variable. In general, the definition of violent crime (and violent criminal) is left to the state without much consideration of the massive constraints imposed by this choice (Ref *103*, p. 61). Typically, the subjects are classified as violent (or nonviolent) on the basis of a single (most recent) offense. This offense is important since it usually led to the current incarceration, but it is insufficient as a classification criterion for research purposes. The criminal *history* is very important, but it is usually ignored. The problem can be illustrated by an example. A study [*87*] compared three prisoner groups: "murderers," "violent offenders," and "nonviolent" controls; the classification was based on the "present" (most recent) offense. However, the *official* criminal record showed a past history of at least one violent offense in 15% of the subjects in the nonviolent group. The official record usually underestimates the number and severity of offenses actually committed; thus, the 15% of violent offenders in the nonviolent group was probably a very conservative estimate, which raises questions regarding the appropriateness of the control group.

In addition to the conceptual problems involving the offense description, we also have to consider how the information is actually obtained. In the United States, the source of official information closest to the actual offense is the police report. The conviction is the final result of complicated forces which involve plea bargaining and many other factors; the original information about the offense may not be fully reflected in the conviction record. Nevertheless, the conviction record is typically used by researchers for subject classification.

Impulsivity is emerging as a central concept linking violent suicide, assaultiveness, and serotonergic dysfunction. It is unfortunate that the term is not very clear, particularly when applied to criminal acts. In the important paper by Linnoila et al. [*93*], the definition of impulsivity was based in part on the relationship between the offender and the victim: if the offender did not know the victim, the crime met one of the criteria for impulsiveness. If the offender and the victim knew each other, the data were not used since the reports on premeditation appeared to be unreliable in these cases (Linnoila, personal communication, 1991). It is important to realize that offenses involving domestic violence were excluded; this exclusion represents a potential limitation on the ability to generalize from Linnoila's data.

We noted that impulsivity remained undefined in the paper on fire setters [*94*]. Operationalizing the concept of impulsivity would clearly be of great importance. A ten-item rating scale of impulsiveness and premeditation has been constructed and applied to the records of 251 criminals [*66*]. The interrater reliability of this scale was high [*66*]. Other authors attempted to use a single-item scale to measure the impulsiveness of crimes, but their interrater agreement was lower [*29*].

Apparently unaware of the literature on serotonin and impulsive crime, criminologists Gottfredson and Hirschi [*103*] have developed a general theory purporting to explain *all* crime on the basis of offenders' insufficient "self-control." Although these authors do not clearly define the concept of self-control, they include impulsiveness as one of its dimensions (Ref *103*, p. 95). The other dimensions are insensitivity and lack of intelligence. Thus, the dimensions of self-control are "factors affecting calculation of one's

own acts" (Ref *103*, p. 95). Thus Gottfredson and Hirschi provide an independently derived theoretical support for the importance of impulsiveness in crime.

Subject Selection

One can study the entire population of known homicide offenders in a geographic area, such as Iceland [*18*], Northern Sweden [*34*], or a county in California [*53*]. Such methods avoid sampling bias, but these retrospective studies do not permit reliable assessment of neuropsychiatric impairment. A more typical source of subjects is a referral for forensic pretrial evaluation [*49,50,52,54*]. Individuals may be referred by the police, judges, prosecutors, or defense lawyers. The biases involved in these referrals are unknown and probably vary greatly among different jurisdictions; they also probably depend on the availability of forensic science services and the experience and motivation of the referring officials. Other researchers select their subjects among inmates of prisons [*5,51*], mental hospitals [*51*], or institutions whose characteristics were not disclosed.

The methods of subject selection from these sources are variable. Some of the workers reported on consecutive referrals within a specified period of time [*50,54*]. Others, reporting on convicted offenders, selected them by the sentence received [*5*]. Finally, the subject selection criteria for some studies are not clearly defined [*4,51*].

Thus, most studies used samples of opportunity; the sample selection was based more on subject availability than on theoretical considerations of the ability to generalize to a population. This is a basic common flaw which makes the results difficult to interpret or replicate.

Unfortunately, appropriate epidemiological methods are particularly difficult to implement in psychobiological studies of violent offenders. Such studies cannot be done without informed and voluntary consent of the subjects. The requirement of consent is of course firmly based on the general principles of human rights, and everybody supports it. However, it is important to realize that the subjects' decision to consent is determined by many factors which may ultimately result in biasing the selection process. The literature on consent bias in samples of psychiatric patients is beyond the scope of this review, but we note that paranoid and hostile patients are less likely to consent than others.

To complicate matters further, it is not clear whether the decision to consent to participate in research can ever be truly voluntary in prisoners. Some ethicists feel that incarceration makes prisoners so vulnerable to real or imagined coercion that they would consent against their own will. This view appears to be more popular in the United States than in Europe.

Thus, the subject selection method is a crucial step in the study design. The principal factors to consider include the following: the ability to generalize from the sample, the resources available, and ethical as well as political issues.

Lack of Controls

Most reports on neurobiology of violent crime lack control or comparison groups. Those researchers who use a control group make no provisions for "blinding" their interviewers and testers: these researchers are invariably aware of the subjects' group membership (for example violent versus nonviolent prisoners). This is a serious problem with research involving interviews, evaluation of EEG recordings by visual inspection, and any other procedures calling for subjective judgment on the part of the tester. We have not found any cross-sectional studies dealing adequately with this problem. Prospective study designs build in protection against such biases.

Lack of Prospective Studies

With some exceptions [*4,13,95*], neurobiological research into violent crime has been cross-sectional and retrospective. The major inherent weakness of the retrospective studies is the inability of this design to reliably distinguish between the antecedents and consequences of violent crime.

Lack of Studies of Interactions

Most studies report one or two variables related to violent crime (for example, the psychiatric diagnosis of the offender). Those researchers who study more variables at a time only rarely attempt to develop an explanatory multivariate model [*13,38,77*]. Violent crime appears to have complex causation, and a multiple-variable model generally provides more explanatory power than studying one variable at a time. We feel that substantial progress in this field will be impossible without integrative multidisciplinary studies.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appendix to the Merit Brief of Appellant, Anthony Belton, 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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