

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**

REPLY BRIEF OF APPELLANT CARON MONTGOMERY

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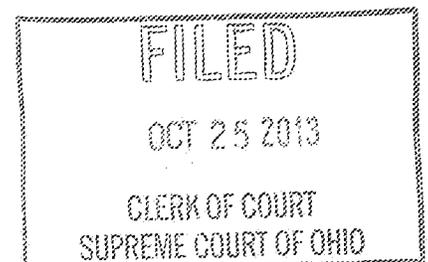


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Preface

Caron Montgomery replies to the State's argument in the First, Fourth and Sixth Propositions of Law. The absence of a reply by Montgomery on other claims is to avoid rearguing the merit brief.

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.

The State asserts that once Montgomery pled guilty to all specifications, evidence no longer had to be presented to the 3-judge panel to prove those specifications. State's Brief at p. 8. This is incorrect. As this Court held in *State v. Ketterer*,

Nonetheless, when the offense charged is a capital offense, R.C. 2945.06 and Crim.R.11(C)(3) require the state to prove guilt of an aggravated-murder charge with death specifications even when an accused pleads guilty." (citations omitted). *State v. Ketterer*, 111 Ohio St. 3d 70, 80, 855 N.E.2d 48, 64 (2006).

This Court reviewed the evidence to determine whether the § 2929.04(A)(3) specification had been proven in *Ketterer*. *Id.* at 81, 855 N.E.2d at 65.

R.C. § 2945.06 states that if the accused pleads guilty to aggravated murder, the three-judge panel will make a determination of whether the accused is guilty of aggravated murder and other offenses. This determination shall be made according to R.C. §§ 2929.03 and 2929.04 when death is a possible punishment. *Id.*

R.C. § 2929.03 requires when a death penalty specification has been charged, the penalty is determined when "the offender is *found guilty of both* the charge and one or more of the specifications..." R.C. 2929.03(C)(2)(a) (emphasis added). Similarly, Ohio Crim.R.11 (C)(3) requires that when a defendant pleads guilty to aggravated murder with one or more death penalty specifications, the three-judge panel "shall *** (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances ***". Thus, even upon a guilty plea in an aggravated

murder with death penalty specification case, the three-judge panel must still determine that the specifications have been proven.

The State asserts that the holding in *Ketterer* should be overruled. State's Brief at p. 14. However, the holding in *Ketterer*, along with the requirements in R.C. § 2945.06 and Crim. R. 11(C) are constitutional. This is a death penalty case and even when a defendant pleads guilty, the court must insure that the plea fits the charge and the evidence. Further, more process is due in a death penalty case, and insuring that a defendant is in fact guilty of the charges and specifications is not asking much from the State. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986).

In Montgomery's case, the first specification with the aggravated murder charge of Tahlia contained in § 2929.04(A)(3) was that "the offense was committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender, to wit: Murder ***." Indictment at p. 2. However, this specification was not proven. The only murder charge in this case was for the killing of Tia, the killing of the other two victims resulted in aggravated murder charges. Indictment at pp. 1-4. There was absolutely no evidence presented to establish that Tia was killed before Tahlia.

The State now argues that "nothing in the specification required that the State prove that Tia's (or Tyron's) murder preceded the killing of Tahlia." State's Brief at p. 15. The State surmises several examples of the broad scope of this specification but that is all irrelevant because at trial the State laid out the exact circumstance of this specification. While arguments of counsel are not evidence, the closing argument of the State at the penalty phase is at least a strong indication of the State's theory for this specification. "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. The sequence of the murders with respect to Tia and Tahlia was set forth by the State at trial.

The State also claims there is evidence to support its argument that Tia was killed first. State’s Brief at p. 18. However, this is all unsupported speculation by the State. For example, the State claims that the 911 call by Tia shows that her yelling alerted Tahlia to defend herself. *Id.* An equally plausible scenario is that Tia was screaming because she saw Tahlia, or both Tahlia and Tyron, being killed, showing that Tia was killed last in time. Thus, the 911 call does not support the State’s argument.

The § 2929.04(A)(3) specification was not proven by the State and this Court should reverse the trial court’s decision finding Montgomery guilty of this specification.

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 State claims that the three-judge panel accurately weighed the aggravating circumstances in this case, when all of the entries and ruminations on the record are read together. State's Brief at pp. 63-64. However, this is flawed reasoning and the error still cannot be cured on appeal.

Contrary to the State's assertion, Appellant does not err by focusing on the sentencing opinion. (hereafter "Sent. Op."). State's Brief at p. 63. A court speaks through its journal entries. *State ex rel. Worcester v. Donnellon*, 49 Ohio St. 3d 117, 119-20, 551 N.E.2d 183, 185 (1990); *State v. Miller*, 127 Ohio St. 3d 407, 409, 940 N.E.2d 924, 926 (2010)(citations omitted). As such, the journal entry, in this case the sentencing opinion, of the panel in Montgomery's case is the document that explains the final determination in this matter, the sentence of death; hence the document is titled "SENTENCING OPINION: FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING IMPOSITION OF THE DEATH PENALTY." The sentencing opinion should alone tie everything together and neither this Court nor counsel should have to extrapolate meaning from multiple entries or transcript pages to ascertain the panel's finding.¹

R.C. § 2929.03(F) lists the requirements for the opinion of a three-judge panel in a death penalty case. "The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors

¹ The panel's Judgment Entry which also states the sentence imposed on Montgomery does not provide any detail about weighing of the aggravating circumstances and mitigating factors. Judgment Entry 5/24/2012.

set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.”

This Court has mandated that “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.” *State v. Cooley*, 46 Ohio St. 3d 20, 28, 544 N.E.2d 895, 916-17 (1989). The three-judge panel did not correctly weigh the aggravating circumstances in Montgomery’s case, as evidenced by the sentencing opinion.

The three-judge panel found, “[i]n 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. However, neither of the aggravated murder counts contained four aggravating circumstances. The panel never weighed the aggravating circumstances for count Three against the collective mitigating factors or the aggravating circumstances for count Five against the collective mitigating factors as required by *Cooley*. The panel merged the purposeful killing of two or more persons specification from both counts three and five but never stated with which count that specification was weighed and which it was not. Sent. Op. at p. 2.

The three-judge panel “concluded that the mitigation evidence paled in comparison to the aggravating circumstances.” *Id.* at p. 10. Further, “each judge individually and independently concluded that in this case, the aggravating circumstances outweighed the mitigating factors

beyond a reasonable doubt” (*Id.*). However, the panel did so without specifying which aggravating circumstances were being weighed for which count.

The three-judge panel never made the accurate and required assessment for weighing the aggravating circumstances for each count against the collective mitigating factors. The Sentencing Opinion is replete with errors concerning the weighing process. The three-judge panel did a wholesale weighing of all the aggravating circumstances for both counts combined against the collective mitigating factors.

In *State v. Clemons*, 82 Ohio St. 3d 438, 447, 696 N.E.2d 1009, 1018 (1998) this Court held that “if a court correctly identifies the aggravating circumstances in its sentencing opinion, we will presume that the court relied only on those circumstances ***.” That presumption cannot be afforded to the panel in Montgomery’s case because they did not correctly identify the aggravating circumstances for the two different counts and weigh them accordingly against the mitigating factors. *Cooley*, 46 Ohio St. 3d at 28, 544 N.E.2d 895, 916-17.

In *State v. Green*, 90 Ohio St. 3d 352, 738 N.E.2d 1208 (2000), this Court held that the three-judge panel “used an improper weighing standard” when it imposed the death penalty (*Id.* at 362, 738 N.E.2d at 1223) and “[t]he panel overlooked many of this court’s prior decisions and the mandated statutory framework.” *Id.* at 363-64, 738 N.E.2d at 1224. This same analysis applies to the three-judge panel’s weighing of the aggravating circumstances against the mitigating factors in Montgomery’s case.

The same remedy is warranted for Montgomery as was ordered in *Green*; the three-judge panel must revise the sentencing opinion to conform to the statutory requirements. *Id.* at 364, 738 N.E.2d at 1224.

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.

The State argues that Montgomery's death sentence is appropriate and that this Court's independent reweighing of the aggravating circumstances against the mitigation evidence supports a sentence of death. State's Brief at p. 78. For the reasons stated below, this Court should conclude that the sentence of death imposed on Montgomery was unreliable and inappropriate. U.S. Const. Amends. VIII and XIV; Ohio Const. Art. I, §§ 9 and 16 and O.R.C. § 2929.05.

I. Introduction

Caron Montgomery was convicted of four counts of aggravated murder involving the deaths of Tahlia and Tyron Hendricks. Two of the aggravated murder counts carried three specifications. The other two aggravated murder counts contained two capital specifications. The trial court merged two of the counts and the course of conduct specifications. After this merger, two aggravating circumstances were left: 1) the victim being under the age of thirteen and 2) escaping detection, apprehension, trial or punishment for committing murder. Tr. 1473-74. Montgomery was sentenced to death for each victim.

Ohio Revised Code § 2929.05(A) requires this Court to determine the appropriateness of the death penalty in each capital case it reviews. The statute directs the appellate courts to "affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case."

Id. The statute requires this Court to make an independent review of the record and decide for itself, without any deference given to the determinations below, whether it believes that this defendant should be sentenced to death. *State v. Jenkins*, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984); *State v. Maurer*, 15 Ohio St. 3d 239, 473 N.E.2d 768 (1984). The record in this case merits the independent conclusion by this Court that the death sentences are not appropriate for Caron Montgomery.

II. Mitigation Evidence

This Court has frequently described a mitigating factor as one that "lessens the moral culpability of the offender or diminishes the appropriateness of death as the penalty." *State v. DePew*, 38 Ohio St. 3d 275, 292, 528 N.E.2d 542, 560 (1988), quoting *State v. Steffen*, 31 Ohio St. 3d 111, 129, 509 N.E.2d 383, 399 (1987). Although these were shocking and tragic crimes, there are factors that mitigate against the death sentences imposed on Montgomery.

A. Montgomery's history and background is mitigating

The United States Supreme Court has long held that a troubled history is relevant to assessing a defendant's moral culpability. *Wiggins v. Smith*, 539 U.S. 510, 535 (2003), citing *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) *rev'd on other grounds Penry v. Johnson*, 532 U.S. 782 (2001) (evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse."); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (noting that consideration of the offender's life history is a "part of the process of inflicting the penalty of death."). This Court has considered a poor family environment as a mitigating factor. *State v. McGuire*, 80 Ohio St. 3d

390, 404, 686 N.E.2d 1112, 1124 (1997); *State v. Dennis*, 79 Ohio St. 3d 421, 432, 683 N.E.2d 1096, 1106 (1997).

1. Montgomery lived a chaotic life fraught with substance abuse, physical violence and behavior problems.

As a young child, Montgomery had been “brutally raped” and was “sexually abused”. Tr. 174. 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. *Id.* at 206, 218. 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 worked with Montgomery during his early teenage years testified about the Children’s Services system in general and about their memories of Montgomery and his situation. *Id.* at 246, 249-55, 272-85. 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 was expected to participate in the program but she did not. *Id.* at 249-51. Montgomery was often rewarded with weekends at home for good behavior, but Carol rejected these attempts to reward Montgomery and in essence rejected Montgomery by failing on numerous occasions to pick him up. *Id.* at 252. Montgomery acted out as a teenager because of a lack of parental guidance, discipline, support and a chaotic family life. *Id.*

2. **Despite Montgomery's chaotic upbringing he was a good kid and had a positive impact in the lives of several family members.**

Tim Brown testified that Montgomery was a good kid in comparison to many others in the program. *Id.* at 272. Brown echoed Thomas' 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 psychologist's 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.

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.

B. Other evidence relevant to sentencing

Finally, this Court must consider any other mitigation evidence that would be relevant to whether Montgomery should be sentenced to death. O.R.C. § 2929.04(B)(7). Montgomery gave an unsworn statement during the mitigation phase where 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. This Court has determined that remorse of the defendant is relevant mitigation evidence. *State v. Highbanks*, 99 Ohio St. 3d 365, 387, 792 N.E.2d 1081, 1103 (2003).

Montgomery consistently chose to plead guilty. Ct. Ex. 10, p. 7. He has not denied that he committed these crimes. *State v. Newton*, 108 Ohio St. 3d 13, 36, 840 N.E.2d 593, 617 (2006); *State v. Mink*, 101 Ohio St. 3d 350, 369, 805 N.E.2d 1064, 1083 (2004). In fact, he pled guilty to all charges, even in the absence of any plea offer from the State.

III. Weighing aggravating circumstances against mitigating factors.

This Court must independently examine the mitigating factors and decide for itself whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. O.R.C. § 2929.05. This Court must confine its consideration of the arguments in favor of death to proven aggravating circumstances for each count of aggravated murder. Furthermore, when, as in the present case, the defendant is convicted of more than one count of aggravated murder, only the aggravating circumstances related to a given count may be considered in **assessing** the penalty for that count. *State v. Cooney*, 46 Ohio St. 3d 20, 28, 544 N.E.2d 895, 916-17 (1989). *See*, Proposition of Law 4. Although the crimes in the present case were horrific, the evidence demonstrates that Montgomery's culpability is significantly reduced by compelling mitigating factors.

IV. Conclusion.

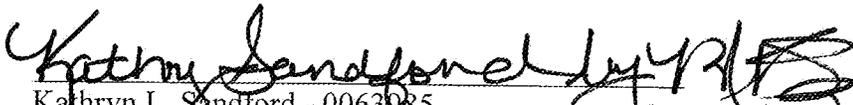
Our law requires "a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). A humane and principled ruling in this case requires vacating Montgomery's death sentence because it is unreliable and inappropriate.

Conclusion

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

Respectfully submitted,

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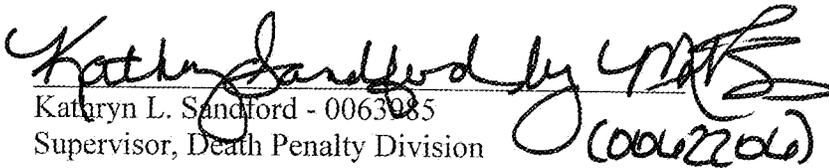

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Certificate of Service

I hereby certify that a true copy of the foregoing REPLY 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, 13th Floor, Columbus, Ohio 43215, on the 25th day of October, 2013.


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