

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :  
Appellee, : Case No. 2012-1212  
-vs- : Appeal taken from Franklin County  
Court of Common Pleas  
CARON E. MONTGOMERY, : Case No. 10CR-12-7125  
Appellant. : **This is a death penalty case**

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**MERIT BRIEF OF APPELLANT CARON MONTGOMERY**

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Steven L. Taylor - 0043876  
Chief Counsel, Appellate Division

Franklin County Prosecutor's Office  
373 South High Street, 13<sup>th</sup> Floor  
373 South High Street, 13<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 525-3555

COUNSEL FOR APPELLEE

Office of the  
Ohio Public Defender

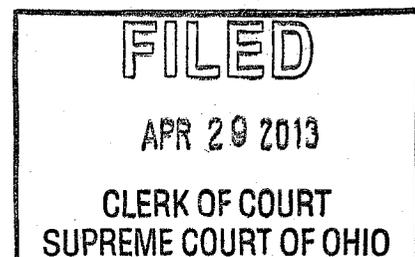
Kathryn L. Sandford – 0063985  
Supervisor, Death Penalty Division  
**Counsel of Record**

Jennifer A. Prillo – 0073744  
Supervisor, Death Penalty Division

Gregory A. Hoover – 0083933  
Assistant State Public Defender

Office of the Ohio Public Defender  
250 E. Broad St., Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 644-0708 – Fax

COUNSEL FOR APPELLANT



## PREFACE

Appellant Caron Montgomery hereby provides the following key to describe citations to the record made in this brief:

Transcript – Vol. \_\_\_, Tr. \_\_\_

## TABLE OF CONTENTS

<b>PREFACE</b> .....	i
<b>TABLE OF CONTENTS</b> .....	ii
<b>TABLE OF AUTHORITIES</b> .....	v
<b>STATEMENT OF THE CASE AND FACTS</b> .....	1
<b>Proposition of Law No. 1</b> .....	9
When the State fails to introduce sufficient evidence of particular charges and there is not substantial evidence upon which a jury can conclude that all elements have been proven beyond a reasonable doubt, a resulting conviction deprives a capital defendant of substantive and procedural due process. U.S. Const. amends. VI, VIII, XIV; Article I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.....	9
<b>Proposition of Law No. 2</b> .....	15
A jury waiver and guilty plea are not made knowingly, intelligently and voluntarily when the capital defendant is medicated at the time he waives his rights and the full panoply of rights he is giving up is not explained to him. U.S. Const. amends. VI, VIII, XIV; Article I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.....	15
<b>Proposition of Law No. 3</b> .....	23
The defendant's right to the effective assistance of counsel is violated when counsel's performance during a capital trial is deficient to the defendant's prejudice. U.S. Const. amends. VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20.....	23
<b>Proposition of Law No. 4</b> .....	44
Where the three-judge panel's weighing of the aggravating circumstances in determining Montgomery's sentence as memorialized in the sentencing opinion violated <i>State v. Cooley</i> , R.C. § 2929.03(D)(3) and R.C. § 2929.03(F), the sentence is void and must be vacated because the weighing process was erroneous. U.S. Const. amends. VI, VIII, XIV; Article I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.....	44
<b>Proposition of Law No. 5</b> .....	48
The introduction of graphic photographs with no probative value but which are highly prejudicial violates a capital defendant's rights to a fair trial, due process, and a reliable determination of guilt as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution. ....	48

<b>Proposition of Law No. 6</b> .....	56
Ohio’s death penalty law is unconstitutional. Ohio Rev. Code Ann. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Montgomery. U.S. Const. Amends. V, VI, VIII, And XIV; Ohio Const. Art. I, §§ 2, 9, 10, And 16. Further, Ohio’s death penalty statute violates the United States’ obligations under international law. ....	56
<b>Proposition of Law No. 7</b> .....	69
The cumulative effect of trial error renders a capital defendant’s trial unfair and his sentence arbitrary and unreliable. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20.....	69
<b>CONCLUSION</b> .....	71
<b>CERTIFICATE OF SERVICE</b> .....	72

**APPENDIX:**

<i>State v. Montgomery</i> , Ohio Supreme Court, Case No. 12-1212, Notice of Appeal filed July 20, 2012.....	A-1
<i>State v. Montgomery</i> , Franklin County Common Pleas, Case No. 10-CR-7125 Sentencing Opinion: Findings of Fact and Conclusions of Law Regarding Imposition of the Death Penalty filed June 6, 2012.....	A-4
<i>State v. Montgomery</i> , Franklin County Common Pleas, Case No. 10-CR-7125, Judgment Entry filed May 24, 2012 .....	A-16
Ohio Const. art. I, § 1.....	A-21
Ohio Const. art. I, § 2.....	A-22
Ohio Const. art. I, § 5.....	A-23
Ohio Const. art. I, § 9.....	A-24
Ohio Const. art. I, § 10.....	A-25
Ohio Const. art. I, § 16.....	A-26
Ohio Const. art. I, § 20.....	A-27
Ohio Const. art. II, § 39 .....	A-28
U.S. Const. amend. V.....	A-29

U.S. Const. amend. VI .....	A-30
U.S. Const. amend. VIII.....	A-31
U.S. Const. amend. XIV .....	A-32
U.S. Const. art. II, § 2 .....	A-33
U.S. Const. art. VI.....	A-35
O.R.C. § 2901.05 .....	A-36
O.R.C. § 2903.01 .....	A-38
O.R.C. § 2903.02 .....	A-40
O.R.C. § 2919.25 .....	A-41
O.R.C. § 2929.02 .....	A-44
O.R.C. § 2929.021 .....	A-46
O.R.C. § 2929.022 .....	A-48
O.R.C. § 2929.023 .....	A-50
O.R.C. § 2929.024 .....	A-51
O.R.C. § 2929.03 .....	A-52
O.R.C. § 2929.04 .....	A-58
O.R.C. § 2929.05 .....	A-61
O.R.C. § 2929.06 .....	A-63
Ohio R. Crim. P. 11 .....	A-66
Ohio R. Evid. 401 .....	A-69
Ohio R. Evid. 403 .....	A-70
Ohio R. Evid. 801 .....	A-71
Sup. R. 20.....	A-73

## TABLE OF AUTHORITIES

### CASES

<i>Adams v. United States ex. rel. McCann</i> , 317 U.S. 269 (1942).....	15
<i>Ake v. Oklahoma</i> , 470 U.S. 68 (1985).....	36
<i>Beavers v. Balkom</i> , 636 F.2d 114 (5th Cir. 1981).....	36
<i>Beck v. Alabama</i> , 447 U.S. 625 (1980).....	53
<i>Brady v. United States</i> , 397 U.S. 742 (1970).....	18
<i>California v. Ramos</i> , 463 U.S. 992 (1983).....	53
<i>Clinton v. City of New York</i> , 524 U.S. 417 (1998).....	65, 67
<i>Coker v. Georgia</i> , 433 U.S. 584 (1977).....	56
<i>Combs v. Coyle</i> , 205 F.3d 269 (6th Cir. 2000).....	42
<i>Commonwealth v. O'Neal</i> , 339 N.E.2d 676 (Mass. 1975).....	57
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	26
<i>Delo v. Lashley</i> , 507 U.S. 272 (1993).....	58
<i>Dickerson v. Bagley</i> , 453 F.3d 690 (6th Cir. 2006).....	24
<i>Eddings v. Oklahoma</i> , 455 U.S. 104 (1982).....	58
<i>Enmund v. Florida</i> , 458 U.S. 782 (1982).....	58
<i>Evitts v. Lucey</i> , 469 U.S. 387 (1985).....	62
<i>Filartiga v. Pena-Irala</i> , 630 F.2d 876 (2d Cir. 1980).....	62, 67
<i>Forti v. Suarez-Mason</i> , 672 F.Supp. 1531 (N.D. Cal. 1987).....	62
<i>Free v. Peters</i> , 12 F.3d 700 (7th Cir. 1993).....	59
<i>Freeman v. Lane</i> , 962 F.2d 1252 (7th Cir. 1992).....	24
<i>Frolova v. Union of Soviet Socialist Republics</i> , 761 F.2d 370 (7th Cir. 1985).....	66
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972).....	56, 57, 59
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977).....	54
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963).....	23
<i>Glasser v. United States</i> , 315 U.S. 60 (1942).....	10
<i>Godfrey v. Georgia</i> , 446 U.S. 420 (1980).....	58, 60
<i>Gravley v. Mills</i> , 87 F.3d 779 (6th Cir. 1996).....	23
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976).....	57, 58
<i>Hamblin v. Mitchell</i> , 354 F.3d 482 (6th Cir. 2003).....	29
<i>In re Winship</i> , 397 U.S. 358 (1970).....	9

<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979).....	10, 14
<i>Jells v. Mitchel</i> , 538 F. 3d 478 (6th Cir. 2008).....	37
<i>Johnson v. Texas</i> , 509 U.S. 350 (1993).....	58
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938).....	15
<i>Lewis v. Jeffers</i> , 497 U.S. 764 (1990).....	60
<i>Lockett v. Ohio</i> , 438 U.S. 586 (1978).....	53, 59
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803).....	66
<i>Maynard v. Cartwright</i> , 486 U.S. 356 (1988).....	60
<i>Ohio Adult Parole Authority v. Woodard</i> , 523 U.S. 272 (1998).....	18, 21
<i>Patton v. United States</i> , 281 U.S. 276 (1930).....	15
<i>Payne v. Tennessee</i> , 501 U.S. 808 (1991).....	52
<i>Penry v. Lynaugh</i> , 492 U.S. 302 (1989) <i>rev'd on other grounds Penry v. Johnson</i> , 532 U.S. 782 (2001).....	58
<i>Pulley v. Harris</i> , 465 U.S. 37 (1984).....	61
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981).....	56
<i>Rickman v. Bell</i> , 131 F.3d 1150 (6th Cir. 1997).....	43
<i>Robinson v. California</i> , 370 U.S. 660 (1962).....	56
<i>Satterwhite v. Texas</i> , 486 U.S. 249 (1988).....	69
<i>Schneekloth v. Bustamonte</i> , 412 U.S. 218 (1973).....	15
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960).....	57
<i>Spaziano v. Florida</i> , 468 U.S. 447 (1984).....	62
<i>Starr v. Lockhart</i> , 23 F.3d 1280 (8th Cir. 1994).....	23
<i>State v. Adams</i> , 62 Ohio St. 2d 151, 404 N.E.2d 144 (1980).....	9, 10
<i>State v. Brooks</i> , 75 Ohio St. 3d 148, 661 N.E.2d 1030 (1996).....	17
<i>State v. Cooney</i> , 46 Ohio St. 3d 20, 544 N.E.2d 895 (1989).....	44, 45, 47
<i>State v. Crotts</i> , 104 Ohio St. 3d 432, 820 N.E.2d 302 (2004).....	52
<i>State v. DeMarco</i> , 31 Ohio St. 3d 191, 509 N.E.2d 1256 (1987).....	43, 70
<i>State v. Drummond</i> , 111 Ohio St. 3d 14, 854 N.E.2d 1038 (2006).....	51
<i>State v. Eley</i> , 56 Ohio St. 2d 169, 383 N.E.2d 132 (1978).....	10
<i>State v. Fitzpatrick</i> , 102 Ohio St. 3d 321, 810 N.E.2d 927 (2004).....	26
<i>State v. Fox</i> , 69 Ohio St. 3d 183, 631 N.E.2d 124 (1994).....	58
<i>State v. Gondor</i> , 112 Ohio St. 3d 377, 860 N.E.2d 77 (2006).....	43
<i>State v. Green</i> , 90 Ohio St. 3d 352, 738 N.E.2d 1208 (2000).....	46, 47

<i>State v. Haight</i> , 98 Ohio App. 3d 639 (10th App. Dist. 1994) .....	29, 30
<i>State v. Hessler</i> , 90 Ohio St. 3d 108, 734 N.E.2d 1237 (2000) .....	31
<i>State v. Jenkins</i> , 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984) .....	56
<i>State v. Ketterer</i> , 111 Ohio St. 3d 70, 855 N.E.2d 48 (2006) .....	20
<i>State v. Lang</i> , 129 Ohio St. 3d 512, 954 N.E.2d 596 (2011) .....	33
<i>State v. Madrigal</i> , 87 Ohio St. 3d 378, 721 N.E.2d 52 (2000) .....	33
<i>State v. Martin</i> , 20 Ohio App. 3d 172, 485 N.E.2d 717 (1983) .....	11
<i>State v. Maurer</i> , 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984) .....	52
<i>State v. Miclau</i> , 167 Ohio St. 38, 146 N.E.2d 293 (1957) .....	9, 10
<i>State v. Mink</i> , 101 Ohio St. 3d 350, 805 N.E.2d 1064 (2004) .....	20, 21, 26
<i>State v. Morales</i> , 32 Ohio St. 3d 252, 513 N.E.2d 267 (1987) .....	52
<i>State v. Murphy</i> , 91 Ohio St. 3d 516, 747 N.E.2d 765 (2001) .....	61
<i>State v. Pierre</i> , 572 P.2d 1338 (Utah 1977) .....	57
<i>State v. Poindexter</i> , 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988) .....	56
<i>State v. Ruppert</i> , 54 Ohio St. 2d 263, 375 N.E.2d 1250 (1978) .....	18
<i>State v. Scott</i> , 101 Ohio St. 3d 31, 800 N.E.2d 1133 (2004) .....	11
<i>State v. Spivey</i> , 81 Ohio St. 3d 405, 692 N.E.2d 151 (1998) .....	30
<i>State v. Steffen</i> , 31 Ohio St. 3d 111, 509 N.E.2d 383 (1987) .....	61
<i>State v. Thompkins</i> , 78 Ohio St. 3d 380, 678 N.E.2d 541 (1997) .....	11, 13
<i>State v. Thompson</i> , 33 Ohio St. 3d 1, 514 N.E.2d 407 (1987) .....	54
<i>State v. Wilson</i> , 787 P.2d 821 (N.M. 1990) .....	69
<i>State v. Wogenstahl</i> , 75 Ohio St. 3d 344, 662 N.E.2d 311 (1996) .....	9
<i>Stouffer v. Reynolds</i> , 168 F.3d 1155 (10th Cir. 1999) .....	43
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	passim
<i>The Paquete Habana</i> , 175 U.S. 677 (1900) .....	62, 67
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958) .....	56
<i>Tuilaepa v. California</i> , 512 U.S. 967 (1994) .....	60
<i>United States v. Fessel</i> , 531 F.2d 1275 (5th Cir. 1976) .....	36
<i>United States v. Griffith</i> , 118 F.3d 318 (5th Cir. 1997) .....	37
<i>United States v. Jackson</i> , 390 U.S. 570 (1968) .....	59
<i>United States v. Orrico</i> , 599 F.2d 113 (6th Cir. 1979) .....	10
<i>United States v. Smith</i> , 18 U.S. (5 Wheat.) 153 (1820) .....	67
<i>United States v. Wallace</i> , 848 F.2d 1464 (9th Cir. 1988) .....	69, 70

<i>United States v. Walls</i> , 70 F.3d 1323 (D.C. Cir. 1995) .....	37
<i>Walker v. Engle</i> , 703 F.2d 959 (6th Cir. 1983).....	69
<i>Walton v. Arizona</i> , 497 U.S. 639 (1990), <i>vacated on other grounds Ring v. Arizona</i> , 536 U.S. 584 (2002) .....	60
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).....	24, 28, 37, 38
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000).....	37
<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976) .....	57
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983) .....	61
<i>Zschernig v. Miller</i> , 389 U.S. 429 (1968).....	62

**CONSTITUTIONAL PROVISIONS**

Ohio Const. art. I, § 1 .....	passim
Ohio Const. art. I, § 2 .....	passim
Ohio Const. art. I, § 5 .....	passim
Ohio Const. art. I, § 9 .....	passim
Ohio Const. art. I, § 10 .....	passim
Ohio Const. art. I, § 16 .....	passim
Ohio Const. art. I, § 20 .....	passim
Ohio Const. art. II, § 39 .....	36
U.S. Const. amend. V .....	passim
U.S. Const. amend. VI.....	passim
U.S. Const. amend. VIII .....	passim
U.S. Const. amend. XIV .....	passim
U.S. Const. art. II, § 2 .....	65
U.S. Const. art. VI .....	62, 63, 64, 65

**STATUTES**

O.R.C. § 2901.05 .....	9
O.R.C. § 2903.01 .....	passim
O.R.C. § 2903.02 .....	1
O.R.C. § 2919.25 .....	2
O.R.C. § 2929.02 .....	56, 68
O.R.C. § 2929.021 .....	56, 60, 68
O.R.C. § 2929.022 .....	56, 68
O.R.C. § 2929.023 .....	56, 68

O.R.C. § 2929.024 .....	36
O.R.C. § 2929.03 .....	passim
O.R.C. § 2929.04 .....	passim
O.R.C. § 2929.05 .....	56, 61, 62, 68
O.R.C. § 2929.06 .....	43

**RULES**

Ohio R. Crim. P. 11 .....	30, 59
Ohio R. Evid. 401 .....	51
Ohio R. Evid. 403 .....	52
Ohio R. Evid. 801 .....	24, 26
Sup. R. 20 .....	36

**OTHER AUTHORITIES**

American Bar Association Guidelines for the Appointment of Counsel in Death Penalty Cases.....	16, 19, 24
Cho, Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death, 85 J. Crim. L. & Criminology 532 (1994).....	59
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.....	63, 65
English, D. J., Widom, C. S., & Brandford, C. (2004), <i>Another look at the effects of child abuse</i> , NIJ journal, 251 .....	35
International Convention on the Elimination of All Forms of Racial Discrimination (1994).....	63, 64, 65
International Covenant on Civil and Political Rights (1992) .....	passim
Kevin McNally, <i>Death Is Different: Your Approach to a Capital Case Must be Different, Too</i> , The Champion, Mar. 1984.....	32
Organization of American States.....	63, 68
Restatement (Second) of Foreign Relations Law of the United States, Sec. 154(1) (1965) .....	66
Springer, K. W., Sheridan, J., Kuo, D., & Carnes, M. (2007), <i>Long-term physical and mental health consequences of childhood physical abuse: Results from a large population-based sample of men and women</i> , Child Abuse & Neglect, 31 .....	35
United Nations Charter .....	63
Universal Declaration of Human Rights.....	67
Vienna Convention on the Law of Treaties .....	66

## STATEMENT OF THE CASE AND FACTS

This case involves the homicides of Tia, Tahlia and Tyron Hendricks. Tia and her children lived at 465 Broadmeadows, Apartment 314, Columbus, Ohio. Vol. VII, Tr. 29-30. On November 26, 2010, the bodies of Tia and the children were found in their apartment. *Id.* at 33. Caron Montgomery was arrested and charged with their murders after an investigation by the Columbus Police Department. Vol. VII; Indictment Jan. 11, 2011.

### **The Indictment**

This case was indicted under Franklin County case number 10CR-12-7125. Montgomery was charged with six counts in connection with the deaths of Tia, Tahlia and Tyron Hendricks. Indictment. Vol. I, Tr. 2-9.

In Count One, he was charged with one count of Murder - purposely causing the death of Tia Hendricks under R.C. § 2903.02. Indictment at p. 1.

Count Two charged Montgomery with purposely, and with prior calculation and design, causing the Aggravated Murder of Tahlia Hendricks under R.C. § 2903.01. Three specifications were indicted with this charge: 1) the offense was committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender, to wit: Murder under R.C. § 2929.04(A)(3); 2) the offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender under § 2929.04(A)(5), and 3) the offender purposely caused the death of another who was under thirteen (13) 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 under R.C. § 2929.04(A)(9). *Id.* at pp. 1-2.

Count Three charged Montgomery with the Aggravated Murder of Tahlia Hendricks by purposely causing the death of an individual who was under the age of thirteen (13) at the time of the commission of the offense, in violation of R.C. § 2903.01. Specifications identical to those in Count Two were also indicted with Count Three. *Id.* at pp. 2-3.

Count Four charged Montgomery with the Aggravated Murder with prior calculation and design of Tyron Hendricks under R.C. § 2903.01. Count Four contained two specifications: 1) the offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender under § 2929.04(A)(5), and 2) the offender purposely caused the death of another who was under thirteen (13) 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 under R.C. § 2929.04(A)(9). *Id.* at p. 3.

Count Five charged Montgomery with the Aggravated Murder of Tyron Hendricks by purposely causing the death of an individual who was under the age of thirteen (13) at the time of the commission of the offense, in violation of R.C. § 2903.01. Specifications identical to those in Count Four were also charged with Count Five. *Id.* at p. 4.

Count 6, charged Montgomery with domestic violence - knowingly causing or attempting to cause physical harm to a family or household member, Tia Hendricks under R.C. § 2919.25. *Id.*

### **Pretrial**

Prior to trial, a hearing was held regarding trial counsel's motion for a continuance of the trial date. At the hearing, trial counsel requested the court push back the trial date because their mitigation expert, psychologist Dr. Bob Stinson, and mitigation specialist, Kelly Heiby, needed

additional time to prepare. Vol. IV, Tr. 4-5. Further, trial counsel requested funds for an additional mitigation expert in the area of sexual abuse “to address issues of sexual abuse as a child and the impact that played on Caron.” Vol. IV, Tr. 4. The court granted the continuance. Vol. IV, Tr. 6. On February 6, 2012, trial counsel again requested a continuance so that their mitigation experts would have ample time in preparing their mitigation evidence. Vol. V, Tr. 2-3.

### **Jury Waiver and Guilty Plea**

At the outset of his trial, Montgomery waived his right to a jury trial and entered a plea of guilty to all counts and specifications charged in the indictment. Vol. VI, Tr. 6; Vol. VII, Tr. 21. There was no jointly recommended sentence. Vol. VII at Tr. 10. The court conducted colloquies with Montgomery. He stated that he was taking the antipsychotic drugs Risperdal and Thorazine for depression. *Id.* at 4-5. After the colloquies, the trial court accepted Montgomery’s waiver of trial by jury and pleas of guilty. Vol. VI, Tr. 6; Vol. VII, Tr. 21.

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

Immediately upon the commencement of trial, Montgomery’s trial counsel voiced concern as to the volume and inflammatory nature of the photographs the prosecution planned to present to the court. *Id.* at 25. Trial counsel continued to object to the photographs throughout the prosecution’s presentation of the evidence. Vol. VII. The court overruled trial counsel’s objections. *Id.*

The prosecution’s sole witness was Detective Dana Croom of the Columbus Police Department. *Id.* at 29. Through Croom, the prosecution presented their entire version of events to the court.

Croom testified that Columbus Police officers were called to the rental office of Broadmeadows Apartments around 3:00 p.m. on November 26, 2010. Vol. VII, Tr. 30. Family

and friends of Tia Hendricks had gone to the rental office to request that the manager check on Tia in her apartment after she had not shown up for Thanksgiving dinner the day prior or to work that morning. *Id.* at 31. After gaining access to Tia's apartment, officers Coy and Kearney found Tia, Tahlia, and Tyron Hendricks deceased inside. *Id.* at 33. Testimony was presented that the bodies were cold and were concluded to have been deceased for awhile. *Id.* at 36. The bodies were located in the living room of Tia's apartment. Officers found Montgomery in the bedroom lying on the bed with a knife in his neck. *Id.* at 34-35.

Detective Croom testified that he spoke with Fred Taylor, who contacted 911 after the bodies were discovered and advised police that he had been with Tia the night of November 24 and into the early morning hours of November 25, 2010. *Id.* at 38-39. The two had engaged in sexual relations, after which Tia left Taylor's home around 3:30 a.m. *Id.*

Croom also testified about another 911 call received by the police from Tia Hendricks around 7:30 a.m. on November 25. According to Croom, the dispatcher who received the call heard Tia saying "Caron, Caron", but Tia hung up before the dispatcher could ask for her location. *Id.* at 40-41. A triangulation of the call resulted in an incorrect address associated with the call. *Id.* Despite defense's objection, a recording of Tia's 911 call was played in open court, twice. *Id.* at 43.

Evidence of the crime was presented through the prosecution's power point presentation and admission of over 450 photographs capturing the scene, the apartment, the bodies, Tia's car, and evidence collected by the Columbus Police Department. *Id.* at 54-161. Trial counsel objected to each of the photographs as they were presented to the panel. Vol. VII. Detective Croom testified as to the investigator's collection of the evidence, photographing of the scene, and to the testing of DNA. *Id.*

The detective next testified to the findings in the coroner's report. Evidence was presented that Tia and the children died as a result of fatal stab wounds to the neck area. Vol. VII, Tr. 147, 157, 158. Tia suffered 23 stab wounds and numerous defensive wounds to her hands and arms. *Id.* at 148-149. 14 wounds were found on Tahlia, including 9 defensive wounds. *Id.* at 155. Tyron was found with two stab wounds to the neck area. *Id.* at 159.

### **The Verdict**

The panel unanimously found that the evidence produced by the State convinced the panel beyond a reasonable doubt as to Montgomery's guilt as to each essential element of all counts and specifications therein. *Id.* at 169.

### **The Mitigation Phase**

The mitigation phase commenced immediately upon the panel's rendering of the guilty verdicts. In its opening statement, trial counsel explained they would be presenting evidence to show that Montgomery lived a chaotic life fraught with substance abuse, physical violence, and behavior problems. Vol. VIII, Tr. 174-76.

Trial counsel elaborated in opening statement saying that the panel would be provided with evidence that Montgomery had been "brutally raped" and "sexually abused" as a young child and never received treatment. *Id.* at 174. Trial counsel reiterated this point in closing argument. *Id.* at 327. Despite pointing out the sexual abuse of Montgomery to the panel, trial counsel failed to present any expert testimony, or any testimony, about this fact during their mitigation case in chief.

Several family members testified as to Montgomery's positive role in their lives. Two of his sons testified that their father financially supported them and made efforts to be involved in their lives and to provide them with advice. *Id.* at 180-86, 192-93, 198. Both sons testified that

they loved their father, and that he could continue to exert a positive influence in their lives from prison. *Id.* at 184, 198. Other family members provided insight into the dynamics of Montgomery's family and the culture in which he was raised. Montgomery's brother and cousin testified as to his mother, Carol's, addiction to crack cocaine. Tanika Montgomery testified about the culture of poverty, drug abuse, and verbal abuse in the Montgomery family. *Id.* at 230-238.

Two former Franklin County Children's Services social workers who had worked with Montgomery during his early teenage years testified about the children service's system in general and about their memories of Montgomery and his situation. *Id.* at 246, 249-55, 272-85. Trial counsel was contacted by Roberta Thomas and Tim Brown just days before trial when they called counsel and indicated that they had known Caron years prior and would be willing to testify on his behalf. *Id.* at 244-45, 269-70.

Roberta Thomas worked with Montgomery while he was under the supervision of Franklin County Children's Services after being removed from his mother's care and was living in the cottages of Franklin Village. *Id.* at 246. Thomas testified that the Children's Services staff failed Montgomery in several respects. Montgomery was treated as the child "nobody really wanted to deal" with. *Id.* Montgomery was also failed by his own mother. Carol did not participate in the program as she was expected to. *Id.* at 249-51. Montgomery was often rewarded with weekends at home for good behavior, but Carol, numerous times, neglected to pick him up. *Id.* at 252. Montgomery acted out as a teenager because of a lack of parental guidance and discipline and a chaotic family life. *Id.*

Tim Brown testified that Montgomery was a good kid in comparison to many others in the program. *Id.* at 272. Brown echoed Thomas's testimony that Montgomery's mother was not adequately involved or interested in her son's improvement. *Id.* at 273. Montgomery was

released from the program despite a psychologists' adamant position that he was not ready for release. *Id.* at 283. Both social workers agreed that Montgomery had been abandoned by both his mother and Children's Services. *Id.* at 255, 285.

During the State's cross examination of Tim Brown, the State pointed out that Brown's name did not appear in any of the Children's Services records provided by the defense in discovery. *Id.* at 287. In response to the State's continued questioning into the content of the Children's Services records, Brown explained that he had not viewed the records. In his position at Franklin Village, he did not have privilege to the records. *Id.* at 289.

Montgomery gave an unsworn statement during the mitigation phase during which he expressed deep remorse for the murders of his family. *Id.* at 299-301. He acknowledged the number of people hurt by the events and apologized to all involved and requested the panel allow him the opportunity to continue to be a father to his children from prison. *Id.* at 300. Additionally, Montgomery apologized to Tia's mother for breaking the trust she had instilled in him to care for her daughter and family. *Id.* at 301. Montgomery has not denied that he committed these crimes.

In rebuttal, the prosecution moved to admit the Children's Services records provided by the defense in discovery. *Id.* at 302. Trial counsel objected on the grounds that the Children Service's records would not actually rebut the witnesses' testimony since the witnesses did not engage in the preparation of the reports nor were they privy to their contents. *Id.* at 302-03. Initially, the court denied the prosecution's request to admit the entire records and indicated that the prosecution would be permitted only to introduce a limited portion of the records to support the assertion that Montgomery had met with a psychologist. *Id.* at 304-305. Trial counsel later withdrew their objection to the introduction of the Children's Services records and introduced,

along with the prosecution, the entire volume of 126 pages, removing only two pages, as Joint Exhibits 1 and 2. *Id.* at 315.

### **Merger and Sentencing**

The trial court found that the doctrine of merger applied, and merged Counts two and three both pertaining to Tahlia Hendricks and Counts four and five, pertaining to Tyron Hendricks for sentencing purposes. *Id.* at 354-55. The court also merged the specifications for course of conduct. *Id.* After merging, the Court considered four aggravating circumstances against the mitigating factors: One specification for the purposeful killing of two or more persons, two specifications as to the killing of a person under the age of 13, and one specification as to the offense being committed for the purpose of escaping detection, apprehension, trial, or punishment. Verdict, May 15, 2012 at Tr. 2. The Court found that these aggravating factors outweighed the mitigating factors beyond a reasonable doubt and imposed the sentence of death. Vol. IX at Tr. 14.

## **Proposition of Law No. 1**

When the State fails to introduce sufficient evidence of particular charges and there is not substantial evidence upon which a jury can conclude that all elements have been proven beyond a reasonable doubt, a resulting conviction deprives a capital defendant of substantive and procedural due process. U.S. Const. amends. VI, VIII, XIV; Article I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.

### **A. Aggravated murder charge**

Caron Montgomery was charged with six counts of Aggravated Murder relating to the deaths of Tia, Tahlia, and Tyron Hendricks. Indictment at pp. 1-5. Counts Two and Three of the indictment charged Montgomery with the aggravated murder of ten-year-old Tahlia Hendricks. *Id.* at pp. 1-3. The indictment contained three specifications with counts two and three. *Id.* For a conviction of aggravated murder of Tahlia and the first specification, the State was required to prove that Montgomery purposely and with prior calculation and design caused the death of Tahlia Hendricks under O.R.C. § 2903.01(A), and that the offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by Montgomery, to wit: the Murder of Tia Hendricks. *Id.* at p. 2.

### **B. Sufficiency of the evidence.**

The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970); *See also State v. Adams*, 62 Ohio St. 2d 151, 404 N.E.2d 144 (1980); *State v. Miclau*, 167 Ohio St. 38, 146 N.E.2d 293 (1957); R.C. § 2901.05(A). When a defendant is charged with any statutory aggravating circumstance set forth in R.C. § 2929.04(A)(1) through (8), it “must be charged and proved beyond a reasonable doubt.” *See, State v. Wogenstahl*, 75 Ohio St. 3d 344, 662 N.E.2d 311, syl. ¶ 1 (1996). The test for determining whether the trial evidence was sufficient to establish guilt

beyond a reasonable doubt is whether there was “substantial evidence upon which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt.” *State v. Eley*, 56 Ohio St. 2d 169 syll., 383 N.E.2d 132 (1978). In examining claims based upon insufficient evidence a reviewing court must ask whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). See also *Adams*, 62 Ohio St. 2d at 153, 404 N.E.2d at 146; *Miclau*, 167 Ohio St. at 41, 146 N.E.2d at 296. A conviction based upon insufficient evidence violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson*, 443 U.S. at 316.

**C. Manifest weight of the evidence.**

In assessing the manifest weight of the evidence, this Court must examine the entire record and determine whether the evidence produced attains the high degree of probative force and certainty required for a criminal conviction. This inquiry is separate from the examination for sufficiency of the evidence. This review must be directed toward a determination of whether there is substantial evidence upon which a trier of fact could reasonably conclude that all of the elements have been proved beyond a reasonable doubt. *State v. Eley*, 56 Ohio St. 2d 169, 172, 383 N.E.2d 132, 134 (1978); *Glasser v. United States*, 315 U.S. 60, 80 (1942). Substantial evidence is more than a mere scintilla. See *United States v. Orrico*, 599 F.2d 113, 117 (6th Cir. 1979). It is evidence affording a substantial basis of fact from which the fact at issue can be reasonably inferred. *Id.*

A claim that a verdict is against the manifest weight of the evidence requires the reviewing court to review the entire record, weigh the evidence and all reasonable inferences,

consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Scott*, 101 Ohio St. 3d 31, 36, 800 N.E.2d 1133 (2004); *see also State v. Thompkins*, 78 Ohio St. 3d 380, 387, 678 N.E.2d 541, 547 (1997), *quoting State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717, 720-21 (1983).

#### **D. Argument**

- 1. There was Insufficient evidence to prove Montgomery caused Tahlia Hendrick's death with the purpose of escaping detection, apprehension, trial, or punishment for the murder of Tia Hendricks.**

In order to convict Montgomery for the aggravated murder of Tahlia Hendricks with the escaping detection, apprehension, trial, or punishment specification, the State was required to prove not only that Montgomery killed Tia Hendricks first in time, but that he killed Tahlia with the purpose of escaping detection for the murder of Tia. Indictment at p. 2.

The State presented evidence in Montgomery's case mostly concerning the scene of the crime itself. Much of the evidence was introduced through numerous photographs taken during the investigation. *See* Vol. VII. The State introduced evidence that three individuals were found deceased in their home, and that Montgomery was found in the apartment as well. *Id.* at 33-34. The State briefly explained the causes of death for each individual. *Id.* at 148, 155, 157. Assuming *arguendo* that the State's evidence was sufficient to support the claim that Montgomery was guilty of the homicides, the State also had to prove the specification that Montgomery caused the death of Tahlia as a means of escaping detection, apprehension, trial, or punishment for the death of Tia. Indictment at p. 2.

The State presented no evidence that Montgomery's purpose in killing Tahlia was to escape detection, apprehension, trial, or punishment for the murder of Tia. In fact, there was

absolutely no evidence presented that Tia was killed before Tahlia, which was necessary to prove this specification. The State made only one mention of the escape specification and that was in closing argument at the sentencing phase when the State listed the aggravating factors which should be given weight by the panel, including, "the weight to be given to the fact that you would kill a ten year old to escape detection, trial, or punishment for killing of the mother." Vol. VIII, Tr. 342. However, prior to this simple argument to the panel, the State presented no evidence that the death of Tia occurred first in time or that Tahlia's death was a means to escape detection, apprehension, trial, or punishment. Without such evidence, Montgomery's guilt cannot be proven beyond a reasonable doubt on that specification. The three judge panel, in their sentencing opinion, stated that they did give weight to the fact that Tahlia was killed in order to escape detection for Tia's murder. Sent. Op. at p. 6. However, since there was no basis of fact for the panel to have found Montgomery guilty of that specification, no weight should have been given to this specification at all in sentencing.

The State's case was insufficient to prove specification one under counts two and three. The panel improperly considered the specification in sentencing. Resultantly, Montgomery's aggravated murder conviction as well as his death sentence, violate his rights to substantive and procedural due process. U.S. Const. amends. VIII, XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20.

**2. Montgomery's conviction was against the manifest weight of the evidence**

In assessing the manifest weight of the evidence, this Court must examine the entire record and determine whether the evidence produced attains the high degree of probative force and certainty required for a criminal conviction. This Court must review the credibility of the

evidence submitted to support Montgomery's conviction when reaching this determination. *Thompkins*, 78 Ohio St. 3d at 387, 678 N.E. 2d at 547.

The panel clearly lost its way when it found Montgomery guilty of the aggravated murder of Tahlia with the purpose of escaping detection, apprehension, trial, or punishment for the murder of Tia. The panel was overwhelmed with photographic evidence of the crime scene itself. *See*, Proposition of Law No. 5; Vol. VII. However, no evidence was presented to the panel as to Montgomery's purpose in killing Tahlia or to the order in which the deaths occurred. Without such evidence, the panel erred in finding Montgomery guilty beyond a reasonable doubt of aggravated murder with this specification.

As outlined above, the only mention that Montgomery caused the death of Tahlia in order to escape detection, apprehension, trial, or punishment for killing Tia was the State's argument to the panel that they consider this fact in weighing the aggravating circumstances. Vol. VII, Tr. 342. There was simply no evidence upon which the panel could have determined that Montgomery caused Tahlia Hendrick's death in order to escape detection, apprehension, trial, or punishment for the murder of Tia. This Court should find that the State's evidence of the order of the homicides and the purpose of Tahlia's murder was essentially nonexistent. The single mention by the State of the specification in its closing argument was uncorroborated by evidence and cannot sustain an aggravated murder conviction for the purpose of escaping detection, apprehension, trial, or punishment.

#### **E. Conclusion.**

There was insufficient evidence that Montgomery caused the death of Tahlia Hendricks in order to escape detection, apprehension, trial, or punishment for causing the death of her mother, Tia Hendricks. Moreover, a review of the entire record demonstrates that Montgomery's

conviction for aggravated murder with this specification was against the manifest weight of the evidence and violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson*, 443 U.S. at 316. His conviction on the aggravated murder charge with the escape specification and his death sentence must be vacated.

## Proposition of Law No. 2

A jury waiver and guilty plea are not made knowingly, intelligently and voluntarily when the capital defendant is medicated at the time he waives his rights and the full panoply of rights he is giving up is not explained to him. U.S. Const. amends. VI, VIII, XIV; Article I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.

Montgomery signed both a waiver of his right to a jury trial and plea of guilty to the indictment. (Waiver of Trial By Jury, May 7, 2012; Vol. VI, Tr. 6; Entry of Guilty Plea, May 7, 2012; Vol. VII, Tr. 21). The trial court conducted superficial colloquies with Montgomery after he signed the jury waiver and guilty plea. The trial court erred in accepting Montgomery's waiver of his Sixth Amendment right to a jury trial, followed by his guilty plea, because his waiver and plea were not entered into knowingly, intelligently and voluntarily.

### Waiver of trial by jury

Trial by jury is the regular, and, by far, the preferable mode of disposing of issues of fact in felony criminal cases. *Patton v. United States*, 281 U.S. 276, 312 (1930). The trial court must jealously preserve this right. *Id.* A criminal defendant may waive a constitutional right as long as the waiver is voluntary, knowing, and intelligent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Whether there is "an intelligent, competent, self-protecting waiver of a jury trial by an accused must depend upon the unique circumstances of each case." *Adams v. United States ex. rel. McCann*, 317 U.S. 269, 278 (1942). Factors to be considered include "the background, experience, and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

On April 4, 2011, the Notification of Capital Case Three Judge Panel Assignment had been filed, assigning Judge Sheeran and Judge Sheward to the case, along with Judge Reece as the presiding judge. On May 7, 2012, the trial court stated that the court had been advised that there was going to be waiver of trial by jury. Vol. VI, Tr. 2. Trial counsel presented the trial

court with a written waiver. The trial court asked trial counsel if they had explained to Montgomery the rights that he was relinquishing to which they replied in the affirmative. Vol. VI, Tr. 3. The trial court asked trial counsel their opinion about Montgomery's competence.

THE COURT: At this time do you believe Mr. Montgomery to be mentally competent?

MS. DIXON: Yes, Your Honor.

THE COURT: Do you believe he understands and knows what he's doing here today?

MS. DIXON: Yes, he does, Your Honor.

Vol. VI, Tr. 3-4.

Relying on trial counsel's assessment of their client's competence is not unailing. In the ABA Guidelines it is set forth that "[c]ounsel's own observations of the client's mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions \*\*\* that could be of critical importance." *American Bar Association Guidelines for the Appointment of Counsel in Death Penalty Cases* (Rev'd Ed. 2003) at 956-57 (footnote omitted).

The trial court next asked Montgomery for his opinion on his own competence.

THE COURT: Have you ever been found to be mentally ill or mentally incompetent?

THE DEFENDANT: Not that I know of.

THE COURT: Okay. Are you currently under the influence of drugs?

THE DEFENDANT: Thorazine and Risperdal.

THE COURT: Those are prescribed by a medical doctor?

THE DEFENDANT: Yes, sir.

THE COURT: Are you currently under the influence of alcohol?

THE DEFENDANT: No, sir.

THE COURT: What are you taking those medications for, sir?

THE DEFENDANT: For mental illness.

THE COURT: For mental illness?

THE DEFENDANT: Yes, sir.

THE COURT: What is the nature of this mental illness?

THE DEFENDANT: Depression.

THE COURT: Depression. All right. Other than depression, have you been diagnosed with any other mental issues?

THE DEFENDANT: No.

Vol. VI, Tr. 4-5.

The trial court explained to Montgomery that by waiving jury he was electing to have the case heard by a panel of three judges and those judges would decide whether he was guilty or not and if he was found guilty, those three judges would determine his sentence. *Id.* at 3. The judge also explained that Montgomery had a right to a jury trial which meant that twelve jurors would decide whether he was guilty and if he was found guilty that the jury would determine his sentence. *Id.* at 5-6. However, at no time did the trial court explain to Montgomery that it would only take one of the twelve jurors voting against conviction for him to be found not guilty. The trial court also failed to explain to Montgomery that if he was found guilty by a jury that it would only take one juror voting against the death penalty for him to receive a sentence less than death. *State v. Brooks*, 75 Ohio St. 3d 148, 661 N.E.2d 1030, 1042 (1996). The trial court did not explain to Montgomery the appellate rights he would be forgoing by waiving a trial by jury including any voir dire and instructional issues.

Nothing in the record indicates that an expert evaluation of any effects that the medications had on Montgomery was ever conducted. Both Thorazine and Risperdal are

antipsychotic medications.<sup>1</sup> An expert opinion on the effects of the medications on Montgomery was necessary, especially given that he was giving up critical rights and facing the death penalty as a possible sentence. The trial court cannot merely rely on the opinions of the attorneys and the person who is being administered the medication to give an accurate assessment of the effects of such medications.

The trial court basically asked trial counsel and Montgomery whether Montgomery was competent to waive his right to a trial by jury. More process is due in a capital case where the defendant's life is at stake, yet in this case there was barely any process. See, *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 292 (1998) (five Justices recognized a distinct "life" interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests.).

This Court has held that a trial court "must insure that the accused's decision to waive such right is made with a sufficient awareness of the relevant circumstances and likely consequences of his waiver." *State v. Ruppert*, 54 Ohio St. 2d 263, 271, 375 N.E.2d 1250, 1255 (1978) (citing *Brady v. United States*, 397 U.S. 742, 748 (1970)). With the waiver of trial by jury, the trial court did not engage in a sufficient colloquy with Montgomery nor did it adequately probe for information about the medications he was taking for an effective waiver.

### **Guilty plea**

Twenty minutes after the jury waiver occurred on May 7, 2012, trial counsel told the three-judge panel that a guilty plea was being entered to the charges and specifications. Vol. VII, Tr. 6. The prosecutor stated on the record that there was "no jointly recommended sentence in this case." *Id.* at 10.

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<sup>1</sup> <http://www.nlm.nih.gov/medlineplus/druginfo/meds/a694015.html>  
<http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682040.html>

The trial court again asked trial counsel's opinion on Montgomery's competence.

JUDGE REECE: At this time do you believe Mr. Montgomery to be mentally competent and do you believe he understands and knows what he's doing here today?

MS. DIXON: Yes, Your Honor.

*Id.* at 11-12.

As previously stated, relying on trial counsel's assessment of their client's competence is not the end-all to finding the waiver valid. *ABA Guidelines* at 956-57 (footnote omitted).

Next, the trial court simply asked Montgomery a few superficial questions about the medication he was taking when the guilty plea was entered.

JUDGE REECE: \*\*\* Have you ever been found to be mentally ill or mentally incompetent?

THE DEFENDANT: No, sir.

JUDGE REECE: Are you currently under the influence of drugs?

THE DEFENDANT: Just Risperdal and Thorazine.

JUDGE REECE; Alcohol?

THE DEFENDANT: No, sir.

JUDGE REECE: And the prescription drugs, I asked you about that a little earlier this morning, those are prescribed by a medical doctor?

THE DEFENDANT: Yes, sir.

JUDGE REECE: My understanding is you are taking that for depression, correct?

THE DEFENDANT: Yes, sir.

Vol. VII, Tr. 12-13.

In other capital cases before this Court in which a guilty plea was entered, the defendants had been evaluated and the medications they were taking were taken into account. In *State v.*

*Ketterer*, 111 Ohio St. 3d 70, 855 N.E.2d 48 (2006), the capital defendant was taking psychotropic medication. *Id.* at 76, 855 N.E.2d at 76. In finding *Ketterer* competent, the trial court had the report from psychologist Dr. Hopes on which to rely. Dr. Hopes made an expert review of the medication *Ketterer* was receiving in reaching her conclusion. *Id.*

In *Ketterer*, this Court determined that “[t]he fact that a defendant is taking antidepressant medication or prescribed psychotropic drugs does not negate his competence to stand trial.” *Id.* (citations omitted). However, as support, the trial court had an expert opinion on *Ketterer*’s competency that included an assessment of the medications he was taking.

In *State v. Mink*, 101 Ohio St. 3d 350, 805 N.E.2d 1064 (2004), the defendant wanted to plead guilty to the indictment, waive counsel and ask for the death penalty. *Id.* at 354, 805 N.E.2d at 1071. In addition to an independent psychologist finding *Mink* competent, the trial court ordered two more competency evaluations. *Id.* This Court found that both experts were aware of the medication *Mink* was receiving and factored that into their assessments of *Mink*’s competency. *Id.* at 355, 805 N.E.2d at 1072.

After the experts’ competency evaluations, the trial court questioned *Mink* about the medications he was taking. “The trial court asked *Mink*, ‘Are you under the influence of any drugs, alcohol, or any other medication that in any way would affect your ability to understand what we’re doing here today or what I’m saying to you and to which you are responding?’” *Id.* at 355-56, 805 N.E.2d at 1072. This Court determined that “the trial court not only *relied upon the written competency evaluations* but received *Mink*’s own assurances that his ability to understand the proceedings was not adversely affected by any prescription medication that he was taking.” *Id.* at 356, 805 N.E.2d at 1072 (emphasis added). This Court also held that “Additional inquiry is necessary into a defendant’s mental state once a defendant seeking to enter

a guilty plea has stated that he is under the influence of drugs or medication.” *Id.* at 361, 805 N.E.2d at 1076.

Nothing in the record indicates that an expert evaluation of any effects that the medication had on Montgomery was ever conducted. An expert opinion was necessary when the defendant was giving up critical rights especially when facing the death penalty as a possible sentence. The trial court cannot merely rely on the person who is being administered the medication to give an accurate assessment of its effects. Even so, in this case the trial judge did not ask any probing questions of Montgomery.

The trial court basically asked trial counsel and Montgomery whether Montgomery was competent to enter a guilty plea to the entire capital indictment. More process is due in a capital case. *See, Woodard*, 523 U.S. at 272.

The trial court erred by accepting a plea without first determining whether Montgomery was competent to relinquish his constitutional rights and whether he did so knowingly, intelligently and voluntarily.

### **Conclusion**

The trial court had an obligation to fully apprise Montgomery of the rights he was giving up by waiving a trial by jury and pleading guilty to the capital indictment. Further, the trial court was obligated to make a full inquiry into Montgomery’s mental state and the effect of the medications on his ability to make a knowing, intelligent, and voluntary waiver of jury and guilty plea, but the court failed to do so. The trial court did not ask the relevant questions to determine whether Montgomery was capable of understanding what he was giving up. The unique characteristics of the defendant must be considered and explored. The trial court did not ask the relevant questions to determine whether Montgomery was capable of understanding what he was

giving up. The court did not consider the totality of the circumstances surrounding the jury waiver and plea. This Court must reverse the trial court's acceptance of Montgomery's jury waiver and guilty plea and remand this case for a new trial.

### Proposition of Law No. 3

The defendant's right to the effective assistance of counsel is violated when counsel's performance during a capital trial is deficient to the defendant's prejudice. U.S. Const. amends. VI, VIII, and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20.

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

The Sixth Amendment right to counsel applies to the states through the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963). The test for whether that right to counsel has been violated is found in *Strickland v. Washington*, 466 U.S. 668 (1984). The reviewing court must determine if counsel's performance was deficient. *Id.* at 687. If counsel's performance was deficient, the court must determine if the deficiency prejudiced the accused. *Id.* To establish prejudice, the accused need not establish outcome determinative error. *Id.* Instead, the accused is prejudiced if the reviewing court loses confidence in the fairness of the trial. *Id.*

Strategic choices by appointed counsel are virtually unassailable. *Id.* at 690. *Strickland* makes clear, however, that a reasonable investigation of both the facts and the applicable law is required before a court may deem counsel's choice strategic. *Id.* at 691. Further, under *Strickland*, appointed counsel in a criminal case has a "duty to advocate the defendant's cause" as well as "a duty to bring to bear such skill and knowledgeable as will render the trial a reliable adversarial testing process." *Id.* at 688. Federal courts have consistently recognized that *Strickland's* duties to advocate and to employ "skill and knowledge" include the necessity for trial counsel to object or otherwise preserve federal issues for review. *See e.g., Gravley v. Mills*, 87 F.3d 779, 785 (6th Cir. 1996); *Starr v. Lockhart*, 23 F.3d 1280, 1285 (8th Cir. 1994). *Cf.*

*Freeman v. Lane*, 962 F.2d 1252, 1259 (7th Cir. 1992) (appellate counsel ineffective for abandoning viable federal claim; cause and prejudice for default established).

When assessing the performance prong in a capital case, this Court is informed by the American Bar Association Guidelines for the Appointment of Counsel in Death Penalty Cases (ABA Guidelines). See *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). “The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover *all reasonably available* mitigating evidence ...” *Id.* (citation and internal quotation marks omitted with emphasis in original). And in reviewing Montgomery’s claim that relevant mitigation was not presented, “[the] focus [is] on whether the investigation supporting counsel’s decision not to introduce mitigating evidence ... was *itself reasonable*.” *Id.* at 523 (citations omitted and emphasis in original).

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

**A. Failure to object to confrontation and hearsay.**

Trial counsel failed to object to evidence that violated Montgomery’s rights under both Ohio R. Evid. 801(C) the Confrontation and Due Process Clauses. Detective Croom essentially

presented the state's entire case. Croom testified about conversations with Fred Taylor, who said Tia left his home at three in the morning on the 25<sup>th</sup> and about statements from family members who were concerned that Tia had not arrived as expected on Thanksgiving and that her car was parked in an unfamiliar location. Vol. VII, Tr. 39, 45-46.

Detective Croom testified as to statements from someone identified as Ms. Battle. According to Croom, this witness saw a black male getting out of Tia's vehicle and then walking "southbound and then Westbound behind her apartment." *Id.* at 47.

Detective Croom also testified to the results of the autopsies performed by the coroner, Dr. An., 145-160. Detective Croom testified that Dr. An performed the autopsies. *Id.* at 145. Detective Croom certainly neither performed the autopsy nor authored the autopsy reports, yet he testified about both. Vol. VII, Tr. 145; State's Exs. 5B, 6B, 7B.

Detective Croom testified to Dr. An's conclusions, including that the deaths were homicides, the causes of death of the victims, the number of stab and cutting wounds. *Id.* at 147-9; 155, 158-59. Detective Croom had absolutely no involvement in the autopsies of the victims yet he testified about everything from the photographs of the bodies taken by the Crime Scene Search Unit and coroner's office to the specifics of the autopsies. *Id.* at 145. For example, Detective Croom testified that Tia Hendricks had forty-six wounds with the fatal wound being the one to her neck. *Id.* at 153. Detective Croom next testified that Tahlia Hendricks had fourteen wounds with the fatal ones being to her neck. *Id.* at 157. Again, Detective Croom did not perform the autopsy and should not have testified about it. With Tyron Montgomery, Detective Croom testified that Dr. An ruled the cause and manner of death were "homicide and laceration to the neck." *Id.* at 158. Detective Croom did not have personal knowledge about those findings

and should not have testified to such. This testimony was in violation of *Crawford v. Washington* 541 U.S. 36 (2004), and trial counsel were ineffective for failing to object.

Trial counsel's failure to object to evidence that violated Montgomery's rights under both Ohio R. Evid. 801(C) the Confrontation and Due Process Clauses. Because Montgomery's trial counsel rendered ineffective assistance of counsel, this case should be remanded for a new trial.

**B. Pleading guilty without seeking a penalty less than death.**

Montgomery was indicted for aggravated murder with death specifications. That meant, if found guilty, Montgomery could be sentenced to death. Montgomery's attorneys advised him to plead guilty to the entire indictment, even though they obtained no assurance, or even an indication, that death would not be imposed. There are other capital cases where defendants have pled guilty without an agreed disposition of life, but that was against counsel's advice. *See, e.g., State v. Fitzpatrick*, 102 Ohio St. 3d 321, 810 N.E.2d 927 (2004); *State v. Mink*, 101 Ohio St. 3d 350, 805 N.E.2d 1064 (2004). Trial counsel's decision to have Montgomery plead guilty to the whole indictment without an agreement that a life sentence be imposed was ineffective and deprived Montgomery of his right to due process.

On May 7, 2012, the trial court stated:

JUDGE REECE:       \*\*\*

Mr. Montgomery earlier this morning entered a waiver of trial by jury. That has been filed.

Vol. VII, Tr. 5, Monday Morning Session.

Trial counsel affirmed this by stating on the record:

MR. WEISMAN:       \*\*\*

But the bottom line is a guilty plea is about to be entered, not - - not just to the offenses and all of the offenses but to all the specifications as well, all of the aggravating circumstances...

Vol. VII, Tr. 6.

Trial counsel continued by stating very harmful facts, ones that would not help to achieve a life sentence for Montgomery, to the panel at this point when objecting to the admission of photographs from the State.

MR. WEISMAN: \*\*\*

I mean, the reality is this: Based on the specifications in this case - - counts two and three are the same victim, same specifications; counts four and five are the same victim, same specifications - - are all established in reality through the coroner's report itself. It's going to show multiple victims. It's going to show a cause of death that obviously wasn't a sudden act, so there would have been one act after another, supporting the idea that one was done to cover up the other, and it will show the ages of those two victims that are under the specifications."

Vol. VII, Tr. 7-8.

The prosecutor and the trial court told Montgomery several times that the death penalty was still on the table with his guilty plea.

MR. STEAD: \*\*\*

The defendant is represented today in open court by Mr. Weisman and Ms. Dixon, and the understands that on his change in plea - excuse me, on count one, he faces a maximum sentence of 15 years to life; on counts two through five, he faces penalties of death, life imprisonment with parole - without parole eligibility, life imprisonment with parole eligibility after 25 full years, or life imprisonment with parole eligibility after 30 full years; and on count six, he faces 18 months.

There is no jointly recommended sentence in this case.

Vol. VII, Tr. 10

The trial court continued to let Montgomery know that the death penalty was a sentence that he could receive.

JUDGE REECE: And if we find you guilty of those specifications, we will then have to determine whether or not - what the penalty would be in this case; do you understand that?

THE DEFENDANT: Yes, sir.

JUDGE REECE: And that penalty can include the death penalty; you understand that?"

THE DEFENDANT: Yes, sir.

Vol. VII, Tr. 15-16

Again the trial court stated to Montgomery

JUDGE REECE: You are also entering pleas of guilty to counts two through five of the indictment, that being aggravated murder with death penalty specifications?

THE DEFENDANT: Yes, Your Honor.

JUDGE REECE: You understand that?

THE DEFENDANT: Yes, sir.

JUDGE REECE: Where the maximum penalty is the death penalty. Maximum fine is up to \$25,000 on each count?

THE DEFENDANT: Yes, sir."  
Vol. VII, Tr. 16-17

At no time did the prosecutor or the court indicate that the plea of guilty would be mitigating, that a life sentence had been agreed upon, or that if a guilty finding was made that Montgomery could withdraw his plea and proceed with a trial. No assurances were made to Montgomery that he would receive any benefit from his guilty plea. In fact, the panel gave "negligible weight" to Montgomery's guilty plea as a mitigating factor. (Sent. Op. at 8). The only party who gained an advantage by the plea of guilty was the State.

The United States Supreme Court has determined that the ABA Guidelines provide the standards to be used in evaluating counsel's effectiveness in a capital case. *Wiggins v. Smith*, 539 U.S. 510 (2003) (citing the 1989 ABA Guidelines). The "standards merely represent a

codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases ....” *Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003). According to the ABA Guidelines, when evaluating whether the capital defendant should plead, “If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client’s trial rights.” *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 1045 (Rev’d ed. February 2003).

In Montgomery’s case, his attorneys did not secure an agreement with the state on the punishment to be imposed. This is not an unheard of practice. In *State v. Haight*, 98 Ohio App. 3d 639 (10th App. Dist. 1994) (discretionary appeal not allowed at 71 Ohio St. 3d 1500 (1995)), the defendant was charged with capital murder. The defendant waived a jury and the case proceeded before a three-judge panel. The defendant was found guilty on all counts. *Id.* at 655. Following the conclusion of the mitigation phase, the prosecutor told the court that prior to trial an arrangement had been entered into between the defense and the prosecution. *Id.* at 657. This arrangement entailed trial counsel approaching the prosecutor and suggesting that if there was a conviction to the charges, if the prosecutor would agree to ask the court not to consider sentencing the defendant to death, the defendant would waive his right to a jury trial. *Id.* The arrangement was agreed to by the prosecutor and the victim’s family. *Id.* Despite this agreement, the three-judge panel sentenced the defendant to death. *Id.* at 658.

On appeal, the court of appeals reversed the defendant’s convictions and sentences. *Id.* at 661. In ruling on trial counsel’s ineffectiveness, the court of appeals stated that trial counsel erred by failing to reveal the arrangement with the prosecutor until all of the evidence had been presented at the mitigation phase and they had rested. *Id.* at 662. The court stated that the

arrangement with the victim's widow was never actually in evidence to be weighed by the three-judge panel and the statement by the prosecutor requesting the panel "not to consider the penalty of death" was not evidence. *Id.* at 658, 662. The court faulted trial counsel for failing to put the victim's agreement to a sentence less than death into evidence. *Id.* The court also faulted trial counsel for "concealing [ ] the agreement with the prosecutor from the trial court at the time that a waiver of jury was being discussed in open court...." *Id.* The holding of this case is important because it demonstrates that trial counsel and the prosecution can, and do, enter into such agreements and the validity of the agreements is recognized by the courts.

Similarly, in *State v. Spivey*, 81 Ohio St. 3d 405, 692 N.E.2d 151 (1998), the capital defendant waived jury and pled no contest to the indictment. *Id.* at 408, 414, 692 N.E.2d at 156, 160. This Court found that the defendant received what he bargained for with respect to the plea namely:

"the state agreed not to make any recommendation concerning appellant's sentence and agreed not to vigorously challenge defense witnesses during the penalty phase unless the witnesses perjured themselves. \*\*\* Additionally, defense counsel knew that if the panel accepted the pleas of no contest, the panel could dismiss the R.C. § 2929.04(A)(7) death penalty specification pursuant to Crim. R. 11(C)(3). Therefore, the no contest pleas provided appellant with a chance to avoid the death sentence."

*Id.* at 418-19, 692 N.E.2d at 163.

However, there is no indication in the record in Montgomery's case that there were any plea negotiations at all. The prosecutor stated on the record that there was "no jointly recommended sentence in this case." Vol. VIII, Tr. p. 10. Yet, based on counsel's advice, Montgomery pled to the entire indictment and received a sentence of death from the three-judge panel. Vol. VII, Tr. 21; Vol. VIII, Tr. 362-63. In the absence of an agreement that the state would recommend that Montgomery receive a penalty less than death, counsel should have made

a guilty plea contingent upon a ruling that the sentence of death would not be imposed and if that ruling could not be made, that Montgomery could withdraw his plea of guilty.

It is not uncommon in cases where evidence of guilt is compelling and difficult to overcome that the defense in effect concedes guilt to the jury during the trial phase and focuses on developing a viable mitigation case. *See, e.g., State v. Hessler*, 90 Ohio St. 3d 108, 734 N.E.2d 1237 (2000). Trial counsel had mitigating factors to focus on here, such as Montgomery's depression, the fact that he endured a rape as a young child and his dysfunctional upbringing. Counsel failed to effectively present this information to the trier of fact.

Counsel made their motion to have Montgomery plead before conducting voir dire. Counsel did not question and assess the prospective jurors before ruling out a jury trial. Trial counsel should have calculated the attitudes of the prospective jurors on mitigation before advising Montgomery to plead guilty. The ABA Guidelines instruct defense counsel in a capital case to "devote substantial time to determining the makeup of the venire, preparing a case-specific set of voir dire questions, planning a strategy for voir dire, and choosing a jury most favorable to the theories of mitigation that will be presented." *ABA Guidelines*, Comment 10.10.2.

Montgomery was entitled to effective assistance of counsel under the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668 (1984). By advising their client to plead guilty to every count and specification in the indictment, counsel sacrificed Montgomery's rights to due process and a fair trial by an impartial tribunal on the issues of both culpability and punishment. There is nothing in the record to indicate that counsel took any steps to reach a sentence less than death prior to having Montgomery waive a jury trial and plead guilty. "Death is different because avoiding execution is, in many capital cases, the best and only realistic result possible"; as a

result, plea bargains in capital cases are not usually ‘offered’ but instead must be ‘pursued and won.’” *ABA Guidelines*, Comment 10.9.1 (quoting Kevin McNally, *Death Is Different: Your Approach to a Capital Case Must be Different, Too*, *The Champion*, Mar. 1984, at 8, 15).

Trial counsel acted unreasonably when they instructed and encouraged Montgomery to plead guilty to the whole indictment without securing an agreement with the State for a life sentence or have an agreement whereby Montgomery could withdraw his guilty plea if the court was going to sentence him to death. Counsel’s failure to protect Montgomery’s constitutional rights resulted in a death sentence. Montgomery’s rights to effective assistance of counsel and due process under the Sixth and Fourteenth Amendments were violated. Because Montgomery’s trial counsel rendered ineffective assistance of counsel, this case should be remanded for a new trial.

**C. Failure to object to Judge Sheward remaining on the case.**

Trial counsel brought up on the record after they rested their mitigation presentation that they had been informed about an issue involving Judge Sheward. Vol. VIII, Tr. 308. Specifically, trial counsel stated that in the previous week members of the media and people in the audience told them “that it appeared that Judge Sheward may have been asleep during part of the proceedings.” *Id.* Counsel stated that media personnel said that there was some video footage showing the Judge with his eyes closed. *Id.*

However, instead of effectively flushing out this issue, trial counsel immediately defended the Judge. Trial counsel stated that he had been in the Judge’s courtroom previously and the Judge was clearly paying attention to the proceedings and that counsel knows that the Judge has a habit of closing his eyes but not sleeping. *Id.* at 310. Counsel also added that he

knows that the Judge isn't sleeping because the Judge responds to objections and other things. *Id.* at 310-11.

It was ineffective for trial counsel to raise this issue and then just as quickly to negate it. Counsel should have called the media personnel to testify about the Judge's behavior and play the video footage showing the Judge in the state that appeared to onlookers that he was sleeping. *Strickland* 466 U.S. 668. Trial counsel were not zealously advocating for their client by failing to pursue this issue. If trial counsel thought it was a frivolous issue then they should not have raised it at all or face Rule 11 sanctions. Counsel did not state that it was a frivolous issue and as such, should not have backed away from it. If testimony and the video footage gave rise to a colorable claim then the Judge should have been removed from the three-judge panel.

Trial counsel were ineffective in failing to present evidence establishing that Judge Sheward was sleeping during the proceedings. Counsel had information from media personnel and others along with the knowledge that video footage existed showing the behavior. Counsel needed to present testimony and evidence supporting this claim to protect Montgomery's right to a fair trial before a fair tribunal. Montgomery was prejudiced by counsel's failure to protect his interest in being tried by a fair court.

**D. Failure to present testimony of a psychologist and sex-abuse expert.<sup>2</sup>**

While Montgomery waived a trial by jury and pled to the indictment, he did not want the death penalty. He did not waive mitigation therefore, he was pursuing a life sentence. Trial

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<sup>2</sup> Support for this claim lies in the transcript. However, Montgomery is cognizant of the holding in *State v. Lang*, 129 Ohio St. 3d 512, 541, 954 N.E.2d 596, 630 (2011) where this Court found that a claim involving ineffectiveness of counsel for not utilizing an expert required evidence outside the record and was not able to be resolved on direct appeal. (quoting *State v. Madrigal*, 87 Ohio St. 3d 378, 390-391, 721 N.E.2d 52, 65 (2000)).

counsel failed to present expert testimony that would have been critical for the panel to consider and weigh when determining the sentence.

Montgomery experienced a childhood that virtually guaranteed that he would be psychologically and emotionally scarred. A group of older boys gang-raped Montgomery when he was just four years old. Joint Ex. 2 p. 21, 31. He did not receive mental health counseling after being raped. *Id.* at pp. 21, 23, 31. Montgomery's family was described as "a cycle like [sic] of poverty and drug use and verbal abuse. . . .The cycle of nobody graduating from high school, people abusing drugs, cussing out your children, letting your children run wild." Vol. VII, Tr. 233. His biological father was entirely absent from his life. Joint Ex. 2 at p. 23. Montgomery's mother and step-father both had problems with drugs, including crack-cocaine. Vol. VIII, Tr. 218. His step-father was a drug dealer and a pimp. Joint Ex. 1 at p. 5. Montgomery's mother set no boundaries for him as a child, and he was often neglected entirely. Vol. VIII, Tr. 234, Joint Ex. 1 at p. 4.

In spite of the overwhelming amount of psychological mitigation testimony that could have been presented, no expert testified on Montgomery's behalf at trial. Trial counsel were ineffective for failing to present expert testimony. *Strickland* 466 U.S. 668, 686. Utilizing an expert is important to provide "psychological . . . insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability." *ABA Guideline* 10.11(F)(2). A psychological expert would have had a great deal to say on Montgomery's behalf. For example, research has repeatedly shown that experiencing abuse and neglect as a child greatly increases the risk of committing violent crime as a juvenile and as an

adult.<sup>3</sup> Abuse suffered as a child has also been shown to cause the victim to experience mental illnesses throughout their life, including depression, dissociative disorders, and posttraumatic stress disorder.<sup>4</sup>

During Montgomery's case-in-chief at the mitigation phase the sexual abuse he suffered as a child was never mentioned except for trial counsel referencing the records reflecting the sexual abuse during their opening and closing. Vol. VIII, Tr. 174, 327. Instead of presenting expert testimony, Montgomery's attorneys presented his troubled background through two former Franklin County Children's Services (FCCS) workers, Roberta Thomas and Timothy Brown. *See* Vol. VIII, Tr. 243-98. Thomas and Brown initiated contact with trial counsel after reading about Montgomery's case in the paper the week before trial. Vol. VIII Tr. 244-45. They testified regarding Montgomery's time in FCCS custody by "relying on (their) memories of events that occurred about 25 years ago," and they "provided no records to corroborate any critical statements." *Sent. Op.* at p. 8.

Trial counsel knew that Montgomery's traumatic childhood had a devastating effect on his life. Trial counsel retained psychologist Dr. Bob Stinson before trial. Vol. IV, Tr. 4. Trial counsel subsequently asked the trial court for additional funds for "an additional mental health expert to address issues of sexual abuse as a child and the impact that played on Caron." *Id.* Trial counsel then retained Dr. Howard Fradkin, who is an expert on childhood sexual abuse issues. Vol. V, Tr. 2. Dr. Fradkin's bill reflects that he did not review any records, and that he had a single interview with Montgomery that lasted approximately one hour. *See Motion for Attorney*

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<sup>3</sup> *See e.g.* English, D. J., Widom, C. S., & Brandford, C. (2004), *Another look at the effects of child abuse*, NIJ journal, 251, 23-24.

<sup>4</sup> *See generally* Springer, K. W., Sheridan, J., Kuo, D., & Carnes, M. (2007), *Long-term physical and mental health consequences of childhood physical abuse: Results from a large population-based sample of men and women*, *Child Abuse & Neglect*, 31, 517-530.

Fees of Isabella Dixon, 6/18/12, attachment from Dr. Fradkin. Because there is no evidence that trial counsel provided Dr. Fradkin with any records, he did not see how badly Montgomery's development was derailed. Neither Dr. Stinson nor Dr. Fradkin testified at Montgomery's mitigation phase.

When he was eleven years old, Montgomery weighed 200 pounds. Joint Ex. 1 at p. 6. He was acting out sexually in school by masturbating in class, exposing himself, and inappropriately touching teachers and other students. Joint Ex. 2 at p. 19. He was constantly being suspended from school. Joint Ex. 1 at p. 4. When this happened, his mother would lock him in her house or car by himself all day. *Id.*

When he was twelve years old, Montgomery was taken to DYS custody and was receiving counseling "because of his inappropriate sexual behavior." Joint Ex. 2 at p. 19. Notes from a counseling session with Carol, Montgomery's mother, in attendance reflect that:

When Caron was 4 years old, he was sexually molested by three older boys. His mother reported that since this incident, Caron has been oppositional and hard to discipline. His mother stated that she and Caron were in counseling for a year afterwards at Children's Hospital, however, FCCS records report that Caron had "no mental health counseling after he was sexually violated."

*Id.* at p. 21. Montgomery is also repeatedly described as being under-socialized and not having parental supervision or guidance. *Id.* at p. 13, 23.

The Sixth and Fourteenth Amendments to the United States Constitution, Section 39, Article II of the Ohio Constitution, Sup. R. 20 (III)(D) and O.R.C. § 2929.024 guarantee an accused in a capital case the use of experts. *Ake v. Oklahoma*, 470 U.S. 68 (1985). There is a "particularly critical interrelation between expert psychological assistance and minimally effective representation of counsel." *Beavers v. Balkom*, 636 F.2d 114, 116 (5th Cir. 1981) (quoting *United States v. Fessel*, 531 F.2d 1275, 1279 (5th Cir. 1976)). Courts recognize that

one of the functions of an expert in any case is to translate technical and esoteric subject matter for the trier of fact. *United States v. Griffith*, 118 F.3d 318 (5th Cir. 1997); *United States v. Walls*, 70 F.3d 1323 (D.C. Cir. 1995).

Trial counsel's decision not to present expert psychological testimony cannot be deemed part of any reasonable strategy. Counsel's mitigation presentation focused heavily on emphasizing Montgomery's troubled background. Providing expert testimony to explain how his background affected his life is integral to such a strategy. Further, Counsel did not investigate adequately and thus could not have made an informed decision. Counsel had records with abundant examples of how Montgomery was abused and his subsequent behavior, but they never gave these records, or any other records, to their sexual abuse expert. An attorney's performance is constitutionally deficient where they have not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background." *Wiggins v. Smith*, 539 US 510, 522 (2003); citing *Williams v. Taylor*, 529 U.S. 362, 396 (2000). A decision by an attorney is not a protected strategic decision where it is not supported by an adequate investigation. Counsel's investigation is inadequate when they do not provide their psychologist with necessary records. *Jells v. Mitchel*, 538 F. 3d 478, 493 (6th Cir. 2008). In *Jells*, counsel retained a psychologist who tested the capital defendant, but they did not provide the psychologist with records to review, and they were found ineffective for failure to adequately investigate the defendant's background. *Id.*

To demonstrate prejudice, a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The reasonable probability standard is lower than but-for causation or a showing that it's more-likely-than-not that counsel's error affected the

outcome of the trial. *Id.* at 693 (“[W]e believe that a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case”). The prejudice prong is satisfied if “there is a reasonable probability that at least one juror would have struck a different balance.” *Wiggins*, 539 U.S. at 537.

Montgomery was prejudiced by his attorney’s deficient performance. Expert psychological testimony could have provided a coherent explanation for how Montgomery was affected by the abuse he suffered. Montgomery received no treatment after he was gang raped as a child, and his mother isolated and neglected him. In spite of this, the State was able to persuade the court to place the onus on Montgomery for his disturbing behavior as a pre-teenager because no expert testimony was presented. For example, the State argued that Montgomery was placed with the worst children because he “sabotaged” his placement at Boys’ Village. Vol. VIII, Tr. 257, 325. This occurred when Montgomery was twelve years old. Joint Ex. 1 at p. 12. The court was persuaded by the State’s argument.

In its sentencing opinion, the court wrote that “while it is probably true that every life has some value, the net value of a particular life may be close to zero. . . . as the Defendant said in his unsworn statement, he was a mess-up, always in trouble.” Sent. Op. at p. 9. The panel dedicated one short sentence to the fact that Montgomery was raped as a child, simply acknowledging that it happened. *Id.* at p. 5. But it spent pages of its opinion disparaging Montgomery for behavioral problems he had as a juvenile. *Id.* at pp. 7-8. The absence of psychological testimony left no explanation about how Montgomery was affected by the abuse he suffered. Consequentially, the outcome of his capital trial was not reliable, and Montgomery was prejudiced.

**E. Failure to object to the use of Franklin County Children's Services records during cross-examination and failure to prepare Children's Services witnesses.**

**1. Failure to object.**

Trial counsel failed to object to the State's use of Franklin County Children's Services records for cross-examine Defense witnesses Roberta Thomas and Timothy Brown. These witnesses had worked for Franklin County Children's services and had interacted with Montgomery. Roberta Thomas provided valuable insight into Montgomery's childhood including the fact that his mother would not pick him up for home visits, she would not participate in counseling, and Thomas' belief that the Children Services department failed Montgomery. VIII, Tr. 245-250.

The state attacked Thomas' testimony using records of which Thomas clearly was not aware. In the state's second question on cross-examination they to refer to the records, asking if the records indicated Montgomery sabotaged his placement at Boys Village. *Id.* at 257. At that time Thomas indicated that she wasn't privy to the information in the records. *Id.* Trial counsel then did not object as the state used the records to paint Montgomery as being sneaky, uncooperative, disrespectful, manipulative, and physically aggressive. *Id.* at 260-263.

Timothy Brown, another former employee of Franklin County Children's Services testified on behalf of Montgomery during the mitigation phase. Brown testified as to his personal experiences with Montgomery as a child, including the fact that Montgomery was a "good kid in comparison to a lot of the kids that we had," and that he was respectful. *Id.* at 272. Brown also confirmed the testimony of Thomas regarding the fact that Montgomery's mother would often not pick him up for home visits. *Id.* at 273-274.

Like Thomas, the state attacked Brown on cross-examination using records of which Brown had no knowledge. In fact, Brown stated that he did not review any of the Children's Services records prior to testifying, and that he was not "privileged to those records." *Id.* at 288-289. Despite this, trial counsel continued to allow the state to question Brown about these records. *Id.* at 289, 291. Trial counsel finally objected to this line of questioning after the state questioned Brown about a report containing a recommended release date for Montgomery. *Id.* at 291. The trial court at that time sustained the objection but the damage was done. *Id.* at 292.

Trial counsel were ineffective for not objecting to the use of the records from Franklin County Children's Services for cross-examination of Roberta Thomas and Timothy Brown. Both witnesses indicated that they did not review the records and did not have access to them while they were employed. These were the only witnesses who could give any insight into Montgomery's childhood as trial counsel did not use an expert witness. Montgomery's counsel failed to object and allowed the state to demolish their witnesses credibility. Montgomery was prejudiced by counsel's failure to do so.

## **2. Failure to prepare.**

Trial counsel was ineffective for failing to prepare Thomas and Brown for cross-examination. In fact, trial counsel apparently never contacted the employees, and instead were sought out by them a mere four days before they testified. Vol. VIII, 244, 245. If trial counsel was not going to object to the use of the children's services records they should have prepared Thomas and Brown for the records potential use by the State.

### **F. Presenting antagonistic information to the panel.**

Montgomery's trial counsel provided constitutionally ineffective assistance of counsel with respect to a voice-mail message received from Montgomery's aunt. On May 14, 2012, at

10:25 am, court adjourned following the conclusion of the mitigation phase of the trial. Vol. III, Tr. 349. At 1:55 pm on May 15, 2012, the case was resumed in chambers with a specific issue from trial counsel. Trial counsel waived their client's presence and a situation was presented to the court and placed on the record. The presiding judge stated that one of Montgomery's trial counsel went to see him about this issue. Trial counsel stated that she talked to "one of [Montgomery's] aunts on the phone who was rather threatening and intimidating and was concerned about things." Vol. VIII, Tr. 349. Trial counsel stated that one of Montgomery's aunts "was concerned about things that had been said about her sister [Montgomery's mother] and demanded in a threatening way that [trial counsel] clear her sister's name..." *Id.* Additionally, trial counsel "checked her voice mail and there was a voice mail from another sister, another of Caron's aunts." *Id.* This message was received at 12:49 pm that day, May 15, 2012. *Id.* at 350.

Trial counsel then played the voice-mail message that was recorded on her cell phone for the three-judge panel. *Id.* The message was from Linda Montgomery. Linda stated that Montgomery's trial counsel were

"trying to slander my sister's name \*\*\* [m]y nephew was never raped at four. \*\*\* I don't get where y'all getting this mother fucking fucked-up information from and it's pissing me the fuck off. And my back has been broke and I can't even get down there but better believe I'll be there to save my sister's mother fucking name because it don't work like this. \*\*\* You trying to save this life. This life don't need to be saved if it's going to hurt the family. Fuck him. Now, get my sister's name cleared, and I mean that."

*Id.* at 350-51.

Trial counsel told the panel that the other phone call "was equally, forcefully threatening in terms of getting the sister's name cleared." *Id.* at 351.

While the trial court stated that the case had concluded since the panel was deliberating on the sentence, the deliberations had not concluded because a sentence had not yet been

imposed on Montgomery. *Id.* Given that, Montgomery was prejudiced by trial counsel presenting this antagonistic information to the panel. The messages from Montgomery's two aunts only worked to undercut information presented at the mitigation phase.

Beginning with opening statement at the mitigation phase, trial counsel presented information about Montgomery's mother and her dysfunction. Information was presented that his mother was an alcoholic, she was addicted to crack cocaine and suffered a crack-cocaine-induced stroke, Montgomery could do whatever he wanted when his mother was around, he was locked in a car and in a house, nobody graduated from high school in the household, there was verbal abuse in the home, when Montgomery was in DYS custody his mother would often not pick him up for visits, and Montgomery was raped at the age of four by more than one male. Vol. VIII, Tr. 327.

To present witnesses and records putting these issues before the panel as mitigation only to potentially completely diminish its credibility and effect by informing the court of the calls from Montgomery's aunts was ineffective and cannot be deemed strategic. The panel inquired of trial counsel whether she felt threatened or needed the sheriff's office to be watchful. *Id.* at Tr. 352. Trial counsel stated that she would handle the situation and tell Montgomery's aunts or anyone else that they can't make telephone calls like the ones that were made and would try to explain what they were doing. *Id.* There was no reason for trial counsel to place this harmful and damaging information before the panel. Trial counsel were not zealously advocating for Montgomery or effectively representing him, in fact they were undercutting the information they presented during the mitigation phase.

In *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000), the Sixth Circuit granted relief to the petitioner on an issue of ineffective assistance of counsel. At the trial and mitigation phases the

defense presented testimony from an expert, Dr. Fisher, to demonstrate that Combs lacked intent to commit the murder. However, the expert ended up testifying that Combs actually possessed the intent to commit the murder. The Sixth Circuit granted relief finding that

Although defense counsel presented substantial testimonial evidence that Combs was in fact intoxicated at the time of the shootings, this testimony was rendered worthless when the defense's own expert testified that Combs's intoxication did not legally excuse his crime. Furthermore, not only did Fisher's testimony destroy any hope of a successful intoxication defense, but it also helped the prosecution to establish one of the elements of its case in chief. Quite simply, this testimony was completely devastating to the defense, and counsel's decision to present it was objectively unreasonable.

*Id.* at 288. *See, Rickman v. Bell*, 131 F.3d 1150, 1160 (6th Cir. 1997) (trial counsel's portrayal of the defendant created "hostility toward the hated and violent freak" and was an "evisceration of the right-to-counsel that is guaranteed by the Sixth Amendment.").

There is a reasonable probability that, had counsel not presented the panel in Montgomery's case with the messages from Montgomery's aunts, the mitigation evidence would not have been diminished and the result of the mitigation phase would have been a life sentence. *Strickland*, 466 U.S. at 694. Trial counsel's actions were not competent assistance. *Id.* at 690.

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

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

#### Proposition of Law No. 4

Where the three-judge panel's weighing of the aggravating circumstances in determining Montgomery's sentence as memorialized in the sentencing opinion violated *State v. Cooley*, R.C. § 2929.03(D)(3) and R.C. § 2929.03(F), the sentence is void and must be vacated because the weighing process was erroneous. U.S. Const. amends. VI, VIII, XIV; Article I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.

The three-judge panel's sentencing decision as documented in the sentencing opinion is flawed by its weighing of the aggravating circumstances. Montgomery's case must be remanded for a new sentencing opinion.

In *State v. Cooley*, 46 Ohio St. 3d 20, 544 N.E.2d 895 (1989), this Court dealt with the issue of weighing aggravating circumstances when determining the sentence in a death penalty case. In *Cooley*, there were two aggravated murders. The trial court combined the aggravating circumstances from both aggravated murders and weighed them together against the mitigating factors. *Id.* at 38, 544 N.E.2d at 916. This Court held that was error because "when a capital defendant is convicted of more than one count of aggravated murder, the penalty for each individual count must be assessed separately. Only the aggravating circumstances related to a given count may be considered in assessing the penalty for that count." *Id.*, 544 N.E.2d at 916-17. When counts are merged for sentencing, the counts that remain must each be individually assessed.

The panel in this case merged counts two and three, with the State electing to proceed with count three for sentencing (Vol. IX at Tr. 5; Sent. Op. at p. 2), and counts four and five, with the State electing to proceed with count five for sentencing. (Vol. IX at Tr. 5; Sent. Op. at p. 2). The aggravating circumstances for count three were: 1) "the offense was committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender, to wit: Murder"; 2) "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”; and 3) “the offender, in the commission of the offense, purposely caused the death of another who was under thirteen (13) 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.” (Indictment at pp. 1-3).

The aggravating circumstances for count five were: 1) “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”; and 2) “the offender, in the commission of the offense, purposely caused the death of another who was under thirteen (13) 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.” (Indictment at pp. 3-4).

According to *Cooley*, the trial court was required to make an individual determination of the aggravating circumstances relating to count three against the collective mitigating factors and then make an individual determination of whether the aggravating circumstances in count five outweighed the collective mitigating factors. *Cooley*, 46 Ohio St. 3d at 38, 544 N.E.2d at 916-17. However, the panel stated that “each judge gave a summary of his opinion as to the weighing process, and each judge individually and independently concluded that in this case, the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt.” (Sent. Op. at p. 10). The panel did not follow the holding in *Cooley* and weigh the aggravating circumstances for each count separately and make a separate determination. As a result, it is unclear for which counts the aggravating circumstances were weighed. Worse, a review of the

opinion leads to the conclusion that the panel weighed all the aggravating circumstances from both counts together against the mitigating factors.

The panel merged the course of conduct specification from counts two, three, four and five for sentencing. (Sent. Op. at p. 2). However, the panel never stated for which count the course of conduct aggravating circumstance was being weighed. This demonstrated that the panel did not weigh each count separately to determine the appropriate sentence for the two individual aggravated murder counts, counts three and five.

The panel weighed four aggravating circumstances but did not separate them into the different aggravated murder counts. The panel stated "In consideration of the sentence to be imposed, therefore, there were a total of four aggravating circumstances that the three-judge panel considered in the weighing process." (Sent. Op. at p. 2). This demonstrates confusion because there were two sentences to be imposed for the aggravated murder counts, one sentence for count three and one sentence for count five, and neither count had four aggravating circumstances attached to it.

Not only did neither count have four aggravating circumstances, count five only had two aggravating circumstances. Therefore, it would be conceivable that the aggravating circumstances did not outweigh the mitigating factors as least as it related to count five, if not also for count three.

These sentencing errors require Montgomery's sentence to be vacated and the case remanded. In *State v. Green*, 90 Ohio St. 3d 352, 738 N.E.2d 1208 (2000), the defendant was convicted of aggravated murder and death penalty specifications. The three-judge panel erred in sentencing the defendant because of improperly weighing the aggravating circumstances. This Court remanded the case finding that "the trial court's sentencing opinion was constitutionally

deficient because the court improperly weighed the aggravating circumstances that were alleged and proved, improperly considered nonstatutory aggravating circumstances and failed to consider relevant mitigating evidence.” *Id.* at 360, 738 N.E.2d at 1222. In *Green*, this Court held that the errors in sentencing were too severe to be cured by reweighing and the sentence was vacated and the proceeding remanded. *Id.* at 364, 738 N.E.2d at 1224.

### **Conclusion**

The three-judge panel’s sentencing opinion did not set forth the correct procedure for weighing the aggravating circumstances as required in R.C. § 2929.03(D)(3), R.C. § 2929.03(F) and *State v. Cooley*. The errors are not capable of being cured by reweighing, thus this Court must reverse the sentence and remand to the three-judge panel for a new sentencing decision.

## **Proposition of Law No. 5**

The introduction of graphic photographs with no probative value but which are highly prejudicial violates a capital defendant's rights to a fair trial, due process, and a reliable determination of guilt as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution.

### **I. Introduction.**

During the trial phase, the State introduced a total of 455 photographs into evidence, over trial counsel's objections. Many of these photographs were extremely graphic and repetitive. Among the photographs admitted were eleven photographs of Tia Hendricks at the scene, twelve photographs of the Hendricks children at the scene, forty-two photographs of Tia Hendricks during the autopsy, twenty of Tahlia Hendricks during the autopsy, and eleven of Tyron Hendricks during the autopsy. Additionally, the State introduced a total of fifty-eight photographs of the blood at the scene of the crime: forty-four as were found when the police arrived and fourteen after the victims were removed. Even though the evidence in this case was heard by a three-judge panel and not a jury, the extensive use of these numerous, graphic photographs nevertheless would have a strong emotional impact on the fact-finders. The prejudice far outweighed any minimal probative value that the photographs may have had. Accordingly, the trial court erred in admitting the photographs over trial counsel's objections.

### **II. Facts.**

The State presented eleven photographs of Tia Hendricks' body as it was found at the apartment. (State's Exs. 2A-43, 2A-44, 2A-45, 2A-58, 2A-59, 2A-60, 2A-61, 2A-120, 2A-131, 2A-132, 2A-134.) Not only were those photographs extremely graphic, but many of them were repetitive. Photographs 2A-43, 2A-44, and 2A-45 all show the same scene from three different angles. 2A-58 and 2A-59 both show the victim's torso, one from the head looking towards the

feet and one from the feet looking towards the head. Moreover, the State introduced 2A-132, showing the body in the exact same position and from the exact same vantage point as 2A-50, except her face is uncovered. The later photographs, State's Exs. 2A-131, 2A-132, and 2A-134, are incredibly graphic photographs of Tia Hendricks' bloodied face, hands, and neck, her body splayed on the living room floor. Her personal belongings, including a condom, can be seen on the floor next to the body.

The State further presented twelve photographs of the children as found at the scene of the crime. (State's Exs. 2A-48, 2A-49, 2A-51, 2A-52, 2A-54, 2A-57, 2A-136, 2A-137, 2A-140, 2A-141, 2A-143, and 2A-145.) These photographs are similarly repetitive and graphic. State's Exs. 2A-48, 2A-49, 2A-51, 2A-52, 2A-54, and 2A-57 all show the children's bodies, covered by pillows, except from different angles. State's Exs. 2A-48 and 2A-49 show the same child from the same angle, with 2A-49 showing a closer view of the blood-stained pillow covering her face. The blankets, pillows, and carpeting surrounding the children is stained with blood. One photo simply shows the intertwined legs of the children on a bloody blanket. (State's Ex. 2A-52.)

The photographs taken once the blankets and pillows covering the children's faces were removed are all the more graphic. State's Exs. 2A-136 and 2A-143 show Tyron and Tahlia's bloodied faces, necks, and torsos. State's Exs. 2A-141 and 2A-146 both show Tahlia's bloodied torso, one viewed from the head towards the feet, and one viewed from the feet towards the head.

There are an additional forty-four photographs of possible blood taken throughout the house. (State's Exs. 2A-29, 2A-31-33, 2A-35, 2A-39, 2A-40, 2A-46, 2A-62, 2A-64, 2A-64-68, 2A-70-82, 2A-86, 2A-88-91, 2A-98, 2A-99, 2A-102, 2A-108, 2A-110, 2A-111, 2A-119, 2A-121, 2A-133, and 2A-146-148.) These pictures are duplicative. (*See, e.g.*, State's Exs. 2A-32 and 2A-33, showing the same door twice, one from far away, and one from a short distance; State's

Exs. 2A-67 and 2A-68, showing the same blood smear twice; 2A-77-2A-79, showing the same walls surrounding a laundry basket from three different angles; 2A-88-2A-91, showing three piecemeal photographs of Tyron's bedding, pillows, and crib with the fourth photograph showing the three previous photographs together.) An additional seven photographs show the blood left on the carpeting after the bodies had been removed from the scene. (State's Exs. 3A-2-3A-8.)

Thereafter, the State introduced a total of seventy-three photographs of the three bodies taken at the coroner's office—forty-two of Tia, twenty of Tahlia, and eleven of Tyron—many of which show no distinct difference from the photographs taken at the scene. The State introduced photographs for every one of Tia Hendricks' forty-six wounds, many of which were repetitive. State's Exs. 6A-2, 6A-3, and 6A-6 show pictures of Tia's body and face, virtually identical to the photographs taken at the scene. Eleven photos are close-ups of Tia's hands and wrists. (State's Exs. 6A-26, 6A-27, 6A-37, 6A-38, 6A-47-50, 6B-20, 6B-21, and 6B-43.) Six photographs show Tia's head, neck, and face. (State's Exs. 6A-6, 6B-26, 6B-28, 6B-31, 6B-34 and 6B-35.) State's Exhibits 6B-36-6B-43 show injuries to her chest. State's exhibits 6B-44, 6B-46, 6B-54, 6B-56, and 6B-58 show Tia's back, many of which show the same area, some closer and some further away. (*See, e.g.*, State's Exs. 6B-44, 6B-46, and 6B-58.) An additional seven photographs show Tia's leather jacket and shirt. (State's Exs. 6A-9-6A-15.)

The twenty pictures of Tahlia are equally graphic. State's Exhibits 5A-5 and 5A-6 show the body almost exactly how it was found at the crime scene. Two photographs show virtually the same neck injury, one with blood and one with blood cleaned off. (State's Exs. 5A-11 and 5B-17.)

Likewise, the photographs taken of Tyron at the coroner's office were redundant and graphic. State's Exhibits 7A-4, 7A-5, and 7A-9 show Tyron's body almost exactly as it was already pictured at the scene of the crime. There were three close-up pictures of Tyron's neck, showing the same injury. (State's Exs. 7A-9, 7B-2, 7B-7.)

Detective Dana Croom testified about the above-stated photographs. Detective Croom identified each of the victims, the wounds on each of the victims, and which wounds appeared to be defensive wounds and fatal wounds. Vol. VII, Tr. 150-60. He also testified to the photographs of the crime scene, identifying possible blood within the house. *Id.* at. 65-98.

Trial counsel made timely objections to all of the photographs before they were admitted *Id.* at. 25, and to each of the photographs as they were introduced. Vol. VII, *passim*. Defense counsel objected neither to the coroner's reports for each of the victims, *Id.* at. 25 nor to State's Exhibit 1, which showed the layout of the scene of the crime. *Id.* at. 54. Moreover, . Montgomery had already entered his plea of guilty before the court. *Id.* at 21. The cause of death was not contested at the time the photographs were introduced. *Id.* at 161. Trial counsel did not cross examine Detective Croom. *Id.* at 160.

The panel admitted the photographs over trial counsel's objections. *Id.* at 162-63. Therefore, the claim is subject to an abuse of discretion standard of review.

### **III. Law.**

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

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

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

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

A defendant’s due process rights are violated when evidence is “so unduly prejudicial that it renders the trial fundamentally unfair.” *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). In

capital cases, where an individual's life is at stake, the United States Supreme Court has insisted upon even higher standards of reliability and fairness. *See, e.g., Beck v. Alabama*, 447 U.S. 625 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Moreover, courts must employ a "greater degree of certainty" to guard against unreliable sentencing determinations in capital cases. *California v. Ramos*, 463 U.S. 992, 998-99 (1983).

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

The coroner's reports on the deaths of Tia (ex. 6B), Tahlia (ex. 5B), and Tyron (ex. 7B) Hendricks indicate that the causes of death for Tia, Tahlia, and Tyron were the multiple stab wounds to each of their necks. Detective Croom testified as to these findings, and that testimony went unchallenged. Tr. Vol. VII, p. 146-60. Therefore, the numerous graphic photographs of Tia, Tahlia, Tyron, and their home served no purpose, were cumulative, and were highly prejudicial. The trial court abused its discretion in admitting these photographs into evidence.

Many of the photographs were plainly unnecessary and completely unrelated to the cause of death, such as the multiple photographs of Tia Hendricks' car, the contents within the car, or the numerous orienting photographs of Tia Hendricks' apartment. Moreover, many of the photographs showed the same room, object, or blood splatter, but from a different perspective. Because these photographs were unrelated to the cause of death and cumulative, their probative value was extremely limited.

The prejudice produced by the photographs was substantial. Many of the images are extremely graphic. This is especially true for the photographs of the Hendricks children at the scene of the crime. Furthermore, the State introduced every instance of blood found throughout the Hendricks' home, from the smallest drop of blood on the kitchen counter, to the bloody tissues found on the master bed, to the spattering of blood on the walls of the living room. These

images were gruesome, graphic, and shocking, and they supported no fact in question at the time of Montgomery's sentencing.

Though Montgomery had already entered a guilty plea, these images could have inflamed the passions and prejudices of the fact-finders, thereby impacting their judgment in imposing a sentence. All of these photographs were introduced in the trial phase. Vol. VII, Tr. 54. The photographs pertaining to the aggravating circumstances were introduced by the State at the mitigation hearing and admitted by the panel. Vol. VII, Tr. 176-77. These gruesome images would have roused the fact-finders' emotions during its sentencing deliberations, violating the Eighth and Fourteenth Amendment guarantees "that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). *See also State v. Thompson*, 33 Ohio St. 3d 1, 514 N.E.2d 407 (1987).

The panel, in its sentencing opinion, noted that it "gave scant consideration to the photographs." Sent. Op., fn. 1. But the judges are only human and subject to human emotion. And despite what they said in the sentencing opinion, during the proceedings they recognized that the use of the photographs was excessive and problematic. When the State presented its fifty-eighth photograph, Judge Reece said that they were getting repetitive. Vol. VII, Tr. 73. The State continued to use the photographs, and Judge Reece said "I think we've seen enough." *Id.* at 74. The State still continued, leading Judge Reece to tell the prosecutor that they used three photographs where one would have been sufficient and also that they should go through the photographs and "use the economy of scale and give us what we need and not everything." *Id.* at 83.

The judges were inundated by inflammatory and disturbing photographs. Despite their statement to the contrary, they recognized during the proceedings that the excessive use of the photographs was problematic.

**V. Conclusion.**

The prejudicial impact of the fact-finders' exposure to inflammatory photographs deprived Montgomery of his right to a fair trial, due process, and a reliable determination of his guilt and sentencing in a capital case as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I §§ 1, 2, 5, 9, 10, 16 and 20 of the Ohio Constitution. For these reasons, Montgomery's conviction should be overturned, or, at a minimum, his death sentence should be vacated.

## Proposition of Law No. 6

Ohio's death penalty law is unconstitutional. Ohio Rev. Code Ann. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face and as applied to Montgomery. U.S. Const. Amends. V, VI, VIII, And XIV; Ohio Const. Art. I, §§ 2, 9, 10, And 16. Further, Ohio's death penalty statute violates the United States' obligations under international law.<sup>5</sup>

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

### A. Arbitrary and unequal punishment

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

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<sup>5</sup> In *State v. Jenkins*, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), this Court upheld this death penalty statute and this Court may, therefore, reject this claim on its merits if it disagrees with Appellant's federal constitutional arguments. *State v. Poindexter*, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**F. Proportionality and appropriateness review**

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

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

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

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

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

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

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

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

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

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

**1. International law binds Ohio.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **H. Conclusion**

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

### Proposition of Law No. 7

The cumulative effect of trial error renders a capital defendant's trial unfair and his sentence arbitrary and unreliable. U.S. Const. amends. VI, XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20.

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

From beginning to end, Montgomery's capital trial was replete with prejudicial error. *See* Propositions of Law Nos. 1-7. Assuming *arguendo* that none of the errors Montgomery raised alone warrant reversal of his convictions and sentence, the cumulative effect of the errors is so prejudicial that this Court must order a new trial.

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

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

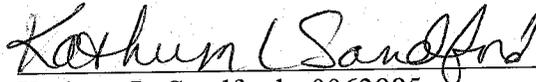
The result of cumulative error entitles Montgomery to a new trial. His convictions based upon cumulative error denied him a fair trial and his right to due process. U.S. Const. amends. VI, XIV; Ohio Const. art. I, § 5, 16. Additionally, these same errors render Montgomery's death sentence unreliable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

**CONCLUSION**

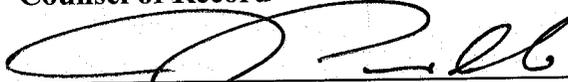
For the foregoing reasons, Caron Montgomery's convictions and sentence must be reversed.

Respectfully submitted,

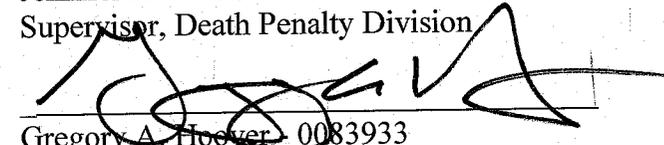
Office of the  
Ohio Public Defender



Kathryn L. Sandford - 0063985  
Supervisor, Death Penalty Division  
**Counsel of Record**



Jennifer A. Prillo - 0073744  
Supervisor, Death Penalty Division



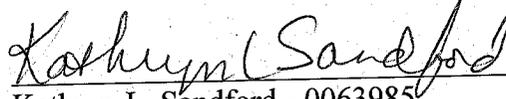
Gregory A. Hoover - 0083933  
Assistant State Public Defender

Office of the Ohio Public Defender  
250 East Broad Street - Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 644-0708 (Fax)

COUNSEL FOR APPELLANT

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MERIT BRIEF OF APPELLANT CARON MONTGOMERY was forwarded by first-class, postage prepaid U.S. Mail to Steven L. Taylor, Chief Counsel, Appellate Division, Franklin County Prosecutor's Office, 373 South High Street, 13<sup>th</sup> Floor, Columbus, Ohio 43215, on the 27<sup>th</sup> day of April, 2013.



Kathryn L. Sandford - 0063985  
Supervisor, Death Penalty Division  
**Counsel of Record**

COUNSEL FOR APPELLANT

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