



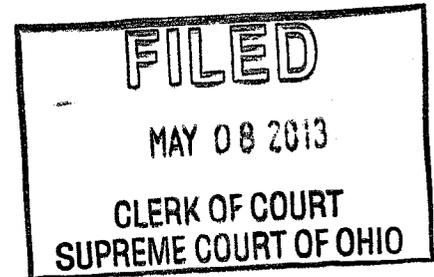
RON O'BRIEN

FRANKLIN COUNTY PROSECUTING ATTORNEY

May 8, 2013

Ms. Kristina D. Frost
 Clerk of Court
 Supreme Court of Ohio
 65 South Front Street, 8th Floor
 Columbus, Ohio 43215-3431

Re: Request for Recusal of Justice William M. O'Neill
State v. Caron Montgomery
 Case No. 12-1212



Dear Clerk of Court Frost:

Defendant Caron Montgomery is appealing his triple-homicide convictions and two death sentences. Defendant Montgomery has now filed a brief asking the Court to reverse the convictions. In light of the constitutional claims being raised in that brief, and pursuant to S.Ct.Prac.R. 4.04, the State is hereby submitting this letter requesting that Justice William M. O'Neill recuse himself from the *Montgomery* case. This letter is accompanied by an affidavit. The letter and accompanying affidavit are being served on opposing counsel.

Justice O'Neill's dissent from the setting of an execution date in *State v. Wogenstahl*, No. 95-42, demonstrates that Justice O'Neill will be unable to follow the law in *Montgomery* and will be unable to impartially carry out the statutory responsibilities of a Supreme Court justice in the review of the death sentences.

I. Overview of *State v. Wogenstahl*

In *State v. Wogenstahl*, 75 Ohio St.3d 344, 662 N.E.2d 311 (1996), the defendant was convicted of aggravated murder in the killing of a ten-year-old girl he had kidnapped during an aggravated burglary. The Ohio Supreme Court rejected the defendant's categorical constitutional challenges to the imposition of the death penalty. *Id.* at 351, 371-72 (summarily rejecting several issues, including eighteenth proposition of law challenging constitutionality of death penalty on federal and state constitutional grounds). The Court unanimously found that the death penalty was the appropriate punishment and that the aggravating circumstances outweighed the mitigating factors. *Id.* at 368. The federal courts also refused to disturb the convictions and death sentence. *Wogenstahl v. Mitchell*, 668 F.3d 307 (6th Cir. 2012).

After the defendant completed his state-court and federal-court reviews, the prosecutor filed a motion to set execution date. The only thing left to do was to carry out the sentence of death, which had already been upheld. The motion was unopposed.

When the Court ruled on the motion, however, Justice O'Neill dissented from the setting of an execution. He acknowledged that, if there was any case that warranted the imposition of the death sentence, "this case clearly qualifies." *State v. Wogenstahl*, 134 Ohio St.3d 1437, 2013-Ohio-164, ¶ 1 (dissenting opinion). He conceded that, given the kidnapping-murder of a ten-year-old girl, "[t]here can be no disputing that this was a horrific act that is deserving of the strongest penalty possible." *Id.* A review of the *Wogenstahl* facts confirms the horrific nature of the crime, as the defendant had stabbed the girl eleven times and struck her several times with a blunt instrument. As stated by the Ohio Supreme Court's original opinion in *Wogenstahl*:

[A]ppellant broke into an occupied structure to kidnap ten-year-old Amber Garrett. He forcibly removed Amber from the apartment to use her for his own sexual gratification. Appellant physically restrained Amber and bound her arms in the clothing she was wearing. A knife was held to Amber's neck. She was transported in appellant's vehicle across the Ohio-Indiana border. At some point, appellant killed Amber when he realized that he could not return her to the apartment without being identified as the perpetrator of the aggravated burglary and/or kidnapping offenses.

Wogenstahl, 75 Ohio St.3d at 367.

Notwithstanding his acknowledgement of the horrific facts, Justice O'Neill refused to approve the setting of the execution date. He asserted his *personal view* ("I would hold * * *") that the death penalty is inherently unconstitutional under the United States and Ohio Constitutions.

In reaching his conclusion of unconstitutionality, Justice O'Neill had not given the parties notice and an opportunity to be heard on the question of constitutionality. In failing to give notice and an opportunity to be heard before his constitutional ruling, Justice O'Neill violated well-settled legal precedent requiring such notice and opportunity. *Miller Chevrolet v. Willoughby Hills*, 38 Ohio St.2d 298, 301 & n. 3, 313 N.E.2d 400 (1974); *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988).

In reaching his conclusion that the death penalty is inherently unconstitutional, Justice O'Neill notably failed to address the binding authority of the Ohio Supreme Court upholding the death penalty in the *Wogenstahl* case, which included the rejection of claims of unconstitutionality under the federal and Ohio constitutions. Justice O'Neill violated the law-of-the-case and *res judicata* doctrines. *Nolan v. Nolan*, 11 Ohio St.3d 1, 462 N.E.2d 410 (1984) (law of the case); *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104 (1967) (*res judicata*).

Instead of recognizing that the death sentence had already been upheld, Justice O'Neill relied on a 1972 concurrence and 1976 dissent authored by United States Supreme Court Justice

William J. Brennan. Neither of these opinions constituted controlling or even persuasive precedent in light of the United States Supreme Court's and Ohio Supreme Court's repeated rejections of Justice Brennan's claims of inherent unconstitutionality.

Justice O'Neill conceded that he was not following the decisional law of the United States and Ohio Supreme Courts. He stated, "While I recognize that capital punishment is the law of the land, I cannot participate in what I consider to be a violation of the Constitution I have sworn to uphold." *Wogenstahl* dissent, ¶ 9.

II. Failure/Refusal to Comply with Law

As Justice O'Neill concedes, "capital punishment is the law of the land * * *." The United States Supreme Court and Ohio Supreme Court have repeatedly rejected the kind of categorical objection to the death penalty made by Justice O'Neill. The issue is so settled that such claims are now summarily rejected by the Ohio Supreme Court. See, e.g., *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 208 (summarily rejecting constitutional challenges); see, also, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). In addition, the Ohio Supreme Court rejected the same kind of challenge in *Wogenstahl* itself. The death penalty is not inherently unconstitutional, notwithstanding Justice O'Neill's personal views.

The first responsibility of a judge is to follow the law. "A judge shall comply with the law." Jud.Cond.R. 1.1. The "law" includes decisional law. Jud.Cond.R. Terminology. When Justice O'Neill acknowledges the reality that the death penalty has been found constitutional and is "the law of the land," and yet relies on a personal view that the death penalty is inherently unconstitutional and therefore shall not be enforced, he is refusing to follow the law, including the decisional law of a higher court.

Justice O'Neill is bound to follow the United States Supreme Court in rejecting claims of inherent unconstitutionality under the federal constitution. "It has long been settled that the Supremacy Clause binds state courts to decisions of the United States Supreme Court on questions of federal statutory and constitutional law." *State v. Burnett*, 93 Ohio St.3d 419, 422, 755 N.E.2d 857 (2001). Justice O'Neill's personal views are irrelevant. As a matter of federal constitutional law under United States Supreme Court precedent, the death penalty is not inherently unconstitutional. Justice O'Neill's refusal to follow such precedent constitutes a failure to comply with the law.

Justice O'Neill also violated well-settled Ohio precedent. The Ohio Supreme Court had already upheld the validity of the death penalty in the *Wogenstahl* case. But, instead of following the Ohio Supreme Court decision, Justice O'Neill chose to rely on personal views and cite non-precedential opinions of a United States Supreme Court justice. This violated the law-of-the-case and *res judicata* doctrines since it amounted to a refusal to adhere to the Ohio Supreme Court's earlier decision when there was no good-faith basis for doing so but, rather, only Justice O'Neill's personal views not grounded in precedent.

Justice O'Neill recently relied on his *Wogenstahl* dissent when he dissented from the setting of a execution date in *State v. Campbell*, 134 Ohio St.3d 1510, 2013-Ohio-1166. In *Campbell*, too, the Ohio Supreme Court already had rejected state and federal constitutional challenges to the death penalty. *State v. Campbell*, 90 Ohio St.3d 320, 347, 738 N.E.2d 1178 (2000) (rejecting well-worn constitutional challenges). Thus, in *Campbell*, just as in *Wogenstahl*, Justice O'Neill was refusing to comply with decisional law from the United States and Ohio Supreme Courts.

Justice O'Neill also failed to comply with law in *Wogenstahl* when he did not give the prosecutor notice and an opportunity to be heard before he ruled on the issue of constitutionality. With the issue of constitutionality having already been settled in the Court's earlier decision, the prosecutor had no reason to address the settled matter of constitutionality in the motion to set execution date. The motion was unopposed. Yet Justice O'Neill proceeded to raise the issue of constitutionality *sua sponte* and addressed it without giving the prosecutor notice and an opportunity to be heard, as required by Ohio law.

Given the failure to follow the earlier decision upholding the *Wogenstahl* death penalty, and given Justice O'Neill's cutting of corners in failing to give notice to the prosecutor, it is clear that Justice O'Neill has a fixed and unalterable opinion that the death penalty is inherently unconstitutional under all circumstances and in all cases. He will not adhere to binding precedents from the United States Supreme Court. He will not follow binding precedents of the Ohio Supreme Court, not even in the very case being addressed.

This inability and refusal to follow binding precedents will have an effect on *State v. Caron Montgomery*. Defendant Montgomery is challenging the constitutionality of the death penalty under the United States and Ohio Constitutions. See Defendant's Merit Brief, Proposition of Law No. 6, pp. 56-68. Through his dissent in *Wogenstahl*, Justice O'Neill has already demonstrated that he will not be able to comply with the law in the *Montgomery* case but rather will rely on mere personal views on the inherent unconstitutionality of the death penalty. Since Justice O'Neill will not be able to comply with the law as required by Jud.Cond.R. 1.1, he should recuse himself from the *Montgomery* case.

Also applicable here is Jud.Cond.R. 2.2, which provides that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Comment One to the rule indicates that, "[t]o ensure impartiality and fairness to all parties, a judge must be objective and open-minded." Comment Two to the rule acknowledges that judges come to the bench with unique personal backgrounds and philosophies but that "a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question." (Emphasis added) The Terminology section of the rules provides that "impartiality" requires the "maintenance of an open mind in considering issues that may come before a judge."

The *Wogenstahl* dissent demonstrates that Justice O'Neill has personal views that close his mind on the issue of the constitutionality of the death penalty. Notwithstanding binding precedents by the United States Supreme Court and Ohio Supreme Court, and notwithstanding his own concession that capital punishment is the "law of the land," Justice O'Neill has shown that he will not even listen to arguments that the death penalty is constitutional. He will not

follow the “law of the land,” but, rather, will merely cast his vote in the case on personal views. His mind is fixed and closed, not open. He will not be impartial.

Other rules apply. Under Jud.Cond.R. 2.5(A), a judge must perform his duties with competence and diligence. Justice O’Neill did not act with competence and diligence when he failed to follow binding precedents from the United States and Ohio Supreme Courts, including the Ohio Supreme Court decisions in the *Wogenstahl* and *Campbell* cases themselves.

Also, under Jud.Cond.R. 2.6, a judge shall accord every party the right to be heard according to law. When Justice O’Neill *sua sponte* raised the issue of constitutionality and ruled upon that issue without giving the prosecutor notice and the opportunity to be heard, he failed to accord the prosecutor the right to be heard according to law.

III. Inability to Carry Out Statutory Duties

Justice O’Neill’s personal views will also preclude him from carrying out his statutory responsibilities as an Ohio Supreme Court justice. He contended that “[t]he time to end this outdated form of punishment in Ohio has arrived.” *Wogenstahl*, ¶ 9. He further asserted that “I cannot participate in what I consider to be a violation of the Constitution I have sworn to uphold.” *Id.*

This “cannot participate” state of mind will preclude him from engaging in the mandatory review set forth in Ohio law.

The Ohio Supreme Court essentially sits as a 13th juror in deciding whether the death penalty is justified by an independent weighing of the aggravating circumstances against mitigating factors. R.C. 2929.05(A). But a juror with Justice O’Neill’s views would be excluded for cause because the juror’s personal views would prevent or substantially impair the juror from fairly and impartially considering the imposition of the death penalty. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 76, citing *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Like a juror who is disqualified because he would never be able to sign his name to a death recommendation, see *Davis*, ¶ 76, Justice O’Neill admits that he will refuse to even “participate” in the required process of weighing the aggravating circumstances and mitigating factors.

Indeed, Justice O’Neill goes out of his way to emphasize that the factual details of any particular case are irrelevant to his personal view that the death penalty is inherently unconstitutional. He highlighted the horrific nature of the aggravated murder in *Wogenstahl*, and yet he still claimed that the death penalty was cruel and unusual. He also insisted that, given his views on inherent unconstitutionality, he cannot even “participate” in the setting of an execution date.

As shown by his *Wogenstahl* dissent, Justice O’Neill has a fixed opinion that, no matter what the facts and circumstances of the case, he cannot even participate in the decision to impose or carry out a death sentence. Since a juror would be excluded for cause because of such views,

and since Justice O'Neill concedes he cannot even "participate" in decisions enforcing the death penalty, it easily follows that Justice O'Neill should not sit on the *Montgomery* case.

Again, this is a problem of not being open-minded and not being able to comply with the law. Jud.Cond.R. 1.1, 2.2. Justice O'Neill asserts that he cannot even participate in the death-sentencing process because of his views. Such a decisionmaker cannot impartially and fairly consider whether to uphold the death penalties in the present case because the aggravating circumstances outweigh the mitigating factors. No matter how horrific the case, Justice O'Neill will always oppose a death sentence and will always vote against affirming a death sentence.

IV. Duty to Disqualify

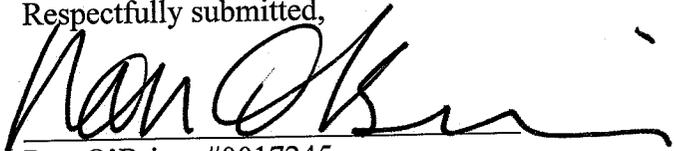
The standard for disqualification in Jud.Cond.R. 2.11 requires Justice O'Neill's disqualification. "A judge *shall* disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned * * *." Jud.Cond.R. 2.11(A) (emphasis added). Although the justice concedes that capital punishment is the law of the land, the justice concedes that his personal views do not allow him to "participate" in the death penalty. He has a closed mind on the topic of the death penalty based on his personal views, and those views prevent him from complying with constitutional and statutory law. Impartiality requires the "maintenance of an open mind in considering issues that may come before a judge." Jud.Cond.R. Terminology. Being a judge requires that he be able to comply with the law. Jud.Cond.R. 1.1.

"A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Jud.Cond.R. 1.2. "Impropriety" includes "conduct that violates the law, court rules, or provisions of this code, and conduct that undermines a judge's independence, integrity, or impartiality." Jud.Cond.R. Terminology.

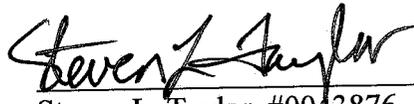
It would create at least the appearance of impropriety for Justice O'Neill to sit on the present case when he has categorically indicated that he will not participate in the statutory role a justice is required to perform in a capital case. He has honestly stated his inflexible prejudice and bias against the State and admitted that he cannot carry out the mandatory statutory duties of a Supreme Court justice in the review of a death sentence. He will refuse to follow existing precedents, including binding precedents from the United States Supreme Court rejecting claims of inherent unconstitutionality under the federal constitution. It would constitute an act of impropriety, and would create at least the appearance of impropriety, for Justice O'Neill to sit on the *Montgomery* case where his personal views will prevent or substantially impair his ability to follow the law.

Thus, for all of the reasons stated above, counsel for the State respectfully requests that Justice William M. O'Neill voluntarily recuse himself from participation in this case.

Respectfully submitted,



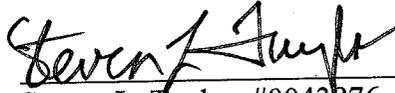
Ron O'Brien #0017245
Franklin County Prosecuting Attorney



Steven L. Taylor #0043876
Chief Counsel, Appellate Division
Counsel for State of Ohio

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing and the accompanying affidavit were sent by regular U.S. Mail, postage prepaid, on May 8th, 2013, to Kathryn Sandford, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, counsel for defendant Montgomery.



Steven L. Taylor #0043876
Chief Counsel, Appellate Division

AFFIDAVIT OF STEVEN L. TAYLOR

STATE OF OHIO,

COUNTY OF FRANKLIN, SS:

I, Steven L. Taylor, having been duly cautioned and sworn, hereby states the following:

1. I am one of the counsel representing the State of Ohio in *State v. Caron Montgomery*, Sup.Ct. No. 12-1212.
2. A three-judge panel sentenced Caron Montgomery to death for the aggravated murders of two young children, Tahlia Hendricks, age 9, and Tyron Hendricks, age 2. Defendant Montgomery was also convicted for the murder of Tia Hendricks, age 31, the mother of the two children.
3. The death sentences will be under review in Montgomery's appeal in Sup.Ct. No. 12-1212.
4. Undersigned counsel asserts that the following specific bases exist for Justice William M. O'Neill to recuse himself from the *Montgomery* case. Undersigned counsel incorporates by reference here the contents of the accompanying letter dated May 8, 2013, requesting Justice O'Neill's recusal.
5. Justice O'Neill's dissent from the setting of an execution date in *State v. Wogenstahl*, No. 95-42, demonstrates that Justice O'Neill will be unable to follow the law in *Montgomery* and will be unable to carry out the statutory responsibilities of a Supreme Court justice in the review of the death sentences.
6. Justice O'Neill conceded in the *Wogenstahl* dissent that "capital punishment is the law of the land * * *." The United States Supreme Court and Ohio Supreme Court have repeatedly rejected the kind of categorical objection to the death penalty made by Justice O'Neill. The issue is so settled that such claims are now summarily rejected by the Ohio Supreme Court. See, e.g., *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 208 (summarily rejecting constitutional challenges); see, also, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). In addition, the Ohio Supreme Court rejected the same kind of challenge in *Wogenstahl* itself. The death penalty is not inherently unconstitutional, notwithstanding Justice O'Neill's personal views.
7. The first responsibility of a judge is to follow the law. "A judge shall comply with the law." Jud.Cond.R. 1.1. The "law" includes decisional law. Jud.Cond.R. Terminology. When Justice O'Neill acknowledges the reality that the death penalty has been found constitutional and is "the law of the land," and yet relies on a personal view that the death penalty is inherently unconstitutional and therefore shall not be enforced, he is refusing to follow the law, including the decisional law of a higher court.

8. Justice O'Neill is bound to follow the United States Supreme Court in rejecting claims of inherent unconstitutionality under the federal constitution. "It has long been settled that the Supremacy Clause binds state courts to decisions of the United States Supreme Court on questions of federal statutory and constitutional law." *State v. Burnett*, 93 Ohio St.3d 419, 422, 755 N.E.2d 857 (2001). Justice O'Neill's personal views are irrelevant. As a matter of federal constitutional law under United States Supreme Court precedent, the death penalty is not inherently unconstitutional. Justice O'Neill's refusal to follow such precedent constitutes a failure to comply with the law.

9. Justice O'Neill has demonstrated that he will adhere to his *Wogenstahl* dissent in future rulings. He recently relied on the *Wogenstahl* dissent in order to dissent from the setting of a execution date in *State v. Campbell*, 134 Ohio St.3d 1510, 2013-Ohio-1166. In *Campbell*, just as in *Wogenstahl*, the Ohio Supreme Court already had rejected state and federal constitutional challenges to the death penalty. *State v. Campbell*, 90 Ohio St.3d 320, 347, 738 N.E.2d 1178 (2000) (rejecting well-worn constitutional challenges). Thus, in *Campbell*, just as in *Wogenstahl*, Justice O'Neill was refusing to comply with decisional law from the United States and Ohio Supreme Courts.

10. This demonstrated inability and refusal to follow binding precedents will have an effect on the present case, *State v. Caron Montgomery*. Defendant Montgomery is challenging the constitutionality of the death penalty under the United States and Ohio Constitutions. See Defendant's Merit Brief, Proposition of Law No. 6, pp. 56-68. Through his dissent in *Wogenstahl*, Justice O'Neill has already demonstrated that he will not be able to comply with the law in the *Montgomery* case but rather will rely on his mere personal views on the inherent unconstitutionality of the death penalty.

11. Since Justice O'Neill will not be able to comply with the law as required by Jud.Cond.R. 1.1, he should recuse himself from the *Montgomery* case.

12. Also applicable is Jud.Cond.R. 2.2, which provides that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Comment One to the rule indicates that, "[t]o ensure impartiality and fairness to all parties, a judge must be objective and open-minded." Comment Two to the rule acknowledges that judges come to the bench with unique personal backgrounds and philosophies but that "a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question." The Terminology section of the rules provides that "impartiality" requires the "maintenance of an open mind in considering issues that may come before a judge."

13. The *Wogenstahl* dissent demonstrates that Justice O'Neill has personal views that close his mind on the issue of the constitutionality of the death penalty. Notwithstanding binding precedents by the United States Supreme Court and Ohio Supreme Court, and notwithstanding his own concession that capital punishment is the "law of the land," Justice O'Neill has shown that he will not follow the "law of the land." His mind is fixed and closed, not open. He will not be impartial.

14. Under Jud.Cond.R. 2.5(A), a judge must perform his duties with competence and diligence. Justice O'Neill did not act with competence and diligence when he failed to follow binding precedents from the United States and Ohio Supreme Courts, including the Ohio Supreme Court decisions in the *Wogenstahl* and *Campbell* cases themselves. Given his demonstrated intention to rely on the *Wogenstahl* dissent in future cases, he will not act with competence and diligence in future cases either, including the present *Montgomery* case.

15. Justice O'Neill's personal views will also preclude him from carrying out his statutory responsibilities as an Ohio Supreme Court justice. He contended that "[t]he time to end this outdated form of punishment in Ohio has arrived." *Wogenstahl*, ¶ 9. He further asserted that "I cannot participate in what I consider to be a violation of the Constitution I have sworn to uphold." *Id.*

16. This "cannot participate" state of mind will preclude him from engaging in the mandatory review set forth in Ohio law.

17. The Ohio Supreme Court essentially sits as a 13th juror in deciding whether the death penalty is justified by an independent weighing of the aggravating circumstances against mitigating factors. R.C. 2929.05(A). But a juror with Justice O'Neill's views would be excluded for cause because the juror's personal views would prevent or substantially impair the juror from fairly and impartially considering the imposition of the death penalty. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 76, citing *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Like a juror who is disqualified because he would never be able to sign his name to a death recommendation, see *Davis*, ¶ 76, Justice O'Neill admits he is refusing to even "participate" in the process.

18. Justice O'Neill goes out of his way to emphasize that the factual details of any particular case are irrelevant to his personal view that the death penalty is inherently unconstitutional. He highlighted the horrific nature of the aggravated murder in *Wogenstahl*, and yet he still claimed that the death penalty was cruel and unusual. He also insisted that, given his views on inherent unconstitutionality, he cannot even "participate" in the setting of an execution date.

19. As shown by his *Wogenstahl* dissent, Justice O'Neill has a fixed opinion that, no matter what the facts and circumstances of the case, he cannot even participate in the decision to impose or carry out a death sentence. Since a juror would be excluded for cause because of such views, and since Justice O'Neill concedes he cannot even "participate" in decisions enforcing the death penalty, it easily follows that Justice O'Neill should not sit on the *Montgomery* case. He is not able to be open-minded and not able to comply with the law. Jud.Cond.R. 1.1, 2.2.

20. Justice O'Neill asserts that he cannot even participate in the death-sentencing process because of his views. Such a decisionmaker cannot impartially and fairly consider whether to uphold the death penalties in the present case because the aggravating circumstances outweigh the mitigating factors. No matter how horrific the

case, Justice O'Neill will always oppose a death sentence and will always vote against affirming a death sentence.

21. The standard for disqualification in Jud.Cond.R. 2.11 requires Justice O'Neill's disqualification. "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned * * *." Jud.Cond.R. 2.11(A). Although the justice concedes that capital punishment is the law of the land, the justice concedes that his personal views do not allow him to "participate" in the death penalty. His personal view will prevent him from complying with constitutional and statutory law. Impartiality requires the "maintenance of an open mind in considering issues that may come before a judge." Jud.Cond.R. Terminology. Being a judge requires that he be able to comply with the law. Jud.Cond.R. 1.1.

22. "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Jud.Cond.R. 1.2. "Impropriety" includes "conduct that violates the law, court rules, or provisions of this code, and conduct that undermines a judge's independence, integrity, or impartiality." Jud.Cond.R. Terminology.

23. It would create at least the appearance of impropriety for Justice O'Neill to sit on the present case when he has categorically indicated that he will not participate in the statutory role a justice is required to perform in a capital case. He has honestly stated his inflexible prejudice and bias against the state and admitted that he cannot carry out the mandatory statutory duties of a Supreme Court justice in the review of a death sentence. He will refuse to follow existing precedents, including binding precedents from the United States Supreme Court rejecting claims of inherent unconstitutionality under the federal constitution. It would constitute an act of impropriety, and would create at least the appearance of impropriety, for Justice O'Neill to sit on the *Montgomery* case where his personal views will prevent or substantially impair his ability to follow the law.

24. To sum up, Justice O'Neill's recusal is required by Jud.Cond.R. 1.1 because he will be unable to follow the decisional law that rejects his personal view that the death penalty is inherently unconstitutional.

25. Justice O'Neill's recusal is required by Jud.Cond.R. 2.5(A) because his refusal or inability to follow such decisional law will prevent him from performing his judicial duties in a competent and diligent manner.

26. Justice O'Neill's recusal is also required by Jud.Cond.R. 1.1 because his avowed refusal to "participate" will prevent him from following the statutory law requiring that Supreme Court justices participate in the death-penalty process.

27. Justice O'Neill's recusal is also required by Jud.Cond.R. 2.2 because he will be unable to uphold and apply the law and will be unable to perform all of the duties of his judicial office fairly and impartially in the *Montgomery* case.

28. Justice O'Neill's recusal is also required by Jud.Cond.R. 1.2 and 2.11(A) because, given his lack of impartiality, his participation will not promote public confidence in the impartiality of the judiciary, will constitute an impropriety, and/or will create the appearance of an impropriety.

FURTHER AFFIANT SAITH NOT.



Steven L. Taylor

Sworn and subscribed before me this 8th day of May, 2013.



NOTARY PUBLIC *no expiration*