ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Appellee, v. NATHANIEL JACKSON, Appellant.	)	**CASE NO. 12-1644** On Appeal from the Trumbull County Court of Common Pleas No. 01-CR-794 **DEATH PENALTY CASE**

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES.....iv

STATEMENT OF FACTS.....1

ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW.....4

State's Answer to Appellant's Proposition of Law No. I:
A reviewing court has jurisdiction to entertain a direct appeal when the convicted offender files with his notice of appeal documents which comply with R.C. 2929.03(F) and Crim. R. 32(C).....4

State's Answer to Appellant's Proposition of Law No. II:
A capital defendant precludes a finding of ineffective assistance of counsel when he voluntarily waives the right to one death-certified attorney and insists that the mitigation proceed with a highly qualified and trained criminal attorney.....13

State's Answer to Appellant's Proposition of Law No. III:
A trial judge has no duty or obligation to recuse himself from a capital case when the Chief Justice of this Court has twice denied motions of disqualification because the complaining defendant fails to demonstrate bias or ill-will on the part of the judge.....19

State's Answer to Appellant's Proposition of Law No. IV:
When a capital defendant has been represented by two death-qualified attorneys for five years, the trial court does not abuse its discretion by denying an eleventh-hour motion to stall a simple resentencing hearing so that one of those attorneys can shirk his duty to his client and the court.....26

State's Answer to Appellant's Proposition of Law No. V:
A remand for re-sentencing does not require a trial court to consider irrelevant or cumulative "evidence" when re-imposing a death sentence previously affirmed by this Court.....31

State's Answer to Appellant's Proposition of Law No. VI:
A trial court does not trample a convicted, capital murderer's allocution right by permitting him to speak twice during a sentencing hearing and withholding the filing of the sentencing entry until after the hearing.....38

TABLE OF CONTENTS CONT'D

PAGE(S)

State's Answer to Appellant's Proposition of Law VII:
A trial court commits no error in relying on portions of an original sentencing entry which have been affirmed by a superior court and portions of which were prepared personally by the judge in drafting the original entry.....43

State's Answer to Appellant's Proposition of Law VIII:
A trial court does not err in declining to merge charges and specifications which sound in aggravated robbery and aggravated burglary and which were clearly committed with a separate animus.....48

State's Answer to Appellant's Proposition of Law IX:
In the total absence of evidence to the contrary, a trial court properly re-imposes a death sentence which has already survived appellate review by a superior court.....57

State's Answer to Appellant's Proposition of Law No. X:
A capital defendant waives constitutional challenges to Ohio's death penalty statutes when he fails to articulate with specificity those challenges in the trial court.....66

State's Response to Appellant's Proposition of Law No. XI:
Since 1984, neither this Court, nor a federal court, has held that Ohio's death penalty statutes violate either the federal or state constitution.....73

State's Answer to Appellant's Proposition of Law No. XII:
A defendant will not benefit from the cumulative error doctrine when he fails to demonstrate multiple errors.....78

CONCLUSION.....80

PROOF OF SERVICE.....81

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Baze v. Rees, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008).....67. 68

Cooey v. Kasich, S.D, Ohio Nos. Nos. 2:04–cv–1156, 2:09–cv–242, 2:09–cv–823, 2:10–cv–27. (Nov. 4, 2011).....71, 72

Davis v. Coyle, 475 F. 3d 761 (6th Cir. 2007).....33, 34

Defiance v. Cannon, 70 Ohio App.3d 821, 592 N.E.2d 884 (3rd Dist.1990).....39, 40

Disciplinary Counsel v. Stuard. 121 Ohio St.3d 29, 2009-Ohio-261, 901 N.E.2d 788.....44

Fisher v. Fisher, 8th Dist. No. 78092, 2001 WL 740100 (July 28, 2001).....47

Gapen v. Bobby, S.D. Ohio No. 3:08-CV-280, 2012 WL 3686303 (Aug. 27, 2012).....72

Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).....45

In re Disqualification of Eyster, 105 Ohio St. 3d 1246, 2004-Ohio-7350.....22

In re Disqualification of Lawson, 135 Ohio St. 3d 1243, 2012-Ohio-6237, 986 N.E. 2d 6.....22

In re Disqualification of Park, 991 N.E. 2d 244, 2013-Ohio-2834.....22

In re Disqualification of Stuard, 113 Ohio St. 1236, 2006-Ohio-7233, 863 N.E. 2d 636 .....19, 20, 22, 23

In re Disqualification of Stuard, Ohio Supreme Ct. No. 08-AP-043.....27

In Re Ohio Execution Protocol Litigation, 906 F. Supp. 2d 759 (S.D.Ohio).....69, 70, 71

Scott v. Houk, 127 Ohio St.3d 317, 2010-Ohio-5805, 939 N.E.2d 835.....67

Moore v. Mitchell, 708 F.3d 760 (6th Cir. 2013).....34

Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983).....70

Pulley v. Harris 465 U.S. 37 (1984).....75

State ex rel. Bitter v. Missig, 72 Ohio St.3d 249 (1995).....12

State ex. rel. Jackson v. Stuard, 11th Dist. No. 2012-T-0062, 2012-Ohio-4209.....23, 24.

TABLE OF AUTHORITIES CONT'D

CASES **PAGE(S)**

State ex. rel. Jackson v. Stuard, Ohio Supreme Court No. 2008-0028.....27

State ex rel. Kline v. Carroll, 96 Ohio St.3d 404, 2002 -Ohio- 4849, 775 N.E.2d 517.....29

State ex rel. O'Beirne v. Geauga Cty. Bd. of Elections, 80 Ohio St.3d 176 (1997).....12

State v. Awan, 22 Ohio St.3d 120, 489 N.E.2d 277 (1986).....66

State v. Brewer, 2nd Dist. No. 87-CA-67, 1988 WL 88697 (Aug. 26, 1988).....11, 12

State v. Buell, 22 Ohio St.3d 124, 139-140, 489 N.E.2d 795 (1986).....74

State v. Carter, 89 Ohio St.3d 593, 2000–Ohio–172, 734 N.E.2d 345.....67

State v. Chinn, 85 Ohio St.3d 548, 709 N.E.2d 1166 (1999).....7, 8, 59

State v. Coleman 37 Ohio St.3d 286, 525 N.E.2d 792 (1988).....29

State v. Copeland, 12th Dist. No. CA2007-02-039, 2007-Ohio-6168.....42

State v. Cunigan 195 Ohio App.3d 162, 2011-Ohio-4010, 958 N.E. 2d 1290 (2nd Dist.).....16, 78

State v. Davis, 63 Ohio St. 3d 44, 584 N.E. 2d 1192 (1992).....59

State v. D'Ambrosio, 73 Ohio St.3d 141, 652 N.E.2d 710 (1995).....73

State v. DeMarco, 31 Ohio St.3d 191, 31 OBR 390, 509 N.E.2d 1256 (1987).....78

State v. Esparza, 39 Ohio St.3d 8 (1988).....74

State v. Ferguson, 108 Ohio St. 3d, 2006-Ohio-1502, 844 N.E. 2d 806.....73, 74

State v. Frazier, 58 Ohio St.2d 253, 12 O.O.3d 263, 389 N.E.2d 1118, (1979).....50, 55

State v. Fry, 125 Ohio St. 3d 163, 2010-Ohio-1017, 929 N.E. 2d 1239.....9, 40, 41

State v. Garner, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995).....78

State v. Getsy, 84 Ohio St.3d 180, 702 N.E.2d 866 (1998).....21

State v. Gibson, 69 Ohio App.2d 91 (8th Dist., 1980).....17

TABLE OF AUTHORITIES CONT'D

CASES **PAGE(S)**

State v. Green 90 Ohio St.3d 352, 2000 -Ohio-182 ,738 N.E.2d 1208.....39

State v. Hunter, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955.....30, 78

State v. Ishmail 54 Ohio St.2d 402, 377 N.E.2d 500 (1978).....16, 17

State v. Jackson, 107 Ohio St. 3d 300, 2006-Ohio-1,839 N.E. 2d 362.....11, 14, 18, 36, 37, 45, 46, 57, 60, 61, 62, 63, 64, 65, 73, 75, 76

State v. Jackson, 111 Ohio St. 3d 1469, 2006-Ohio-5625, 855 N.E. 2d 1258.....17

State v. Jackson, Ohio Supreme Ct. No. 2010-0865.....27

State v. Jackson, Ohio Supreme Ct. No. 2008-1610.....27, 28

State v. Jackson 190 Ohio App.3d 319, 941 N.E.2d 1221, 2010-Ohio-5054.....5, 10 11, 14, 23, 25, 27, 31, 44

State v. Jackson, 11th Dist. No. 2004-T-0089, 2006-Ohio-2651.....15, 16, 35, 64

State v. Jackson, 2008-T-0024, 2010-Ohio-1270.....27, 62

State v. Jackson, (May 13, 2010), 11th Dist. No. 2009-T-0050.....27

State v. Jarvi, 11th Dist. No. 2011-A-0063, 2012-Ohio-5590.....54, 55

State v. Johnson, 128 Ohio St. 3d 153, 2010-Ohio-6314.....51, 52, 53

State v. Jordan, 101 Ohio St.3d 216, 2004-Ohio-783, 804 N.E.2d 1.....75

State v. Ketterer, 126 Ohio St.3d 448, 2010-Ohio-3831.....5, 6

State v. Logan 60 Ohio St.2d 126, 397 N.E.2d 1345 (1979).....48

State v. Maynard, 9th Dist. No. 07CAO116-M, 2009-Ohio-282.....40

State v. Mitts, 81 Ohio St.3d 223, 690 N.E.2d 522 (1998).....56

State v. Monroe, 105 Ohio St. 3d 384, 2005-Ohio-2282.....50, 51

State v. O'Neill, 11th Dist. No. 2010-P-0041, 2011-Ohio-2202.....17

TABLE OF AUTHORITIES CONT'D

PAGE(S)

CASES

State v. Palmer, 80 Ohio St. 3d 543, 687 N.E. 2d 685(1997).....56

State v. Perry, 10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d 104 (1967).....13, 14, 58

State v. Reynolds, 80 Ohio St.3d 670, 1998-Ohio-171, 687 N.E.2d 1358.....9, 24, 40, 41

State v. Roberts, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168.....6, 24, 31, 32, 43, 46

State v. Roberts, --- N.E.2d ----, 2013 WL 5746121, 2013 -Ohio- 4580.....6, 13, 14, 24, 37 38, 42, 59, 60, 78, 79

State v. Short, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121.....76, 77

State v. Slagle, 65 Ohio St. 3d 597, 605 N.E.2d 916.....50

State v. Steffen, 31 Ohio St. 3d 111, 509 N.E.383 (1987).....49, 74

State v. Unger, 67 Ohio St. 2d 65, 423 N.E.2d 1078 (1981).....27, 28

State v. Warner, 55 Ohio St.3d 31, 43, 564 N.E.2d 18, 30–31. (1990).....73

State v. Williams, 134 Ohio St.3d 482, 2012–Ohio–5699.....48

State v. Williams, 74 Ohio St.3d 569, 660 N.E.2d 724 (1996).....51

State v. Wilson 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381.....13, 14

Towery v. Brewer, 672 F. 3d 650 (9th Circ., 2012).....69, 70

Xu Yong Lu v. Ashcroft, 259 F.3d 127 (2001).....29

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII.....37, 42, 66, 68, 72

U.S. Const. amend. XIV.....42, 66, 68, 72

TABLE OF AUTHORITIES CONT'D

PAGE(S)

STATUTES

R.C. 2701.03(B)(1) 21

R.C. 2929.021 76

R.C. 2929.03 76

R.C. 2929.03(D)(1) 74, 75

R.C. 2929.03(F) 4

R.C. 2929.04 75

R.C. 2929.04(B) 10

R.C. 2929.05(A) 75

R.C. 2949.22 (A) 68, 69, 71

RULES

Crim. R. 32 ..... 38, 42

Crim. R. 32(C) 12

Crim. R. 52(A) 30, 78

Sup. R. 20 II (A) 26

STATEMENT OF FACTS

The Plaintiff-Appellee, the State of Ohio ("State"), will dispense with a recitation of the facts regarding the evidence it presented during the guilt or penalty phase of Defendant-Appellant's jury trial in 2002. In the interest of judicial economy, the State would refer this Court to its unanimous opinion in *State v. Jackson,* 107 Ohio St. 3d 300, 2006-Ohio-1, 839 N.E.2d 362, ¶¶2-72 for a recitation of the facts concerning Appellant's role as the principal offender in the home-invasion shooting death of Robert Fingerhut. Mr. Fingerhut was a Youngstown, Ohio, businessman who resided in Howland Township, Trumbull County, Ohio, with Appellant's co-defendant, Donna Marie Roberts. Briefly stated, while Appellant was incarcerated in an Ohio penitentiary on unrelated charges, he plotted with Roberts to kill Mr. Fingerhut for his insurance proceeds, a plot which he and his co-defendant successfully executed, killing Mr. Fingerhut.

The jury convicted Appellant on two counts of aggravated murder for killing Mr. Fingerhut in violation of R.C. 2903.01(A) and (B). Both murder counts carried two felony-murder death-penalty specifications: murder during an aggravated burglary and during an aggravated robbery. R.C. 2929.04(A)(7). The jury also convicted Appellant on separate counts of aggravated burglary and aggravated robbery with a firearm specification on each count. The jury recommended the death penalty which the trial court imposed and which this Court unanimously affirmed. *State v. Jackson,* 107 Ohio St. 3d 300, 2006-Ohio-1, 839 N.E.2d 362, ¶185.

Roberts was likewise convicted and sentenced to death for her role in the killing. While this Court unanimously affirmed her conviction, it remanded her case for resentencing because "[t]he trial judge conceded that the prosecution had participated in the drafting of the opinion without the knowledge of defense counsel." *State v. Roberts,* 110 Ohio St.3d 71, 2006-Ohio-

3665, 850 N.E.2d 1168, ¶155 (*Roberts I*). Once this remand occurred, Appellant started a relentless campaign to, at minimum, secure a new sentencing hearing like the one this Court ordered for his co-defendant because the same judge who presided over the Roberts trial presided over Appellant's trial. Most of these efforts are detailed in Appellant's brief at pages 1 through 4. Suffice it say that in 2010 the Eleventh District Court of Appeals agreed that the trial court should conduct a new sentencing hearing for Appellant. *State v. Jackson,* 190 Ohio App. 3d 319, 2010-Ohio-5054, 941 N.E. 2d 1221.

Twenty-two months elapsed between the Eleventh District's remand and the August 14, 2012 re-sentencing hearing. A mere 13 days before the scheduled hearing, Appellant's counsel from the Office of the Public Defender filed a motion with the trial court notifying the court that Atty. John Parker, who has signed on as "pro bono" counsel April 27, 2007, would be withdrawing from the case and that substitute counsel would need to be appointed. (T.d. 391). The Public Defender also requested a six-month continuance for new counsel to acquaint himself or herself with Appellant's case. (T.d. 392). The trial court denied the motion and proceeded with the re-sentencing (T.d. 415).

The trial court permitted Appellant to deliver a second allocution wherein he made no apology for his actions, no expression of remorse, but did tell the judge he did not want to go back to death row. (Resentencing T.p. 21-22). The trial court re-imposed the identical sentence affirmed by this Court in 2006. (T.d. 409, 410). Pursuant to a motion to correct sentencing entry filed by the State (T.d. 412), the trial court redrafted the Judgment Entry on Sentence (T.d. 416). On October 22, 2013, after Appellant had filed his merit brief in this matter, this Court remanded Roberts' case for a third sentencing hearing. *State v. Roberts,* --- N.E.2d ----, 2013

WL 5746121 (Ohio), 2013 -Ohio- 4580. ("*Roberts II*"). Other facts will be brought to the Court's attention as necessary in the Argument portion of this brief.

ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW

State's Answer to Appellant's Proposition of Law No. I:
A reviewing court has jurisdiction to entertain a direct appeal when the convicted offender files with his notice of appeal documents which comply with R.C. 2929.03(F) and Crim. R. 32(C).

Appellant posits a jurisdictional argument that the trial court failed during the re-sentencing proceeding to comply with R.C. 2929.03(F) and that therefore this Court is without jurisdiction to entertain the instant appeal for want of a final appealable order. The record before this Court totally belies his argument.

R.C. 2929.03(F) sets forth the following criteria to establish a final appealable order in a death sentence: "The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.*** The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed."

This Court recently revisited the topic of the death sentence as final appealable order: "'[I]n order to decide whether an order issued by a trial court in a criminal proceeding is a reviewable final order, appellate courts should apply the definitions of 'final order' contained in R.C. 2505.02.' *State v. Baker,* 119 Ohio St.3d 197, 2008-Ohio-3330, 893 N.E.2d 163, ¶ 6, quoting *State v. Muncie* (2001), 91 Ohio St.3d 440, 444, 746 N.E.2d 1092, citing *State ex rel. Leis v. Kraft* (1984), 10 Ohio St.3d 34, 36, 10 OBR 237, 460 N.E.2d 1372. R.C. 2505.02(B) states: 'An order is a final order that may be reviewed, affirmed, modified, or reversed, with or

without retrial, when it is one of the following: '(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment.'

"Crim.R. 32(C) sets forth the requirements for a final, appealable order in criminal cases. It states that '[a] judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence.' It further states: 'The judge shall sign the judgment and the clerk shall enter it on the journal. A judgment is effective only when entered on the journal by the clerk'." *State v. Ketterer,* 126 Ohio St.3d 448, 2010-Ohio-3831, ¶8-11.

This Court has before it two entries filed by the trial court on August 14, 2012; (1) a Findings of Fact and Conclusions of Law (T.d. 410) and (2) an Entry on Sentence (T.d. 409). Pursuant to a motion by the State (T.d. 412), the trial court corrected the Entry on Sentence and filed a nunc pro tunc entry (T.d. 416) on August 16, 2012. As Appellant correctly points out at page 13 of his brief, these two entries comprise a final appealable order.

Where Appellant goes astray is when he argues that the trial court failed to consider "any new mitigating factors" at the resentencing hearing. In the remand by the Eleventh District Court of Appeals which mandated the re-sentencing, the court ordered as follows: "Based on the Supreme Court of Ohio's holding in *Roberts I* appellant is entitled to the same relief afforded to his co-defendant. Thus, the trial judge must personally review and evaluate the appropriateness of the death penalty, prepare an entirely new sentencing entry as required by R.C. 2929.03(F), and conduct whatever other proceedings are required by law and consistent with this opinion. Id. at ¶ 167." *State v. Jackson* 190 Ohio App.3d 319, 941 N.E.2d 1221, 2010-Ohio-5054, at ¶29.

By way of review, in Appellant's co-defendant's case, this Court ordered as followed: "Because of the prejudicial error in sentencing Roberts to death, the sentence of death is vacated, and the cause is hereby remanded to the trial court. On remand, the trial judge will afford

Roberts her right to allocute, and the trial court shall personally review and evaluate the evidence, weigh the aggravating circumstances against any relevant mitigating evidence, and determine anew the appropriateness of the death penalty as required by R.C. 2929.03. The trial court will then personally prepare an entirely new penalty opinion as required by R.C. 2929.03(F) and conduct whatever other proceedings are required by law and consistent with this opinion." *Roberts I*, ¶167. It is noteworthy that neither court ordered that the evidentiary phase of the mitigation hearing for either offender be reopened or supplemented.

In a more recent opinion, this Court clarified any possible or perceived ambiguity with respect to its purpose in having Roberts resentenced. "In a case in which the defendant was not deprived of any constitutional right – including her Eighth Amendment right to present mitigation – at the time of her mitigation hearing, their seems to be no basis for requiring the trial court to reopen or supplement that evidence in a later proceeding." *State v. Roberts,* ---Ohio St. 3d.--,.2013-Ohio-4580, --N.E.2d--, ¶36. (*Roberts II*). This Court continued: "The concurring and dissenting opinion interprets *Roberts I* as *ordering* the trial court to hold a new mitigation hearing and to permit Roberts to introduce mitigating evidence. *Roberts I* did no such thing." *Id.* at ¶41-42. After restating its order in *Roberts I,* this Court held: " The [original Roberts resentencing] order says nothing about holding a new evidentiary hearing. Nor is a requirement to hold a new evidentiary hearing implicit in our instructing the trial court to 'weigh the aggravating circumstances against any relevant mitigating evidence' and 'determine anew the appropriateness of the death penalty'." *Roberts II,* ¶43.

As an aside, the trial court permitted Appellant to allocute at both sentencing hearings. The trial court had inadvertently omitted the allocution portion of Roberts' original sentencing hearing, but did not make the same omission in Appellant's case. Nevertheless, the trial court

extended the same courtesy to Appellant as was done with Appellant's co-defendant. And while this Court remanded Roberts for a third sentencing hearing because the trial court failed to note her allocution in the resentencing entry, the trial court did reference Appellant's second allocution in his second entry: "The Defendant was afforded all rights pursuant to Crim.R.32. The Court has considered the record, oral statements, as well as the principles and purposes of sentencing under R.C. 2929.11 and has balanced the seriousness and recidivism factors of R.C. 2929.12." (T.d. 409, 416).

Those distinctions aside, this Court has made clear that when a capital case is remanded for purposes of correcting errors which occurred post-mitigation hearing, the trial is required to rewind the proceedings only to where the error occurred, not before. This Court considered a nearly identical argument to the one presented by Appellant in *State v. Chinn,* 85 Ohio St.3d 548, 709 N.E.2d 1166 (1999), and concluded that unless the capital defendant was precluded from introducing certain information during the original proceedings, he is not entitled to pad the record with additional mitigating factors at resentencing:

"[A]ppellant also argues that he had 'an absolute right to present any new mitigating evidence at his resentencing hearing in 1994.' In support of this proposition, appellant relies on several United States Supreme Court opinions requiring that the sentencer not be precluded from considering relevant mitigating evidence in a capital case. See, *e.g.*, *Lockett v. Ohio* (1978), 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973; *Skipper v. South Carolina* (1986), 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1; and *Hitchcock v. Dugger* (1987), 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347. However, each of those cases involved a situation where the capital sentencer was prohibited, in some form or another, from considering relevant mitigating evidence at trial. In the case at bar, no relevant mitigating evidence was ever excluded from consideration during the

penalty phase of appellant's 1989 trial. Therefore, the case at bar is clearly distinguishable from the United States Supreme Court's pronouncements in *Lockett, Skipper,* and *Hitchcock.* Accordingly, as was the case in *State v. Davis* (1992), 63 Ohio St.3d 44, 46, 584 N.E.2d 1192, 1194-1195, we find *Lockett, Skipper,* and *Hitchcock* to be inapplicable here. It is of no consequence that the additional mitigating evidence in *Davis* involved *post-trial* accomplishments, whereas appellant's additional mitigation evidence involves matters appellant claims he could have presented but did not present during the mitigation phase of his 1989 trial. In this case, as in *Davis,* the errors requiring resentencing occurred after the close of the mitigation phase of the trial. Under these circumstances, the trial court is to proceed on remand from the point at which the error occurred." *State v. Chinn* 85 Ohio St.3d 548, 564-565, 709 N.E.2d 1166, 1180 – 1181.

Like Appellant, Chinn was a capital defendant who was subject to a remand for sentencing purposes only. Like Chinn, Appellant cites to absolutely no examples of evidence that he was precluded from presenting during his original sentencing. The point of error in Appellant's case occurred not during his mitigation hearing, but during his sentencing hearing. Therefore, he is not legally entitled to improve or expand the record to his advantage. Based on this Court's holding in *Chinn,* Appellant is simply wrong that he was entitled to present "new mitigating factors" at his resentencing.

Appellant points out next that during the resentencing hearing, the trial court read from a pre-drafted sentencing opinion. By implication he suggests that there is something improper in so doing, but fails to cite to any authority prohibiting such a practice. The idea that the trial court could improvise a reversal-proof, 17-page sentencing opinion in open court without some written

prompts is completely unrealistic. This Court has never imposed such a burden on trial judges and hopefully never will.

Notably, this Court has held that even when a sentencing opinion is *filed* before the oral hearing concludes, the capital defendant suffers no prejudice: "We agree that the trial court should have waited until the sentencing hearing was completed to file its sentencing order. However, it is apparent to us that Reynolds was not prejudiced by the court's premature filing.*** Had new evidence or information been presented during the sentencing hearing, the trial court could have modified its sentencing order. We conclude that the premature filing was not prejudicial error." *State v. Reynolds,* 80 Ohio St.3d 670, 683-684,1998-Ohio-171, 687 N.E.2d 1358.

This Court reached the same conclusion in another, even more recent capital case, *State v. Fry,* 125 Ohio St. 3d 163, 2010-Ohio-1017, 929 N.E. 2d 1239, wherein a judge filed the sentencing opinion eight minutes before the sentencing hearing began. Again, this Court found no reversible error. "Here, the trial court permitted Fry to make a statement, and having listened to it, did not modify the entry, though it could have done so. While it is true that the court violated Crim.R. 32(A) by filing the sentencing entry pursuant to R.C. 2929.03(F) before the sentencing hearing, in accordance with *Reynolds,* and under the facts of this case, we hold the premature filing to be harmless error." *Fry, supra,* at ¶193. If Reynolds and Fry suffered no prejudice by his trial court's premature filing of sentencing opinion, Appellant suffers no prejudice in the trial court's preparation of a document prior sentencing. It is axiomatic that the pre-hearing drafting would not render the ultimate death sentence non-final or non-appealable. If Appellant or his counsel had said anything of substance to persuade the court that life was the appropriate sentence, the document could have been redrafted.

Appellant argues that the trial court failed to consider *all* the mitigating factors presented at his resentencing. His version of this omitted "mitigating evidence" appears in footnote 7 wherein he cites to completing a basic prison computer skills class, acquiring a prison music certificate, and amassing a nearly unblemished conduct record in prison. Appellant's brief at p. 16. Ohio Revised Code 2929.04(B) lists the following mitigating factors for an Ohio trial court to consider in a capital case: 1) Whether the victim of the offense induced or facilitated it; (2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation; (3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law; (4) The youth of the offender; (5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications; (6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim; (7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

In its prior opinion, this Court has already found that Appellant's mitigating evidence as presented was woefully lacking: "With respect to the statutory mitigating factors of R.C. 2929.04(B), none appear applicable except for 'other mitigating factors' under (B)(7). Although Jackson claimed that Fingerhut pulled a gun on him, thus forcing him to kill Fingerhut in self-defense, the factor of victim-inducement under (B)(1) is not implicated because the claim of self-defense lacks any credibility under the evidence. Likewise, there is no credible evidence of the factor of victim provocation under (B)(2). Jackson's mitigation expert dispelled any claim that he

suffers from a mental disease or defect, the factor under (B)(3). Since Jackson was 29 years old at the time of the homicide, the youthful-offender factor under (B)(4) does not apply. There is no mitigation in the factor of a clean record under (B)(5), for Jackson had a history of prior criminal convictions. Finally, since Jackson was the principal offender in the murder, the factor of being an accomplice rather than the principal offender under (B)(6) does not apply." *State v. Jackson,* 107 Ohio St. 3d 300, 2006-Ohio-001, 839 N.E. 2d 362, ¶180.

This Court continued: "Under R.C. 2929.04(B)(7), Jackson's ADHD and antisocial personality disorder deserve some weight in mitigation, as well as his ability to overcome his ADHD and adaption to the structured setting of prison.*** On the other hand, Jackson's expression of remorse 'for what happened to the victim' deserves little weight in mitigation. *** Upon independent weighing, we find that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. Jackson murdered Fingerhut during a burglary and stole his car. These were the aggravating circumstances that merit imposition of the capital penalty. Those were weighed against the mitigating evidence found in the nature and circumstances of the offense, Jackson's history, character, and background, and the statutory factors of R.C. 2929.04(B). We find that the aggravating circumstances of this case outweigh the minimal mitigating factors." *Id* at ¶181-183.

The very thought that Appellant's computer skills, musical talents, and his self-reported clean conduct record would qualify as an "any other factor" sufficient to tip the balance in this weighing process is absurd. Computers, music, and good conduct medals do not overcome the horrendous facts of this case which were proven beyond a reasonable doubt. The catchall "any other factor" provision "necessarily implicates a subjective judgment on the part of the sentencing tribunal." *State v. Brewer,* 2nd Dist. No. 87-CA-67, 1988 WL 88697 (Aug. 26, 1988),

at *8. If the court found these accomplishments insignificant and unworthy of mention it did not err in so doing, much less render the sentencing order non-final, or non-appealable.

Finally, the State maintains that even if the Findings of Fact and two sentencing entries do not constitute a "non-final" order, Appellant has waived any such error by filing an appeal thereof. If Appellant had a good faith belief that one or any of these three entries were non-compliant with R.C. 2505.02 or Crim. R. 32(C), it was incumbent upon him to object at the trial court. The "invited error doctrine" holds that a party will not be permitted to take advantage of an error which he himself invited or induced the court to make. See *State ex rel. O'Beirne v. Geauga Cty. Bd. of Elections,* 80 Ohio St.3d 176, 181, (1997); *State ex rel. Bitter v. Missig*, 72 Ohio St.3d 249, 254 (1995). By filing the instant Notice of Appeal with this Court, he vouched for the final and appealable nature of his death sentence. If there was error in this Court accepting the instant appeal, Appellant invited it by filing the appeal. The State found error in the original Entry on Sentence (T.d. 409) , brought the error to the Court's attention (T.d. 412) and the court corrected the error. (T.d. 416). There is no reason why Appellant could not have done likewise.

It is clear that this T.d. 409 and 416 constitute a final appealable order. This Court has jurisdiction to review same. Appellant's Proposition of Law No. I is without merit.

<u>State's Answer to Appellant's Proposition of Law No. II:</u>
A capital defendant precludes a finding of ineffective assistance of counsel when he voluntarily waives the right to one death-certified attorney and insists that the mitigation proceed with a highly qualified and trained criminal attorney.

In his second Proposition of Law, Appellant argues ineffective assistance of trial counsel, not from the point of his resentencing hearing occurring August 14, 2012, but from his mitigation hearing occurring November 15, 2002. For a variety of reasons, this argument is without merit.

First, this Court has held that "[t]he scope of an appeal from a new sentencing hearing is limited to issues that arise at the new sentencing hearing." *State v. Wilson* 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶30. The doctrine of res judicata establishes that "a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment of conviction, or on an appeal from that judgment." Id. quoting *State v. Perry,* 10 Ohio St.2d 175, 39 O.O.2d 189, 226 N.E.2d 104 (1967), paragraph nine of the syllabus.

When Appellant's co-defendant attempted to raise issues from her mitigation hearing in her resentencing appeal, this Court quickly applied the doctrine of res judicata to bar further consideration of her arguments: "These claims are res judicata. They are based entirely on the record of the 2003 hearing. Thus, Roberts could have, and should have, raised these issues in *Roberts I.* She is barred from raising them now. 'Where an argument could have been raised on an initial appeal, *res judicata* dictates that it is inappropriate to consider that same argument on a second appeal following remand.' *State v. D'Ambrosio,* 73 Ohio St.3d 141, 143, 652 N.E.2d 710

(1995). *See also State v. Gillard,* 78 Ohio St.3d 548, 549, 679 N.E.2d 276 (1997) (issues not raised on prior appeal are barred by res judicata and overruled without further consideration)." *Roberts II,* ¶95.

Appellant's argument as fashioned goes beyond the scope of an appeal from his resentencing. Appellant does not challenge his counsel's performance at his 2012 resentencing which is the subject of this appeal. Instead, he reaches back to his mitigation hearing in 2002 to argue counsel's purported ineffectiveness. That is impermissible. According to *Wilson* and *Perry,* this entire argument is barred by the doctrine of res judicata and should be dismissed outright.

Appellant had every opportunity to challenge the mitigation-stage performance of his trial counsel in his direct appeal to this Court. He did not; instead, he challenged the effectiveness of his trial counsel, Atty. James Lewis and Atty. Anthony Consoldane, in their performance in the voir dire and guilt phases of his trial. This Court spent a considerable part of its opinion rejecting any notion that Atty. Lewis or Atty. Consoldane rendered ineffective assistance of counsel. *State v. Jackson,* 107 Ohio St. 3d 300, 2006-Ohio-1, 839 N.E. 2d 362, ¶¶127-141. Therefore, this issue is res judicata barred.

Appellant raised a strikingly similar argument to his Proposition of Law No. II in his Amended Petition for Postconviction Relief filed March 29, 2006 (T.d. 306). Said argument was dismissed by the trial court without hearing. Though not controlling on this Court, the Eleventh District unanimously upheld the trial court's dismissal of this claim noting that even with his "evidence" de hors the record, Appellant did not support a claim of ineffectiveness. "***The only new argument made is that the last minute substitution of Attorney Thomas Wright for Attorney James Lewis compromised his defense during mitigation. Specifically, appellant asserts

that Attorney Wright was not certified by the Supreme Court of Ohio to serve in a capital case, and he was new to the case. However, none of the exhibits presented by appellant in support of this claim demonstrate that Attorney Wright was ineffective." *State v. Jackson,* 11th Dist. No. 2004-T-0089, 2006-Ohio-2651, ¶¶139-140.

More importantly, Appellant conveniently omits from this twice-rejected argument that Judge Stuard offered to recess the proceedings until Atty. Lewis could re-join the defense team, but Appellant insisted the mitigation hearing proceed. The transcript on this issue reads as follows:

> **MR. CONSOLDANE:** I have talked with Mr. Jackson and we do not think that any delay at this point would be wise. I have also talked with Tom Wright, who has a contract to work with our office. Mr. Wright has gone through the three day death penalty seminar. He also meets the other requirements. He, however, is not certified. He has not applied for the certification and would ask the Court to permit him to sit as co-counsel in this case with me, so he can get this finished.

(T.p. Vol. 16, p.4-5).

Atty. Consoldane also told the court:

> **MR. CONSOLDANE:** "[F]or the last ten years on the cases that Mr. Lewis and I have tried together, I pretty much have handled most of the mitigation. I had the witnesses here. I didn't want to have them come back.

(T.p. Vol. 16, p. 157).

The trial court personally inquired of Appellant *twice* if he agreed to proceed with Atty. Wright instead of Atty. Lewis, if he understood that the court would grant a continuance if requested, and if he felt it was in his own best interests to proceed as scheduled without Atty. Lewis. Appellant answered in the affirmative each time. (T.p. Vol. 16, p. 5, 155). Appellant told the court, after closing arguments in the mitigation phase, that he was satisfied with Atty. Wright's help. (T.p. Vol. 16, p. 155). Following an inquiry by the prosecuting attorney, Atty. Consoldane stated his client wished to waive his right to be represented by two death-certified

attorneys. (T.p. Vol. 16, p. 7). This waiver was also noted by the Eleventh District: "[A]ppellant was offered a continuance by the trial court to delay proceedings until Attorney Lewis could recuperate, but the court's offer was rejected by appellant who stated that he wanted to proceed with Attorney Wright. Thus, this claim was properly denied by the trial court." *State v. Jackson,* 11th Dist. No. 2004-T-0089, 2006-Ohio-2651, ¶¶140-141.

According to the doctrine of invited error, a party cannot complain of any action taken or ruling made by the court in accordance with that party's own suggestion or request. *State v. Cunigan* 195 Ohio App.3d 162, 2011-Ohio-4010, 958 N.E. 2d 1290 (2nd Dist.), ¶12. Appellant requested that the hearing proceed according to schedule; he is barred from complaining that it did.

Even though this Proposition of Law is completely barred by the doctrines of res judicata and law of the case, the State would make two observations here. First, the State takes issue with Appellant's statement at page 20 of his brief that Atty. Wright suffered from a "total lack of any knowledge concerning Appellant's case." That is absolutely unsupported by the record before this Court. Though the parties discussed Atty. Wright's lack of a Sup. R. 20 certification, nothing appears in the record as to his knowledge, or lack thereof, concerning Appellant's case. To make this self-serving, speculative, and unsupported criticism of Atty. Wright is irresponsible and unprofessional.

Second, Appellant spikes this argument with evidence de hors the mitigation record which is also improper. He relies repeatedly upon exhibits from his post-conviction claim. "Since a reviewing court can only reverse the judgment of a trial court if it finds error in the proceedings of such court, it follows that a reviewing court should be limited to what transpired in the trial court as reflected by the record made of the proceedings." *State v. Ishmail* 54 Ohio

St.2d 402, 406, 377 N.E.2d 500, 502 (1978). Appellant's allegations of an insufficient sentencing investigation are based on facts not present in the record. As such, neither allegation can be addressed upon direct appeal. "It is impossible for this court to determine on a direct appeal from a conviction whether an attorney was ineffective in his representation of a criminal defendant, where the allegation of ineffectiveness is based on facts dehors the record." *State v. Gibson,* 69 Ohio App.2d 91, 95 (8th Dist., 1980). Appellant's blended direct appeal and post-conviction petition is an improper invitation to decide his trial counsel's performance with evidence not properly before this Court. Even if it were permissible, the exhibits prove nothing as to the level of representation provided by trial counsel.

Moreover, this Court has previously declined an opportunity to review these very claims about which Appellant complains. Appellant sought a discretionary review of the Eleventh District's decision which affirmed the trial court's denial of his original and amended post-conviction claim. Appellant's argumentation regarding Atty. Wright's lack of Sup. R. 20 certification and complaints about pre-mitigation investigation were contained therein. This Court refused accept this discretionary appeal. See, *State v. Jackson,* 111 Ohio St. 3d 1469, 2006-Ohio-5625, 855 N.E. 2d 1258. Therefore, by way of rejecting the discretionary appeal, this Court has essentially rejected Appellant's argument as well. *State v. O'Neill,* 11th Dist. No. 2010-P-0041, 2011-Ohio-2202, ¶66.

As this Court held in Appellant's first direct appeal, "[r]eversal of a conviction for ineffective assistance requires two showings. 'First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense. Proving prejudice requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial.' *Strickland v. Washington* (1984), 466 U.S. 668, 687,

104 S.Ct. 2052, 80 L.Ed.2d 674. Accord *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. In no instance, however, does Jackson demonstrate prejudice, 'a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.' Id. at paragraph three of the syllabus." *State v. Jackson* 107 Ohio St.3d 300, 2006-Ohio-0001, 839 N.E.2d 362, ¶127. Appellant failed to show ineffective assistance of counsel in his original, direct appeal and fails to show it here.

This Proposition of Law is barred by the doctrines of res judicata, law of the case and waiver. Appellant improperly bolsters this Proposition with evidence de hors the record. This Court has already determined that his trial counsel's performance did not prejudice Appellant. Therefore, this Proposition of Law completely lacks merit.

State's Answer to Appellant's Proposition of Law No. III:
A trial judge has no duty or obligation to recuse himself from a capital case when the Chief Justice of this Court has twice denied motions of disqualification because the complaining defendant fails to demonstrate bias or ill-will on the part of the judge.

Appellant seeks reversal under the positively unsupported allegation that the late Judge John Stuard was less than "neutral" or "detached" in the resentencing proceedings ordered by the Eleventh District Court of Appeals. This accusation is not only contrary to the record, but contrary to arguably schizophrenic post-Roberts pleadings and motions filed by Appellant aimed at forcing Judge Stuard to a resentencing hearing, and then attempting to block the very proceeding he sought.

As Appellant notes in this Proposition of Law, he tried on at least two occasions to remove Judge Stuard from this case after this Court decided *Roberts I.* Both efforts failed. The late Chief Justice Thomas Moyer made it abundantly clear in both applications for disqualification that Judge Stuard was to remain on Appellant's case and decide whether he was entitled to a resentencing hearing like his co-defendant.

Appellant's first failed effort to remove Judge Stuard came about in 2006. He premised the 2006 motion for disqualification on his request for a hearing regarding the authorship of his sentencing entry, and the mere possibility that Judge Stuard would possibly be called as a witness at said hearing. *In re Disqualification of Stuard,* 113 Ohio St. 1236, 2006-Ohio-7233, 863 N.E. 2d 636, ¶ 3. However, Judge Stuard staunched the need for a hearing by supplying an affidavit to this Court admitting that he "held the same kind of communications with the prosecuting attorney's office in both the Roberts and Jackson capital cases before sentencing each of them to death***." Id. at ¶4. Chief Justice Moyer found as follows: "***I conclude that the record before me does not compel his disqualification for any alleged bias or prejudice. To be

sure, if a judge's words or actions convey the impression that the judge has developed a 'hostile feeling or spirit of ill will,' *State ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463, 469, 58 O.O. 315, 132 N.E.2d 191, or if the judge has reached a 'fixed anticipatory judgment' that will prevent the judge from hearing the case with 'an open state of mind * * * governed by the law and the facts,' id., then the judge should not remain on the case. There is no evidence in the record before me, however, to suggest that the judge has shown any hostility or bias toward either party, and there is no indication that he is unable or unwilling to resolve any remaining disputed matters with an open state of mind." *Id.* at ¶8.

The second affidavit for disqualification came about in 2008 wherein Appellant accused Judge Stuard of dragging his feet on his resentencing and of having an interest in the outcome of his resentencing because of pending disciplinary proceedings stemming from the Roberts sentencing entry. Again, Chief Justice Moyer refused to remove Judge Stuard from Appellant's case. "As I have previously held, a judge's action – or inaction – on a motion is within the sound discretion of the judge and is not, by itself, evidence of bias or prejudice." (T.d. 376). Chief Justice Moyer likewise refuted Appellant's allegation that Judge Stuard harbored a personal interest in the outcome of his case: "***I agree with Judge Stuard that nothing he does in the Jackson's case can affect the outcome of his disciplinary case. In addition, the judge has stated that he has no personal interest in Jackson's case and can act as an impartial trier of fact, and my review of this matter prompts me to reach the same conclusion. As I have said, '[a] judge is presumed to follow the law and not to be biased, and the appearance of bias or prejudice must be compelling to overcome these presumptions. *In re Disqualification of George,* 100 Ohio St. 3d 1241, 2003-Ohio-5489, ¶5. *Those presumptions have not been overcome in this case.*" (Emphasis added). *Id.*

Further consideration of this claim at this juncture is barred by the doctrine of res judicata. As this Court held in another Trumbull County capital murder case, "[i]n *State v. Rogers* (1985), 17 Ohio St.3d 174, 185–186, 17 OBR 414, 424–425, 478 N.E.2d 984, 995, this court found that when the Chief Justice dismisses an affidavit of disqualification as not well taken, 'the Chief Justice's ruling is *res judicata* as to the question'." *State v. Getsy,* 84 Ohio St.3d 180, 185, 702 N.E.2d 866, 876 (1998). Chief Justice Moyer considered the purported "bias" of Judge Stuard not once but twice. In both instance he found no merit to Appellant's claim and refused to remove him from this case. Therefore, this issue is well settled and not subject to further review.

Should this Court decline to apply the doctrine of res judicata, the State submits Appellant fails to cite any credible reason for Judge Stuard's removal. As Chief Justice Moyer correctly noted, to prevail on an affidavit of disqualification an affiant must demonstrate clearly the existence of bias, prejudice, or other disqualifying interest that requires a judge's removal. See, R.C. 2701.03(B)(1). First, Appellant alleges at page 38 of his brief that Judge Stuard repeatedly refused to accept this Court's ruling in *Roberts* that he had improperly permitted the prosecutor to draft the sentencing opinion. That is a complete falsehood.

In its opinion reprimanding Judge Stuard for his failure to draft his own sentencing opinion in *Roberts,* this Court found: "Judge Stuard concedes and the board found that his ex parte communications with [Assistant Prosecuting Attorney Christopher] Becker, engaged in without the knowledge or consent of opposing counsel, violated Canon 2 (requiring a judge to 'respect and comply with the law and * * * act at all times in a manner that promotes public confidence in the integrity of the judiciary') and 3(B)(7) (providing that, except in situations not relevant here, '[a] judge shall not initiate, receive, permit, or consider communications [as to

substantive matters or issues on the merits] made to the judge outside the presence of the parties or their representatives concerning a pending or impending proceeding * * *')." *Disciplinary Counsel v. Stuard,* 121 Ohio St.3d 29, 901 N.E.2d 788, 2009-Ohio-261,¶10. This Court continued, "Judge Stuard has complied with our mandate in *State v. Roberts,* 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168. Both he and Becker have acquiesced in the board's recommendation, assuring that they have recognized their wrongdoing and will not repeat it. A public reprimand is therefore appropriate." *Id.,* at ¶15. Conceding violations, recognizing wrongdoing, and a promising not to repeat the same conduct hardly qualifies as a "refusal" to accept this Court's ruling in *Roberts.*

Appellant next argues Judge Stuard's "lack of fairness and impartiality" by delaying ruling on his motion for leave to file a motion for new sentencing hearing. As previously quoted, Chief Justice Moyer already has stated that a mere delay in a ruling is not dispositive a judge's bias in a case. See, also, *In re Disqualification of Eyster,* 105 Ohio St. 3d 1246, 2004-Ohio-7350 at ¶4; *In re Disqualification of Park,* 991 N.E. 2d 244, 2013-Ohio-2834, ¶6; *In re Disqualification of Lawson,* 135 Ohio St. 3d 1243, 2012-Ohio-6237, 986 N.E. 2d 6, ¶6. In fact, Chief Justice Moyer reached that conclusion on September 22, 2008, six months after this Court dismissed Appellant's complaint for writ of procedendo/mandamus which sought to force a ruling on the motion for leave. (T.d. 376). The authority from this Court is clear; the delay is not tantamount to a biased jurist.

Appellant misstates the record when he says Judge Stuard denied his motion to resentence after stating he was prepared to grant the motion. Chief Justice Moyer apparently did not view any affidavit from Judge Stuard as affirmatively stating he would resentence Appellant. "I find no basis for ordering the disqualification of Judge Stuard. *The judge is entitled to*

consider the defendant's motion for relief from judgment now pending in the trial court, and if the judge concludes that relief is appropriate, *he may grant that motion and conduct the new sentencing hearing* that he has described in his response to the affidavit filed here. The judge acknowledges the factual allegations in the defendant's affidavit, so the matter of a new sentencing hearing akin to the hearing ordered by this court in the Roberts case appears not to require the resolution of any factual disputes between the parties but rather turns on the legal question *whether a new sentencing hearing is warranted for this defendant."* (Emphasis added). *In Re Disqualification of Stuard, supra,* at ¶5. This is further evidenced by the Chief Justice's entry of September 22, 2008, when he stated "[A]ffiants have apparently overlooked my prior statements that Judge Stuard *is entitled to determine the appropriate relief in Jackson's case, including whether a new sentencing hearing is warranted.*" (Emphasis added). (T.d. 376). Therefore, while Appellant may have viewed Judge Stuard's affidavit as a promise for a new sentencing hearing, the former Chief Justice of this Court did not.

In the interest of full disclosure, the Eleventh District Court of Appeals agreed with Appellant's interpretation of the Stuard affidavit, and on October 15, 2010, ordered a re-sentencing hearing akin to the one afforded Donna Roberts. *State v. Jackson,* 190 Ohio App.3d 319, 2010 -Ohio- 5054, 941 N.E.2d 1221. From that moment on, Appellant engaged in a relentless campaign to stall the very proceedings he demanded for four years. He opposed the State's motion to set a resentencing date. (T.d. 386). Since this Court had custody of the record of this case (T.d. 387), the State was forced to renew that motion four months later. (T.d. 388). Again, Appellant opposed. (T.d. 389). When Judge Stuard set August 14, 2012, as the resentencing date, Appellant sought a continuance. (T.d. 392). For a *third* time Appellant sought to disqualify Judge Stuard from the case. (T.d. 394). He also filed a complaint for writ of

prohibition in the Eleventh District Court of Appeals just 13 days before the scheduled hearing in an effort to block the resentencing. *State ex. rel. Jackson v. Stuard,* 11th Dist. No. 2012-T-0062, 2012-Ohio-4209. The record is plain: Even after Appellant had won the battle for a resentencing hearing, he did everything within his power to forestall the proceedings. Thus, commentary at page 38 of Appellant's brief claiming Judge Stuard showed bias by refusing to conduct the resentencing is belied by the record.

Appellant next argues that Judge Stuard showed a lack of fairness and impartiality by preparing the findings of fact for the sentencing prior to Appellant's allocution. As the State briefed in its response to Appellant's Proposition of Law No. I, this Court found no prejudicial error when a sentencing judge filed a capital sentencing order prior to the defendant's allocution. *State v. Reynolds,* 80 Ohio St.3d 670, 683-684 (1998). It is axiomatic that if no prejudicial error occurs by the early filing of the order, the mere preparation of the document is not indicative of bias, prejudice or ill-will. Moreover, given this Court's opinion in *Roberts II* wherein this Court makes clear that Roberts is *not* entitled to a second allocution, Appellant's second allocution is arguably rendered moot and it is inconsequential whether the trial court considered it, or completely disregarded it.

Finally, Appellant argues bias in the trial court's refusal to consider additional information which he considered relevant to the appropriateness of a death sentence. Again, this was fully briefed in the State's response to Proposition of Law No. I. This Court in *Roberts I* did not order a re-opening of the mitigation phase, but merely ordered a new sentencing hearing. Even in *Roberts II* which remanded her case for a third sentencing hearing, this Court made clear that the resentencing was not an opportunity for a re-opened mitigation hearing. *Roberts II,*

¶ ¶41-49. In that the Eleventh District ruled that " [b]ased on the Supreme Court of Ohio's holding in *Roberts,* appellant is entitled to the *same relief afforded to his co-defendant.* Thus, the trial judge must personally review and evaluate the appropriateness of the death penalty, prepare an entirely new sentencing entry as required by R.C. 2929.03(F), and conduct whatever other proceedings are required by law and consistent with this opinion. *Id.* at ¶ 167." (Emphasis added). *State v. Jackson* 190 Ohio App.3d 319, 941 N.E.2d 1221, 2010-Ohio-5054, at ¶29. The fact that Judge Stuard attempted to scrupulously follow the mandates of this Court and the Eleventh District with respect to both resentencing hearings does not demonstrate a lack of fairness or impartiality.

To conclude, this Proposition of Law is barred by res judicata. The issue of Judge Stuard's disqualification was settled by this Court not once, but twice. In the alternative, Appellant fails to demonstrate that Judge Stuard exhibited bias, a hostile feeling toward him, or a spirit of ill-will with respect to any post-*Roberts* decision. Therefore, his removal from Appellant's case was wholly unwarranted. This Proposition of Law is without merit.

State's Answer to Appellant's Proposition of Law No. IV
When a capital defendant has been represented by two death-qualified attorneys for five years, the trial court does not abuse its discretion by denying an eleventh-hour motion to stall a simple resentencing hearing so that one of those attorneys can shirk his duty to his client and the court.

In this Proposition of Law, Appellant attempts to assign error on the part of the trial court for "refusing" to appoint qualified counsel to represent him at his resentencing hearing. This argument is without merit.

To be clear, two highly experienced death penalty defense attorneys appeared with Appellant at his resentencing hearing. Atty. John Parker and Atty. Randall Porter were counsel of record during that proceeding and present for the resentencing. Both are "death certified" pursuant to Sup. R. 20 II(A), and appear on this Court's Statewide List of Rule 20 Certified Attorneys as "Lead Trial and Appeal Counsel." Atty. Porter spoke on Appellant's behalf (Resentencing T.p. 10, 12, 14-16, 18-20) and then presented the court with three volumes of proffered exhibits. (T.d. 406, 407, 408).

Appellant attempts to use this argument as a smokescreen to argue the real issue here: whether the trial court abused its discretion by denying Appellant's eleventh-hour motion to continue this case so that the trial court could "appoint" counsel for purposes of resentencing. The State submits no abuse of discretion occurred here and Appellant was ably represented by two eminently-qualified, death-certified attorneys.

By way of review, Atty. John Parker filed a notice of appearance in Appellant's case in the trial court April 27, 2007 (T.d. 351). It should be noted that he filed this notice of appearance on his own initiative, and not by court order or even a tacit invitation by the trial court. The terse notice read as follows: "Now comes John P. Parker who respectfully gives notice of his appearance as co-counsel in the above captioned case. Additionally, counsel requests a status

conference concerning motions pending before this Honorable Court." *Id.* In his brief to this Court, Appellant claims that that Federal Judge James Gwin had appointed Atty. Parker to Appellant's habeas proceedings on March 27, 2007, a full month ahead of Atty. Parker's voluntary entre to the trial court proceedings. Atty. Parker remained on Appellant's case filing pleadings and motions in the trial court (T.d. 355, 360, 386, 389), appeals in the Eleventh District Court of Appeals (*State v. Jackson,* 190 Ohio App.3d 319, 2010 -Ohio- 5054, 941 N.E.2d 1221; *State v. Jackson,* 2008-T-0024, 2010-Ohio-1270; *State v. Jackson,* [May 13, 2010], 11th Dist. No. 2009-T-0050) and in this Court (*State v. Jackson,* Case No. 2010-0865; *State v. Jackson,* Case No. 2008-1610; *State ex rel. Jackson v. Stuard,* Case No. 2008-0028; *In Re Disqualification of Stuard,* Case No. 08-AP-043). In most of these actions, Atty. Parker referred to himself a "pro bono counsel."

It was not until August 1, 2012, a mere 13 days before resentencing, Atty. Porter filed a motion to appoint himself as counsel for purposes of resentencing, and informed the Court, for the first time, that Atty. Parker did not seek "appointment" because he had been serving merely as Appellant's "volunteer" counsel all along, and because he was appointed five-and-half-years earlier to represent Appellant in the federal courts. (T.d. 391). Simultaneous with the motion to appoint, Appellant filed a Motion for a Continuance based on the supposition that the trial court would appoint new counsel and that counsel would need six months to acquaint him or herself with Appellant's case. (T.d. 392). The trial court denied Appellant's motion to continue, but did not immediately rule on the motion to appoint. (T.d. 393).

At the outset, it should be as clear as the nose on Cyrano de Bergerac's face that the tandem motion to continue/appoint was filed as a last-minute delay tactic. This Court has held that: "In evaluating a motion for a continuance, a court should note, inter alia: the length of the

delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstances which gives rise to the request for a continuance; and other relevant facts, depending on the unique facts of each case." *State v. Unger,* 67 Ohio St. 2d 65, 67–68, 423 N.E.2d 1078 (1981).

Appellant requested a six-month delay of a sentencing that for all intents and purposes had been delayed for 22 months when he filed his motion. Though it was Appellant who sought the resentencing, it was the State of Ohio that ultimately filed two motions with the trial court to schedule the resentencing. (T.d. 385, 388). In the interest of full disclosure, part of the reason for the trial court's disinclination to schedule the hearing immediately after the Eleventh District's 2010 remand was because the record for Appellant's case was with this Court for *State v. Jackson,* Ohio Supreme Court No. 2008-1610. As the trial court explained at resentencing, the court was unaware until April of 2012 that the record had been returned two months earlier. (T.p. Resentencing, p. 13). Once the court became aware that the record was back in the local court, it drafted an entry in April of 2012 stating a resentencing date would be set. (T.d. 390). While Appellant was not responsible for *that* delay, his counsel still had 22 months to inform the court that new counsel needed to be appointed. Instead, they waited until 13 days before the hearing and requested a six-month continuance. Pursuant to *Unger,* the requested continuance was for specious reasons, and filed for the sole purpose to delay the resentencing. If Atty. Parker genuinely believed he was conflicted out of the trial proceedings because of his anticipated role in the habeas proceedings, he could have withdrawn from the case months earlier rather than

having his co-counsel raise it at the last minute. Thus, the trial judge did not abuse his discretion in denying a requested six-month continuance to bring new counsel up to speed.

In his brief at page 41, Appellant refers to "Attorney Parker's withdrawal" from his case in the trial court. Point of fact: Atty. Parker never formerly withdrew from the case in the trial court. He filed a notice of appearance April 27, 2007 and as far as the docket below indicates, he is still the attorney of record in the court below. Even if he had formally withdrawn it is well-settled law that a motion to withdraw as counsel is committed to the sound discretion of the trial court. *State v. Coleman* 37 Ohio St.3d 286, 292, 525 N.E.2d 792 (1988). The trial court did not abuse its discretion by disallowing Atty. Parker to officially "withdraw" from the case 13 days before resentencing after five-and-half years of representation with no hint of this manufactured "conflict" with the federal courts.

Atty. Parker was well aware of his appointment in the federal case when he filed his notice of appearance in the state case in 2007. If a conflict exists, Atty. Parker created it by accepting appointment in the federal court, and then joining the defense team in the trial court. If the trial court erred, Atty. Parker invited it. It is well settled that a party is not entitled to take advantage of an error the he invited or induced the court to make. *State ex rel. Kline v. Carroll,* 96 Ohio St.3d 404, 2002 -Ohio- 4849, 775 N.E.2d 517, ¶27. Moreover, an attorney's obligation to his client is not diminished by the pro bono nature of his representation. *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 135 (2001). Despite his "pro bono" status, Atty. Parker was still obligated to provide effective representation of Appellant.

Appellant closes this argument by stating the trial court's failure to appoint two attorneys for resentencing denied him the effective right to counsel. This is incorrect. As this Court explained: "Sup.R. 20(II)(A), titled 'Appointment of counsel for indigent defendants in capital

cases," provides that 'at least' two attorneys (with death-penalty qualifications and experience) shall be appointed by the court to represent an indigent defendant charged with capital murder. However, Sup.R. 20(I)(B) states that these rules apply 'only in cases where the defendant is indigent and counsel is not privately retained *by or for* the defendant'." (Emphasis added). *State v. Hunter,* 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶64 . Counsel was privately retained for Appellant when Atty. Parker entered his notice of appearance. He functioned as Appellant's attorney in the trial court, district appellate court, and this Court. Appellant's parsing of designations of "appointed," "pro bono" or "volunteer" counsel should be looked upon with a jaundiced eye. The fact is two death-qualified attorneys jointly represented Appellant for five-and-half years in three courts. Their designation as appointed, pro bono, volunteer or retained had no bearing on the quality of their representation.

Finally, the State submits that if this Court finds error in the trial court's refusal to further delay a resentencing hearing - already stalled for 22 months - the error is at worst harmless error. Harmless error is described as "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A). Overcoming harmless error requires a showing of undue prejudice or a violation of a substantial right.

Appellant has no substantial right to derail his case for six months so that his "volunteer counsel" can throw his co-counsel of five years under the bus with an ineffective assistance of counsel claim in the federal courts. If Atty. Parker finds his performance at resentencing to be so ineffective as to merit dragging his own professional reputation through the mud in the federal courts, he is free to formally withdraw from the habeas proceedings and let another court-appointed, federal attorney argue his ineffectiveness. These actions will have no effect on any of Appellant's substantial rights.

For the reasons thus state, Appellant's Proposition of Law No. IV is without merit.

State's Answer to Appellant's Proposition of Law No. V:
A remand for re-sentencing does not require a trial court to consider irrelevant or cumulative "evidence" when re-imposing a death sentence previously affirmed by this Court.

As the Court is aware, Appellant's resentencing came about as a result of a remand from the Eleventh District Court of Appeals in *State v. Jackson,* 190 Ohio App. 3d 319, 2010-Ohio-5054, 941 N.E. 2d 1221 (11th Dist). Therein, the court ordered as follows: "Based on the Supreme Court of Ohio's holding in *Roberts,* appellant is entitled to the same relief afforded to his co-defendant. Thus, the trial judge must personally review and evaluate the appropriateness of the death penalty, prepare an entirely new sentencing entry as required by R.C. 2929.03(F), and conduct whatever other proceedings are required by law and consistent with this opinion. Id. at ¶ 167." *Jackson* at ¶29.

The paragraph from this Court's decision in "*Roberts*" quoted by the lower court reads as follows: "Having found no prejudicial error in regard to Roberts's convictions, we affirm the convictions and the judgment of the trial court pertaining to them. Because of the prejudicial error in sentencing Roberts to death, the sentence of death is vacated, and the cause is hereby remanded to the trial court. On remand, the trial judge will afford Roberts her right to allocute, and the trial court shall personally review and evaluate the evidence, weigh the aggravating circumstances against any relevant mitigating evidence, and determine anew the appropriateness of the death penalty as required by R.C. 2929.03. The trial court will then personally prepare an entirely new penalty opinion as required by R.C. 2929.03(F) and conduct whatever other proceedings are required by law and consistent with this opinion." *Roberts I,* at ¶167. The State submits the trial court's resentencing of Appellant fully complied with the directives from both courts.

As cited by the State in prior arguments, since the Eleventh District remanded Appellant's case for resentencing, this Court has decided *Roberts II.* Therein this Court dispelled any notion that Roberts was entitled to present new evidence, including her prison records. Appellant can cite to no reason or authority which would suggest that he is entitled to augment his resentencing proceeding with evidence clearly available at the time of his trial when Roberts was precluded from doing the same.

The State disagrees with Appellant's statement at page 44 that "the judge had not considered any new evidence" offered from the resentencing hearing. As discussed in the State's response to Proposition of Law No. I, neither court sent this case back for the purpose of a reopened mitigation hearing. The judge permitted Appellant to once again allocute, wherein he cited his good conduct in prison and his wish not to return to death row. In recognition of that statement, the judge wrote in both his original sentencing entry and the revised entry that "[t]he court has considered the record, oral statements, as well as the principles and purposes of sentencing under R.C. 2929.11." (T.d. 409, 416). The fact that the allocution was not persuasive does not mean it was not considered.

The State also disagrees that the trial court in anyway erected "barriers," precluded the presentation of relevant mitigating evidence, or excluded testimony during the mitigation proceedings as Appellant insinuates at page 45 of his brief. During his mitigation hearing, Appellant called four lay witnesses, one of whom brought Appellant's daughter to the witness stand as some kind of a sympathy prop or ploy even though she was not sworn to testify. (T.p. Vol. 16, p. 23-32). The defense also called their own hand-picked clinical and forensic psychologist, Dr. Sandra McPherson. (T.p. Vol. 16, p. 37-103). The record does not indicate that Appellant was precluded from calling any witness on his behalf in 2002. It should be noted that

at no time during the resentencing hearing did Appellant alert the court to witnesses standing by to testify, nor did he proffer any testimony. Instead, Appellant proffered three volumes of containing roughly 88 exhibits. (T.d. 406, 407, 408). As will be discussed infra, not one shred of relevant mitigating evidence appears in any of these exhibits not already considered by Appellant's jury during his mitigation hearing.

Appellant relies upon the U.S. Sixth Circuit Court of appeals decision in *Davis v. Coyle,* 475 F. 3d. 761 (6th Cir.2007). Therein, the court vacated a death penalty imposed at resentencing because the panel declined to consider Davis' adjustment to death row and the testimony of a psychologist. In the three volumes of proffered exhibits, Appellant does not offer a single document from the prison to tout his post-sentence adjustment. He offers what appears to be the entire file of Dr. McPherson, including her shorthand notes. (T.d. 408, Ex. 87). Curiously, while trying to convince this Court that Appellant has made just a splendid adjustment to death row, he submits Ex. 64, an affidavit from Dr. Robert G. Kaplan who opined that Appellant had a substance abuse problem in December of 2003, and this was after two full years of incarceration. Dr. Kaplan then took the remaining five out of a twelve- paragraph affidavit to set forth his fee schedule for additional testing to prove that Appellant has a "substance abuse" or "chemical dependency problem." *Id.*

Moreover, it should not be lost on this Court that Appellant orchestrated the Fingerhut homicide *from prison* while incarcerated on an unrelated charge in the fall of 2001. This irrefutable fact merited mention in the court's findings of fact on sentencing: "***[I]t is abundantly clear that he was plotting to commit the ultimate criminal act, a premeditated burglary and murder, while pre-textually presenting himself to prison officials as a good candidate for a release program. Quite simply, in the very setting in which the Defense suggests

that he could be a productive member, the Defendant defined and refined a plot, involving gloves, a mask and handcuffs, to murder Robert Fingerhut so that in effect he could assume Fingerhut's lifestyle, including running the Greyhound bus business, managing rental properties, and living with Fingerhut's ex-wife." (T.d. 410, p. 13-14). Absolutely nothing in Appellant's 88 proffered exhibits contradicts this finding. These findings are not speculation. The State provided ample exhibits through prison phone calls and nearly 300 letters documenting Appellant's lust for his co-defendant and her upscale lifestyle. In Appellant's mind, only Robert Fingerhut stood between Appellant and his personal improvement goals, but he would not stand for long.

Appellant next argues that *Davis, supra,* rejects the notion that this Court can cure any error by a reweighing of the mitigating factors and aggravating circumstances. Given Appellant's hefty three-volume proffer, such an argument is inapplicable here. The Sixth Circuit recently distinguished *Davis* for the following reasons: "This court held [in *Davis*] that *the trial court erred by excluding the mitigation evidence. Id.* at 774–75. We held that reweighing was not a proper remedy *because the improperly excluded evidence had never been put into the record,* and the state appellate courts could not reweigh what had never been weighed in the first place. *Id.* In Moore's case, the mitigation evidence was before the trial court; the court simply found that it was outweighed by the aggravating circumstances. The evidence was never excluded from the record altogether." (Emphasis added). *Moore v. Mitchell,* 708 F.3d 760, 804 -805 (6th Cir. 2013). Just as in *Moore,* this Court has before a plethora of exhibits (T.d. 406, 407, 408) which it can use to reweigh whether the trial court properly imposed the death penalty for the second time. However, this Court's decision in *Roberts II* would indicate that consideration of these extraneous exhibits may be improper.

Appellant argues at page 48 of his brief that his proffered exhibits contain "relevant, probative mitigation evidence." The State disagrees and submits that at best these exhibits have either no possible evidentiary value in mitigation or are simply cumulative of testimony already considered by Appellant's jury, the trial court and ultimately this Court. In his brief, Appellant argues that he suffered from "borderline mental retardation." He uses an affidavit submitted by Dr. Thomas Boyd to suggest that Dr. McPherson's scoring may have skewed Appellant's I.Q. higher than merited. The Eleventh District Court of Appeals has already reviewed this affidavit because it was submitted with his original postconviction petition. The court found as follows: "***[P]ursuant to appellant's own evidentiary materials, the alleged errors in the calculation would have only resulted in a four-point change in the final result, i.e., from 84 to 80. Under Ohio law, there is a rebuttable presumption that a criminal defendant is not mentally retarded if the result of his IQ test is greater than 70. *State v. Lott,* 97 Ohio St.3d 303, 779 N.E.2d 1011, 2002-Ohio-6625. Thus, the difference in appellant's I.Q. would not have changed his basic status under the intelligence scale. In light of the overwhelming nature of the aggravating circumstances in this case, this four-point error in calculation would not have altered the jury's weighing exercise in determining whether to recommend the death penalty." *State v. Jackson,* 11th Dist. No. 2004-T-0089, 2006-Ohio-2651, ¶143. The State acknowledges that this well-reasoned analysis from a lower court is not binding on this Court, but it should be persuasive.

It must also be mentioned that this supposed evidence as to Appellant's "borderline mental retardation" was flatly refuted by Appellant himself at his resentencing when he touted his achievements in basic and advanced computer skills classes in prison and that he tutored other inmates. (Resentencing T.p. 21). This Court has before it considerable evidence concerning Appellant's communication skills and artistic prowess. Appellant's adaptive

functioning level is apparently high enough to master computer skills and teach other inmates. Thus, a designation as "borderline mentally retarded" is supported by nothing more than conjecture and psychometric number crunching which has little to do with reality.

Appellant also cites to exhibits which allege he was a low achiever and a behavioral problem in school, his mother and step-father were binge drinkers, his grandmother raised him, and in true Smothers' Brothers fashion, his mom always liked his brother best. He also lists a litany of criminal activity and anti-social behavior, such as the fact that he routinely stole from others – including his own mother - to support his drug habit, he readily associated with drug dealers and lived on the street, and he refused the advice and counsel of others to change his ways. These are hardly endearing qualities. Appellant's trial counsel sought to humanize Appellant for purposes of mitigation; in retrospect, his appellate counsel thinks the better trial strategy would have been to demonize him. Reconsideration of Appellant's trial counsel's strategy is inappropriate at this juncture.

This Court has already noted the following about the mitigating factors regarding Appellant's less than idyllic upbringing: "The nature and circumstances of the offense offer *nothing in mitigation*. Jackson, with the aid and support of Roberts, planned to murder Fingerhut to get him out of the way and reap the insurance proceeds Roberts would obtain from Fingerhut's death. In correspondence and phone conversations, Jackson assured Roberts that the murder was something *he* had to do and that *he* had it all figured out. Jackson murdered Fingerhut in his home and then fled the scene in Fingerhut's car. Jackson's self-defense claim lacks credibility in light of all the evidence. Jackson's history, character, and background offer some mitigating features. His father was never part of his life, and he suffered from behavioral problems in school, mostly because of his ADHD. Although Jackson's mother denied that Jackson had grown

up in a rough neighborhood, the school records and evaluation by Dr. McPherson indicate otherwise. Jackson's drug dependency was fueled by his involvement in crime, which consisted mostly of burglaries.*** Upon independent weighing, we find that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. Jackson murdered Fingerhut during a burglary and stole his car. These were the aggravating circumstances that merit imposition of the capital penalty. Those were weighed against the mitigating evidence found in the nature and circumstances of the offense, Jackson's history, character, and background, and the statutory factors of R.C. 2929.04(B). We find that the aggravating circumstances of this case outweigh the *minimal mitigating factors*." (Emphasis added). *State v. Jackson* 107 Ohio St.3d 300, 2006-Ohio-0001, 839 N.E.2d 362, ¶¶177-178, 183.

Appellant argues the trial court erred in failing to consider his "new evidence" when re-imposing the death sentence. The State submits that if, in light of the *Roberts II* decision, this Court elects to review these 88 exhibits it will find that he fails to exceed the "minimal" and "nothing" thresholds previously noted by this Court. Moreover, the Eleventh District did not order a remand for additional mitigation evidence, but merely for the purposes of allocution and for the judge to personally draft the sentencing entry. Appellant further argues for a remand to the trial court "to permit him to place into evidence all relevant information that supports a sentence of less than death." Appellant's Brf. at p. 51. *Roberts II* says that should not happen. Moreover, such an exercise would be pointless, as the documents submitted by Appellant are merely cumulative of testimony already introduced and considered by this Court, or contain information so inflammatory that it borders on counsel ineffectiveness to present it. Appellant suffered no Eighth Amendment violation and his Fifth Proposition of law wholly lacks merit.

State's Answer to Appellant's Proposition of Law No. VI:
A trial court does not trample a convicted, capital murderer's allocution right by permitting him to speak twice during a sentencing hearing and withholding the filing of the sentencing entry until after the hearing.

In Proposition of Law No. VI, Appellant argues a violation of Crim. R. 32's right of allocution because the trial court prepared his sentencing order prior to the resentencing hearing. This argument is without merit.

First, it is arguable that this entire Proposition is rendered moot by *Roberts II.* In an abundance of due caution, the trial court permitted Appellant to give a second allocution at resentencing even though he offered an allocution during the original sentencing proceedings. (T.p. Vol.). Based on this Court's decision in *Roberts II,* wherein the trial court was instructed to not accept a second allocution from Roberts, the State submits this was a gratuitous accommodation which will not be repeated at his co-defendant's third sentencing.

In the alternative, it is irrefutable that the court afforded his right pursuant to Crim. R. 32. The rule requires, that prior to *imposing* sentencing the court shall: "Afford counsel an opportunity to speak on behalf of the defendant and address the defendant personally and ask if he or she wishes to make a statement in his or her own behalf or present any information in mitigation of punishment." At the point that Appellant offered his allocution, sentence had not been imposed. It was neither announced from the bench nor filed in written form.

Indeed, during resentencing, Appellant spoke to the court not once, but twice. In his first presentation he stated as follows:

> **Defendant**: "Your Honor, I would just like to say, doing my time in the Trumbull Correctional, I went down there and obtained a certificate in basic skills computer class and I passed advanced class and also became a tutor down there and also got a certificate in the music program, and I was trying to get into other different programs that they have down there. I haven't been in any trouble since I have on death row since 2007 and that was a little minor situation, but I haven't been in any trouble or anything since then. Your Honor. Since I have been off of death

> row I understand a lot of things. In a different situation and different environment I was in, I have learned to adjust to the environment without any problem, Your Honor.

Resentencing T.p. 21-22.

Later in the proceedings, he told the court, "I feel that doing my time, I have learned to find myself and I know who I am right now, and I would like to be placed back on, I wouldn't like to be placed back on death row. I really wouldn't." (Resentencing T.p. 23). It was not until after Appellant spoke to the court twice did the trial court make the oral pronouncement of the death sentence. (Resentencing T.p. 24). The State takes issue with Appellant's repeated claim in this Proposition of Law that the trial court "refused" to consider his allocution. This so-called refusal is patently refuted by the record. The court personally addressed Appellant and let him contribute to the proceedings twice. Moreover, the trial court filed two documents stating that "the defendant was afforded all rights pursuant to Crim. R. 32. The Court has considered the record, oral statements, as well as the purposes and principles of sentencing under R.C. 2929.11." (T.d. 409, 416). Appellant was one of the people making an "oral statement." Therefore, Appellant's characterization that the court "refused" to consider his allocution is belied by the record.

As this Court has noted: "Trial courts must painstakingly adhere to Crim.R. 32 guaranteeing the right of allocution. A Crim.R. 32 inquiry is much more than an empty ritual: it represents a defendant's last opportunity to plead his case or express remorse." *State v. Green* 90 Ohio St.3d 352, 359-360, 2000 -Ohio- 182 ,738 N.E.2d 1208, 1221. The record reflects that the court gave Appellant this opportunity *twice.* Appellant chose to plead his case, but never expressed remorse for killing Robert Fingerhut. Moreover, the Third Appellate District held that "the requirement of allocution will be fulfilled where the conduct of the court is such that the

defendant and [defense] counsel *** know each has a right to make a statement prior to the imposition of sentence." *Defiance v. Cannon,* 70 Ohio App.3d 821, 828, 592 N.E.2d 884, 888 (3rd Dist.1990), citing *United States v. Byars* (C.A.6, 1961), 290 F.2d 515, 517. Appellant obviously knew he had a right to allocute because he did so.

Appellant's contention that the court "refused" to consider his allocution is both empty hyperbole and unsupported by the record. As one Ohio Court has noted a "sentence [is] not finalized until the trial court file[s] its sentencing entry and, up until that time, anything it said about what that sentence would be was tentative." *State v. Maynard,* 9th Dist. No. 07CAO116-M, 2009-Ohio-282, ¶45.

The State would again refer the Court to its decisions in *State v. Reynolds,* 80 Ohio St.3d 670, 684, 687 N.E.2d 1358 and *State v. Fry,* 125 Ohio St.3d 163, 2010-Ohio1017, 926 N.E.2d 1239, as referenced in the State's response to Appellant's first Proposition of Law. In *Fry,* the court filed the sentencing entry eight minutes before the sentencing hearing, and before the defendant allocuted. This Court summarized just some of the memorable moments from that allocution: "After stating that he had killed [the victim] in a fit of rage and should have been convicted only of voluntary manslaughter, he told the court: 'You can do whatever you want to do. If y'all want to put a needle in my arm and poison me because I killed that thieving whore, do what you have got to, but I hope she burn in hell. She will not rob from nobody else.' He further told the victim's mother that she 'should have raised the little bitch not to be a thief'." *Fry, supra*, at ¶186.

This Court found that if this vitriolic tirade had changed the judge's mind as to the appropriate sentence, he could have amended the sentencing entry. "The trial court here allowed Fry an opportunity to personally plead for his life at the sentencing hearing, and because Fry

made a statement, the record is clear as to what he said. Having listened to Fry, the court had an opportunity to evaluate his statement and could have modified its sentencing entry if it had felt obliged to do so. However, the trial court chose not to modify the sentence, and as in *Reynolds,* no prejudice inured to Fry." *Id.* at ¶192. Likewise, no prejudice inures to Appellant merely because the court *prepared* but did not *file* the entry in advance of the hearing. If Appellant's recitation of his newly-acquired computer skills and aversion to death row had swayed the court's decision, the trial court could have redrafted the entry and imposed a life sentence.

In *Reynolds,* the entry was filed as the sentencing hearing was on going. As previously discussed, this Court found no reversible error in this confluence of events. *Reynolds, supra,* at 683. Another glitch in the Reynolds sentencing occurred with the allocution. While the trial court inquired as to whether Reynolds had anything to say regarding the punishment of lesser felonies, it did not personally address Reynolds regarding the penalty for aggravated murder. Instead, the court deferred to counsel who said Reynolds would rely on a letter previously presented to the court. Nevertheless, this Court found no prejudicial error: "The purpose of allocution is to permit the defendant to speak on his own behalf or present any information in mitigation of punishment. Reynolds had this opportunity in the penalty phase of the case when he presented evidence and made an unsworn statement. A court's error in failing to ask a defendant if he wants to make a statement prior to sentencing is not prejudicial where, as here, the defendant makes an unsworn statement in the penalty phase, sends a letter to the trial court, and where defense counsel makes a statement on behalf of the defendant. [This] proposition of law is rejected." *Id.* at 684.

The events as they unfolded at Appellant's resentencing are far less allocution-stifling than the *Fry* or *Reynolds* examples. In both these cases, the court had filed or was filing the

written entry before even inviting input from the accused. Here, the entry was filed after the hearing. If Appellant, his counsel, or the State of Ohio had made any statements meriting a change in the sentence, the sentencing entry could have been amended accordingly.

Finally, in his closing paragraph, Appellant argues that the trial court's "refusal" to consider his allocution violates his Eighth and Fourteenth Amendment rights. To reiterate, the trial court did not "refuse" to consider the allocution. Furthermore, at least one Ohio Court has held that the right to allocution is not a constitutional right. "[T]he failure of a trial court to ask a defendant whether he has anything to say before sentence is imposed is not a constitutional error. *Hill v. United States* (1962), 368 U.S. 424, 428, 82 S.Ct. 468. Although not considered a constitutional right, the right of allocution is firmly rooted in the common-law tradition. *Green v. United States* (1961), 365 U.S. 301, 304, 81 S.Ct. 653." *State v. Copeland,* 12th Dist. No. CA2007-02-039, 2007-Ohio-6168, ¶6. Citing to *Hill,* the dissent in *Roberts II* noted "[t]here is no recognized constitutional right to allocution." *Id.* at ¶100. With no constitutional right, there is no constitutional violation. Appellant cites absolutely no authority to suggest the mere preparation of a complex and detailed sentencing entry prior to a sentencing hearing somehow elevates his right to allocution to a constitutional right.

The State submits *Roberts II* rendered this argument moot. The record reflects that Appellant was afforded his full panoply of rights pursuant to Crim. R. 32 before the new death sentence was announced from the bench or filed in paper form with the clerk's office. Thus, any accusation that the trial court "refused" to consider the allocution is abundantly refuted by the record. Appellant's Proposition of Law VI is without merit.

State's Answer to Appellant's Proposition of Law VII:
A trial court commits no error in relying on portions of an original sentencing entry which have been affirmed by a superior court and portions of which were prepared personally by the judge in drafting the original entry.

In this Proposition of Law, Appellant argues that because the court's redrafted sentencing opinion mirrors the original entry in several places, he has suffered a constitutional violation and he is entitled to a "neutral evaluation" of the evidence and a third reweighing on the aggravating circumstances and mitigating factors. This argument lacks merit on many fronts.

First, this Court found a *statutory* violation in the prosecution's typing the sentencing entry in Donna Roberts' case, not a constitutional violation as argued by Appellant. "The trial court's decision to use the prosecutor in preparing the sentencing opinion constitutes a grievous violation of the *statutory deliberative process*. It is so severe a violation that independent reweighing cannot serve as an adequate remedy. See, *State v. Green,* 90 Ohio St.3d at 363–364, 738 N.E.2d 1208. We find that we must vacate the sentence because of the critical constitutional interests and notions of justice that are implicated by the prosecutor's participation in drafting the sentencing opinion." *State v. Roberts I,* at ¶ 163. The State submits that if Roberts suffered no constitutional violation by the prosecution drafting her original sentencing opinion, Appellant suffers no constitutional violation if the trial court recycles undisputed portions of its original opinion in drafting the newer version.

Second, this Court noted in the Roberts' decision and in the ensuing disciplinary action that prosecutors relied upon the judge's notes in comprising the final draft of her sentencing opinion. "The trial judge stated that he had given notes to the prosecutor and had instructed the prosecutor, '[T]his is what I want.' The court added that the opinion had to be corrected six or seven times." *Roberts I, supra,* at ¶155. After the *Roberts* decision, this Court conducted

disciplinary proceedings against the trial judge, John Stuard, and Trumbull County Assistant Prosecuting Attorneys Christopher Becker and Kenneth Bailey. In so doing, this Court determined that Judge Stuard had already independently weighed the aggravating circumstances and mitigating factors *prior* to handing his notes to the prosecutors during the drafting process. "Judge Stuard gave Becker two pages of notes on the aggravating circumstances and mitigating factors *that he had weighed in deciding that the death sentence was appropriate.* The notes did not relate the history and facts of the Roberts case beyond the discussion of aggravating circumstances and mitigating factors." (Emphasis added). *Disciplinary Counsel v. Stuard.* 121 Ohio St.3d 29, 2009-Ohio-261, 901 N.E.2d 788, ¶5.

The disciplinary proceedings revealed that the judge had made his decision to accept the jury's recommendation in Roberts' case *and* had engaged in his own independent weighing of the mitigating factors and aggravating circumstances prior to involving the prosecutor's office. He reduced those thoughts to writing before handing his notes over to the prosecutor. Based on those disciplinary proceedings, the Eleventh District determined that Judge Stuard engaged in the same conduct with respect to Appellant's sentencing opinion as occurred in Roberts' case. "Because he acknowledged *doing the same thing* that resulted in prejudicial error in the *Roberts* case, the trial judge conceded prejudicial error in Jackson's case. (Emphasis added). *State v. Jackson* 190 Ohio App.3d 319, 327 , 2010-Ohio-5054, 941 N.E.2d 1221, 1227, ¶40 (11th Dist.).

It was the sameness of the conduct that caused the Eleventh District to order the resentencing. Therefore, if the trial court engaged in the "same conduct" as in Roberts, he had decided the issue of death and had engaged in an independent weighing process before involving the prosecutor's office. Logic follows, then, that Judge Stuard merely copied himself in compiling the redraft during the crucial exercise of weighing the aggravating circumstances

against the mitigating factors. The prosecutors had no involvement in the court's initial decision and analysis, and had no involvement whatsoever in the redraft. It is with little wonder then, as Appellant argues that "the first and second sentencing opinions are identical including the sections reviewing the mitigating factors and the reasons that the aggravating factors outweighed the mitigating factors by proof beyond a reasonable doubt." (Appellant's Brf. p. 55).

That leaves the trial court's recitation of the facts and the application of the law in the new entry. Indeed, much of the document is a recitation of the facts from Appellant's case which are beyond dispute, abundantly supported by the record, and were repeatedly relied upon by this Court when it drafted *State v. Jackson,* 107 Ohio St. 3d 300, 2006-Ohio-1. In deciding *Roberts,* this Court cited to *Gardner v. Florida,* 430 U.S. 349, 362, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), wherein the U.S. Supreme Court held the defendant was denied due process of law when the death sentence was imposed, at least in part, on the basis of information from a presentence report which he had no opportunity to deny or explain. Appellant does not highlight one shred of information contained in his redrafted opinion which was not extracted directly from the record in this case.

A side-by-side comparison of this Court's opinion in *State v. Jackson,* 107 Ohio St. 3d 300, 2006-Ohio-1, with the trial court's second entry reveals many similarities. For example, both documents reference the plot between Roberts and Appellant to kill Fingerhut memorialized in prison phone calls and letters, the injury to Appellant during the confrontation with Fingerhut, the injuries to Fingerhut which included three gunshot wounds, Appellant's theft of Fingerhut's car, Roberts supplying a hotel hide-out for Appellant after the killing, Appellant's claim of self-defense, DNA evidence linking Appellant to Fingerhut's car, and the $550,000 in life insurance proceeds which Roberts stood to collect upon Fingerhut's demise. (T.d.410, p.3-6; *State v.*

Jackson, 107 Ohio St. 3d 300, 2006-Ohio-1, ¶¶ 3-4, 11, 13-15, 20-67, 69). This Court managed to extrapolate these facts on its own, from the record in this case, and without any input from the prosecutor's office. It should come as no surprise that the trial court - upon remand from the Eleventh District – independently elicited many of those same facts, and, like this Court, found them germane to whether the death penalty should be re-imposed. As Appellant does not cite to a single, solitary error presented in the factual scenarios in either *State v. Jackson,* 107 Ohio St. 3d 300, 2006-Ohio-1, or the redrafted sentencing opinion, the fact that *both* strongly resemble the original sentencing opinion does not mean Appellant suffers a constitutional violation or prejudicial error.

Finally, though the State concedes no error, the State submits that it is at worst harmless error that the trial court apparently copied large portions of its original sentencing opinion into the new opinion. The Eleventh District did not order the trial court to completely deconstruct its original opinion and rebuild it from the ground up; nor did this Court order a massive rewrite in *Roberts.* "On remand, the trial judge will afford Roberts her right to allocute, and the trial court shall personally review and evaluate the evidence, weigh the aggravating circumstances against any relevant mitigating evidence, and determine anew the appropriateness of the death penalty as required by R.C. 2929.03. The trial court will then personally prepare an entirely new penalty opinion as required by R.C. 2929.03(F) and conduct whatever other proceedings are required by law and consistent with this opinion." *State v. Roberts* 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶167. It is axiomatic that the facts in these cases do not change over time; nor does the law, nor its applicability to the cases. Thus, unless the court decided upon additional reflection that the death penalty was inappropriate, it is reasonable that much of

the wording in the second entry would be identical to what appeared in the first entry, especially in light of the fact that this Court found no constitutional or factual error with the original draft. Therefore, the sameness of the two entries is not prejudicial to Appellant, and is at worst harmless error. A complete rewrite in the instant matter would elevate form over substance and would not be in the furtherance of judicial economy. See, *Fisher v. Fisher,* 8th Dist. No. 78092, 2001 WL 740100 (July 28, 2001), at *6.

To conclude, this Court previously affirmed a sentencing opinion which included a predetermination as to the death sentence and a weighing of the aggravating circumstances personally prepared, if not typed, by the judge. That entry also included a recitation of the facts which were unchallenged by Appellant in the prior appeal. Therefore, Appellant suffers no constitutional error if the trial court opted to re-submit those facts and findings in the new entry. Appellant's Proposition of Law VII lacks merit.

State's Answer to Appellant's Proposition of Law VIII:
A trial court does not err in declining to merge charges and specifications which sound in aggravated robbery and aggravated burglary and which were clearly committed with a separate animus.

Appellant alleges in Proposition of Law No. VIII that the trial court erred in failing to merge the aggravated burglary and aggravated robbery charges for sentencing purposes. He argues a Double Jeopardy violation because the trial court sentenced him separately and consecutively on the aggravated robbery and aggravated burglary counts and because the trial court failed to merge the aggravating circumstances reflected in these two separate counts at sentencing. This argument fails for a variety of reasons.

Over three decades ago, this Court described the doctrine of merger as follows: "It is apparent that the statute has attempted to codify the judicial doctrine sometimes referred to as the doctrine of merger and other times as the doctrine of divisibility of offenses which holds that 'a major crime often includes as inherent therein the component elements of other crimes and that these component elements, in legal effect, are merged in the major crime.' *State v. Botta* (1971), 27 Ohio St.2d 196, 201, 271 N.E.2d 776, 780. However, R.C. 2941.25(B), by its use of the term 'animus,' requires us to examine the defendant's mental state in determining whether two or more offenses may be chiseled from the same criminal conduct. In this sense, we believe that the General Assembly intended the term 'animus' to mean purpose or, more properly, immediate motive." *State v. Logan* 60 Ohio St.2d 126, 131, 397 N.E.2d 1345, 1349 (1979). This Court's review of an allied offenses question is de novo. *State v. Williams,* 134 Ohio St.3d 482, 2012–Ohio–5699, ¶ 12.

In subdivision A of his argument, Appellant focuses on the aggravating circumstances wherein the jury found Appellant guilty as the principal offender while committing the offense of aggravated burglary and guilty as the principal offender while committing the offense of

aggravated robbery. He argues that for sentencing purposes, the trial court should have "merged" these specifications for purposes of sentencing. This argument is somewhat superfluous because the specifications apply only to the death sentence. The trial court sentenced him to die only once, regardless of the number of aggravating circumstances. Thus, whether the court construed one or two underlying crimes as an aggravating circumstance, Appellant suffers no prejudice because he can suffer the death penalty only once.

Nevertheless, Appellant's argumentation is built on two flawed theories: (1) that Appellant did not commit an aggravated burglary because Roberts let him into the house she shared with Fingerhut and (2) that the aggravated robbery and aggravated burglary occurred "simultaneously." Appellant's Brf. at p. 60. The argument that permission to enter a home vitiates a burglary charge was soundly rejected by this Court in a case cited by Appellant, *State v. Steffen,* 31 Ohio St. 3d 111, 509 N.E.383 (1987). David Steffen argued he was not guilty of aggravated burglary because the victim in the case invited him into the home when he represented himself as a door-to-door salesman. While in the home, he raped the victim and slashed her throat. She bled to death. "Under the circumstances of this case, even assuming lawful initial entry, the jury was justified in inferring from the evidence that appellant's privilege to remain in [the victim's] parents' home terminated the moment he commenced his assault on her. Appellant does not deny striking [the victim] repeatedly before killing her. From that undisputed fact, a powerful inference arises that appellant was no longer privileged to remain in [the victim's] parents' home, and that he knew his privilege had been terminated. In our view, this inference is so strong that it excludes the possibility of drawing from the same facts any other reasonable inference supporting a theory of innocence." *Steffen, supra,* at 115. The distinction here, however, is that Appellant *never* had a lawful purpose in entering the Fingerhut

residence. His sole purpose for the entry, no matter how he gained entry, was to kidnap and murder Mr. Fingerhut.

Even if this Court were to disagree, and conclude that Appellant lawfully and without deception entered Mr. Fingerhut's home because he was Roberts' invitee, his lawful entry is still terminated at the point he physically confronted Mr. Fingerhut, a point which Appellant concedes in his brief at p. 60. This leads to Appellant's second erroneous conclusion that he engaged in but one "single discrete act." Appellant's brf. at p. 62. Appellant acknowledges that this Court rejects the notion that aggravated burglary and aggravated robbery specifications are subject to merger. "Aggravated burglary and aggravated robbery are separate offenses and constitute separate aggravating circumstances because they do not arise from the same act." *State v. Williams,* 74 Ohio St.3d 569, 580, 660 N.E.2d 724, 734 (1996) "Aggravated robbery and aggravated burglary are not allied offenses of similar import where, as here, the offenses are committed separately, see *State v. Frazier* (1979), 58 Ohio St.2d 253, 12 O.O.3d 263, 389 N.E.2d 1118, and it was proper for the jury to consider both." *State v. Slagle,* 65 Ohio St. 3d 597, 611, 605 N.E.2d 916, 929 (Defendant admitted breaking into a woman's house to steal something, and murdered her). In this case the separate act evidence is more obvious than most. As previously stated, Appellant's sole purpose in entering the Fingerhut home was to commit a murder, not a theft offense. Once the murder was complete, Appellant moved on to his third crime, the aggravated robbery when he stole Mr. Fingerhut's car to get away.

Even in more recent cases where the trespass is committed for the purpose of a theft, this Court has found the merger of aggravated burglary and aggravated robbery unwarranted when both crimes are committed with a separate animus. For example, in *State v. Monroe,* 105 Ohio St. 3d 384, 2005-Ohio-2282, this Court held: "The aggravated-burglary and aggravated-

robbery specifications were also *not subject to merger*, since they were committed with separate animus. The burglary was complete as soon as Monroe entered the apartment by deception with the intent to commit a theft offense. Monroe then attempted to rob Quincy and Simmons of drugs that Monroe thought were in Quincy's apartment. Thus, the aggravated burglary and aggravated robbery were separate offenses and constituted separate aggravating circumstances because they did not arise from the same act. See *State v. Williams* (1996), 74 Ohio St.3d 569, 580, 660 N.E.2d 724; *State v. Fears,* 86 Ohio St.3d at 344, 715 N.E.2d 136. See, also, *State v. Frazier* (1979), 58 Ohio St.2d 253, 256, 12 O.O.3d 263, 389 N.E.2d 1118." (Emphasis added). *Monroe, supra,* at ¶68.

In *Williams, supra,* another Trumbull County capital case, this Court held "[a]ggravated burglary and aggravated robbery are separate offenses and constitute separate aggravating circumstances because they do not arise from the same act." Id. at 580, 660 N.E.2d 724, 734.

It is easily argued here that the aggravated burglary was complete as soon as Appellant confronted Mr. Fingerhut in his home. That confrontation ended with Mr. Fingerhut's death. Appellant could have elected to flee the residence on foot, or simply wait for Roberts to return. Instead, he chose to take Mr. Fingerhut's automobile to make good his getaway. At the point that he removed the car, he committed not just a theft offense, but a third felony in addition to the aggravated murder and aggravated burglary previously committed. The aggravated robbery was a separate offense and did not arise from the act of burglarizing the Fingerhut residence.

At the close of the "A" subsection, Appellant briefly cites to this Court's decision in *State v. Johnson,* 128 Ohio St. 3d 153, 2010-Ohio-6314, and suggests that this Court revisit the merger issue in his case in light of the *Johnson* decision. At this writing, it appears this Court has not decided whether or not *Johnson* affects this Court's earlier holdings that aggravated robbery and

aggravated burglary constitute allied offenses of similar import. For the reasons to be discussed in the State's response to Appellant's subsection "B," the State submits *Johnson* has no effect the issue of merger in this instance.

Appellant argues that when viewed in light of the *Johnson* decision, this Court should view Appellant's commission of the aggravated burglary and the aggravated robbery as "a single discrete act." "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. *Blankenship,* 38 Ohio St.3d at 119, 526 N.E.2d 816 (Whiteside, J., concurring) ('It is not necessary that both crimes are always committed by the same conduct but, rather, it is sufficient if both offenses *can be* committed by the same conduct. It is a matter of possibility, rather than certainty, that the same conduct will constitute commission of both offenses.' [Emphasis sic]). If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import. If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' *Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, 895 N.E.2d 149, at ¶ 50 (Lanzinger, J., dissenting). If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged. Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." Italics original. *Johnson, supra,* at ¶48-51.

If Appellant's plot had worked according to plan, *Johnson* may have afforded him the benefit of merged specifications and sentences. Appellant and Roberts had originally planned for Appellant to force Mr. Fingerhut into the trunk of his own car, drive him away from his home and execute him. However, that plan went awry when Mr. Fingerhut apparently pulled a gun on Appellant and shot Appellant in the finger as he fought for his life. Once Appellant shot and killed Mr. Fingerhut the car was no longer necessary to facilitate the kidnapping or the murder. As it turned out, Appellant was able to commit the murder without the added necessity of commandeering the car. But he chose to take it anyway. There is no single act with a single state of mind, but separate acts with a separate animi. Even when *Johnson* is placed into legal analysis, Appellant is still not entitled to merger of the specifications or the charges.

In subsection B, Appellant makes the novel argument that because Appellant was charged with aggravated robbery and aggravated burglary as separate counts, the State was obligated to choose at sentencing whether the court should sentence upon the aggravating circumstance or the charges as they appear as counts three and four in the indictment. This argument is wholly nonsensical. *Johnson* in no way requires the State to disappear aggravating circumstances merely because they also mirror separate charges in the indictment. Appellant cites to *Johnson* and three other cases, all of which involve felony murder charges pursuant to R.C. 2903.02(B) wherein defendants were sentenced on the murder count in *addition* to the crimes which served as the predicate offenses, not aggravated murder counts. He admits that a specification that elevates and a predicate offense in a felony murder charge and an aggravated murder specification represent separate legal theories. Moreover, the court instructed the jurors on the crime of aggravated burglary before instructing on aggravated murder. The court instructed the jurors, "You will proceed to consider whether the specification has been proven,

again beyond a reasonable doubt, if, and only if you determine the defendant is guilty of aggravated burglary. If your verdict is not guilty, then you would not consider the specification." (T.p. Vol. 15, p. 3553). The court gave the same admonition with respect to the aggravated robbery count. (T.p. Vol. 15, p. 3557-3558). Suffice it to say the State had no obligation to dismiss either the aggravating circumstances or the additional first degree felonies upon which Appellant was convicted.

In his final "C" subsection, Appellant argues that counts three and four should be merged for sentencing purposes. Again, he is incorrect. He cites to the Eleventh District's decision in *State v. Jarvi,* 11th Dist. No. 2011-A-0063, 2012-Ohio-5590, to again argue a single course of conduct in the commission of the aggravated burglary and aggravated robbery. Though not controlling on this Court, *Jarvi* is instructive in *disproving* Appellant's argument. Because Jarvi pled guilty rather than proceeding to trial, the facts are somewhat thin. However, the Eleventh District provided this summary: "These charges were predicated upon an incident in which appellant and three other persons trespassed into the home of Richard Hackathorn, an individual who had given financial aid to appellant in the past. After Hackathorn refused to give appellant any money on that particular occasion, one of her male companions struck Hackathorn with a wooden club, causing him to fall on the floor. Appellant then removed Hackathorn's wallet from his pocket and took a sum of money. " *Jarvi, supra,* at ¶2.

It appears that the purpose of the *Jarvi* trespass was to exact additional "financial aid" from the victim, which was decidedly not why Appellant trespassed in Mr. Fingerhut's home. Unlike the instant case, the Eleventh District determined that the aggravated burglary and aggravated robbery were committed with the same animus. "[I]t is possible to commit both

aggravated burglary and aggravated robbery with the same conduct as occurred here. Moreover, the two crimes were not committed separately or with a separate animus." *Id.* at ¶24.

As was stated earlier in this argument, the purpose of the trespass was to kill Mr. Fingerhut, not to steal from him. Once Appellant murdered Mr. Fingerhut, the purpose of the aggravated burglary was complete. His election to take the car when he no longer needed the ample trunk space provided by the Chrysler 300M to transport Mr. Fingerhut contributes a new and separate animus to support the aggravated robbery conviction.

Appellant's case is far more factually akin to this Court's decisions in *Frazier, supra,* a non-capital case wherein the defendant assaulted a woman in her own home which he entered under the pretext of inquiring about cutting her grass. The woman's husband discovered Frazier assaulting his wife, and died of a fatal heart attack. Assuming both to be dead, Frazier ransacked the house taking jewelry, silverware, cash and other items. This Court found an aggravated burglary and aggravated robbery to be committed with a separate animus. "The forced entry into the victims' home preceded the beating and was alone sufficient to accomplish the burglary. The testimony indicates that the entry itself could not have given rise to a charge of aggravated robbery since the physical harm was caused not by Mrs. Dorr's fall as the door was forced open, but by the subsequent beating. The fall gave the defendant access to the victims and their house. The subsequent beating facilitated the theft of the victims' property. The fall and beating were accordingly distinct in time and in the functions they served. " *Frazier, supra* at 256, 389 N.E.2d 1118, 1120. Appellant's theft of Mr. Fingerhut's Chrysler was distinct in time from his shooting and killing Mr. Fingerhut. Thus, these are crimes committed with a separate animus.

Finally, the State would argue waiver of the merger issue. While Appellant's counsel argued the merger issue at his resentencing, his trial counsel never argued merger before the case went to the jury at trial. As this Court has explained: "[I]f such multiple specifications are included in an indictment, the 'trial court should instruct the jury in the penalty phase that those duplicative specifications must be considered merged for purposes of weighing the aggravating circumstances against the mitigating factors.' *State v. Garner* (1995), 74 Ohio St.3d 49, 53, 656 N.E.2d 623, 630. No such instruction was given in this case." *State v. Mitts* 81 Ohio St.3d 223, 231, 690 N.E.2d 522, 530 (1998). Appellant did not raise these issues prior to submission to the jury, therefore the issue is waived. *State v. Palmer,* 80 Ohio St. 3d 543, 574, 687 N.E. 2d 685(1997).

The *Palmer* court also pointed out that even *if* the trial court erred in failing to merge specifications, the error can be cured by this Court in the independent weighing process wherein this Court may merge any of the charges if so warranted. *Id.* And given the dearth of mitigating evidence presented in the case sub judice, it is evident that the outcome of the cause would not have changed even if the counts and specifications had merged. See, *Id.* at 575.

For these reasons, Appellant is not entitled to the merger of either the specifications or the charges of aggravated burglary and aggravated robbery. Two separate times were committed and two separate punishments are warranted. Appellant's Proposition of Law No. VIII is without merit.

State's Answer to Appellant's Proposition of Law IX:
In the total absence of evidence to the contrary, a trial court properly re-imposes a death sentence which has already survived appellate review by a superior court.

In this Proposition of Law, Appellant recycles several arguments previously addressed to suggest that the implementation of the death penalty was unreliable and that his death sentence should be reversed. This argument lacks merit.

First and foremost, this Court has already independently weighed the appropriateness of Appellant's death sentence and has unanimously affirmed said sentence. "Upon independent weighing, we find that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. Jackson murdered Fingerhut during a burglary and stole his car. These were the aggravating circumstances that merit imposition of the capital penalty. Those were weighed against the mitigating evidence found in the nature and circumstances of the offense, Jackson's history, character, and background, and the statutory factors of R.C. 2929.04(B). We find that the aggravating circumstances of this case outweigh the minimal mitigating factors. We further find that the death penalty is both appropriate and proportionate when compared with capital cases also involving aggravated murder during aggravated burglary, see *State v. Davie* (1997), 80 Ohio St.3d 311, 686 N.E.2d 245, and aggravated murder during aggravated robbery, see *State v. Burke* (1995), 73 Ohio St.3d 399, 653 N.E.2d 242; *State v. Raglin* (1998), 83 Ohio St.3d 253, 699 N.E.2d 482." *State v. Jackson* 107 Ohio St.3d 300, 2006-Ohio- 839 N.E.2d 362, 2006-Ohio-0001, ¶¶183-184. Appellant presented nothing at this resentencing and presents less in his briefing to suggest that this Court was wrong.

Moreover, the bulk of the unreliability factors which Appellant argues in his brief could have easily been raised in his briefing to this Court in his original appeal and were not. Therefore, they are barred by res judicata. "Under the doctrine of res judicata, a final judgment

of conviction bars a convicted defendant who was represented by counsel from raising and litigating * * * any defense or any claimed lack of due process that was raised or could have been raised * * * on an appeal from that judgment." *State v. Perry* 10 Ohio St.2d 175, (1967), paragraph nine of the syllabus.

Appellant again claims ineffective assistance of counsel at the mitigation phase because of the substitution of Atty. Wright for Atty. Lewis. As was extensively discussed in the State's response to Appellant's Proposition of Law II, this substitution and its alleged ill effects on the penalty phase could have been raised in the direct appeal but was not; therefore it is res judicata barred. Moreover, the mitigation hearing proceeded with Atty. Wright at Appellant's insistence, so if any error occurred said error was invited. Appellant's claim at page 65 that veteran defense counsel Anthony Consoldane "knew little about the sentencing case" is belied by the record. Atty. Consoldane told the court: "[F]or the last ten years on the cases that Mr. Lewis and I have tried together, I pretty much have handled most of the mitigation. I had the witnesses here. I didn't want to have them come back. (T.p. Vol. 16, p. 157). Nevertheless, the place to raise a claim of ineffective assistance of counsel was in the direct appeal, not this one.

As he did in Proposition of Law III, Appellant claims his sentence is unreliable because his original sentence was drafted by the prosecution and copied in large portions by the trial court for resentencing. The State would refer to its extensive argument in its response to Appellant's Proposition of Law III, and remind the Court that Judge Stuard essentially copied himself and therefore neither the entry nor the death sentence can be classified as "unreliable."

At page 66, Appellant accuses Judge Stuard of a lack of impartiality because he declined to resentence Appellant until the Eleventh District instructed him to do so. Judge Stuard did not resentence Donna Roberts until this Court instructed him do so. Appellant fails to explain how

waiting from a directive from a higher court to conduct a resentencing compromises a trial judge's impartiality.

Appellant also claims that the trial judge refused to consider any new evidence at the resentencing. Relying on its prior decision in *State v. Davis,* 63 Ohio St. 3d 44, 584 N.E. 2d 1192 (1992) and *State v. Chinn,* 85 Ohio St. 3d 548, 709 N.E. 2d 1166 (1999), this Court flatly rejected the notion that Appellant's co-defendant was entitled to spike the resentencing proceeding with mitigation evidence. "In *Chinn,* we adhered to *Davis II* and held that when 'errors requiring resentencing occurred after the close of the mitigation phase,' the correct procedure was for the trial court 'to proceed on remand from the point at which the error occurred.' *Chinn,* 85 Ohio St.3d at 565, 709 N.E.2d 1166. Indeed, we stated that 'the trial court was *required* to proceed on remand from the point at which the errors had occurred, i.e., after the jury had returned its recommendation of death." (Emphasis added.) *Id.* at 564. The trial court was bound by those precedents, as well as by our remand order in *Roberts I. Roberts I* neither overruled nor modified *Davis II* or *Chinn* and did not order the trial court to hold a new penalty-phase evidentiary hearing, Thus, *Roberts I* cannot reasonably be understood as imposing a requirement that *Davis II* and *Chinn* had expressly declined to impose." *Roberts II,* at ¶¶45-46.

The so-called error in Appellant's trial occurred at the same point as in Roberts, post-mitigation. And Appellant should have even less of an expectation of contributing additional materials to the resentencing proceeding because unlike his co-defendant, Appellant presented mitigating evidence. During her original mitigation hearing, Roberts forbade her attorneys from introducing *any* mitigating evidence, and then made a lengthy unsworn statement to the jury openly urging – if not daring and demanding – them to recommend a sentence of death. *Roberts*

II, ¶¶9-10. Appellant, on the other hand, took full advantage of his right to present mitigation evidence calling four lay witnesses and a hand-picked forensic psychologist. *State v. Jackson,* 107 Ohio St. 3d. 300, 2006-Ohio-0001, 839 N.E. 2d 362, ¶¶163-175. Appellant's sentence is therefore not "unreliable" because the trial court placed the same restriction on Appellant as it did Roberts.

Finally, at page 66, Appellant erroneously argues that the trial court failed to consider Appellant's allocution. The State submits once again that *Roberts II* has rendered this point moot. Since Roberts was permitted to allocute during her second sentencing, this Court has specifically instructed the trial court that she will not be afforded that privilege during her third sentencing. *Id.* at ¶74. Even if the trial court failed to specifically reference and/ or write *ad nauseam* about what Appellant said, he was apparently not entitled to say anything at all, so there is no error. However, this issue is sufficiently covered in the State's response to Appellant's Proposition of Law No. VI. The State would adopt and incorporate those arguments here and simply state the record is clear that his self-serving allocution was heard by the trial court and referenced in the written sentencing entry. (T.d. 409, 416). For Appellant to state that the judge "refused" to consider Appellant's bonus allocution is just plain wrong and refuted by the record.

The State would refer this Court to its response to Proposition of Law No. VIII for any argument regarding the duplicative specifications and whether or not the mere inclusion of these specifications that represent two separate and distinct crimes "impermissibly titled the scales in favor of death." The State submits that this Court has found that the aggravating circumstances outweigh the paltry mitigating factors presented during the penalty phase both permissibly and legally tilt the scales in favor of death, not the number of "duplicative specifications."

For the rest of this Proposition of Law, Appellant blends the record of his guilt and penalty phase proceedings with his post-conviction and post-*Roberts I* litigation. He makes non-specific references to exhibits generated after his original sentencing; references which *Roberts II* would preclude. The rest of this argument should be therefore disregarded by this Court. Should this Court disagree, the State will briefly address each of these claims.

Appellant argues that his judge and jury heard "inaccurate" information about him during the mitigation phase thus causing the panel to recommend the death penalty and the judge to impose the death penalty. In his brief, Appellant claims the jury heard he was "smart" when in fact is of "borderline intelligence." Appellant does not share with this Court as to who made that statement. In reality, Dr. McPherson testified that she tested Appellant prior to trial and he scored an 84 on an I.Q. test, but also told the jury that Appellant scored a 70 I.Q. when tested in grade school. *State v. Jackson,* 107 Ohio St.3d 300, 2006-Ohio-0001, 839 N.E.2d 362, ¶173. Appellant conveniently omits the fact that during his resentencing allocution he claimed to have completed basic and advanced computer skills classes in prison and was tutoring others. This lends all the more credence to Dr. McPherson's opinion that he is a person "of average ability." *Id.*

His claim that Dr. McPherson improperly scored his I.Q. test has no bearing on whether the aggravating circumstances outweighed the mitigating factors in this case. First, the "proof" of this invalid scoring was presented through an affidavit submitted with his postconviction petition and proffered resentencing exhibits. Though not controlling on this Court, the Eleventh District has already dismissed this argument:

"[P]ursuant to appellant's own evidentiary materials, the alleged errors in the calculation would have only resulted in a four-point change in the final result, i.e., from 84 to 80. Under

Ohio law, there is a rebuttable presumption that a criminal defendant is not mentally retarded if the result of his IQ test is greater than 70. *State v. Lott,* 97 Ohio St.3d 303, 779 N.E.2d 1011, 2002-Ohio-6625. Thus, the difference in appellant's I.Q. would not have changed his basic status under the intelligence scale. In light of the overwhelming nature of the aggravating circumstances in this case, this four-point error in calculation would not have altered the jury's weighing exercise in determining whether to recommend the death penalty." *State v. Jackson,* 11th Dist. No. 2004-T-0089, 2006-Ohio-2651, at ¶143. Thus, Appellant's death sentence is not rendered unreliable because his jury did not know that several years after his trial, another hand-picked expert would retest Appellant's I.Q. and find that he scored a meager four points lower than on the McPherson test. Parenthetically, the later I.Q. test made no reference to his computer skills, musical talent, or artistic ability.

Appellant complains that the jury did not know of his mother's alcoholism or that he was raised by his grandmother. First, since his mother was not on trial, her drinking habits are not relevant. Second, this Court found "that Jackson's father had little, if any, involvement with his son and that Jackson grew up under the care of his mother and maternal grandmother." *State v. Jackson* 107 Ohio St.3d 300, 2006-Ohio-0001, 839 N.E.2d 362, ¶168. If this Court could glean the grandmother involvement from the transcript, it is reasonable to assume Appellant's jury could as well. Thus, the information as presented was neither inaccurate nor prejudicial as to his upbringing.

Appellant claims that "some witnesses" described him as a "good student." Appellant's brief at p. 67. Whoever this mystery witness or witnesses were, they did not merit as much as a mention in this Court's opinion. His mother told the jury he did "pretty good" in school (*Id.* at ¶167) which is hardly a ringing endorsement of his academic accomplishments. The jury also

heard from Dr. McPherson who described Appellant as a behavioral problem who was routinely suspended from school. She said he suffered from attention-deficit hyperactivity disorder ("ADHD") characterized by impulsiveness and an inability to stop his behavior. The doctor also noted that he dropped out of school in the eleventh grade. *Id.* at ¶¶168-171. The jury may have heard differing opinions as to Appellant's performance at school, but Dr. McPherson's opinion was backed by research into his school records, not maternal instincts directed at a desire to keep a child out of Ohio's death chamber.

Finally, Appellant in his brief tells this Court that "the jury heard that Appellant was living with his grandmother at the time of the murder." Appellant's brief at p. 67. This Court did not hear that. In its opinion, this Court wrote that upon his release from an Ohio penitentiary on December 9, 2001, he stayed not with grandma, but with Donna Roberts at a Jacuzzi suite at the Wagon Wheel Motel in Boardman, Ohio. *Id.* at ¶5. Appellant killed Robert Fingerhut on December 11, 2001. After the homicide, police recovered blood samples containing Appellant's DNA and fingerprints at a Days Inn which Roberts had reserved for an entire week. *Id.* at ¶19. Neither this Court's opinion nor the record from the Court below indicated that Appellant's grandmother lived at either the Wagon Wheel or the Days Inn. By all accounts, Appellant was living in area motels at the time of the murder.

Prior to his incarceration, Dr. McPherson told the jury he was living "on the streets." "Jackson dropped out of school in the 11th grade and decided to live independently of his mother. His idea of independence was to live on the streets." *Id.* at ¶171. It is fair to assume that unless his grandmother also lived "on the streets" he was not living with her prior to the murder. The doctor also stated his drug habit fueled his ventures into other criminal activity. "Dr.

McPherson noted that Jackson's repeated involvement in crimes as an adult was mostly related to his drug habit." *Id.* at 170.

Lastly, Appellant complains that the jury heard too little evidence about Roberts' influence on him. The Eleventh District dealt extensively with the Roberts control issue in the appeal of Appellant's unsuccessful postconviction petition. "***Although there was some support in appellant's evidentiary materials that Roberts had at least moderate intelligence, *there was nothing in those materials to indicate that she used this intelligence to induce other individuals of lesser intelligence to commit criminal offenses for her.****** In addition, our review of the exhibits does not support the holding that the submission of evidence as to the difference between the intelligence of Roberts and appellant would have affected the outcome of the guilt phase of the trial. ***[W]e would emphasize that the state submitted evidence during the guilt phase concerning the communications between appellant and Roberts prior to his release from prison. This evidence showed, at the very least, that *appellant played an equal role in the planning of the murder. Therefore, it is extremely unlikely that evidence relating to Roberts' basic intelligence would have altered the jury's conception as to the nature of the relationship between her and appellant.****

[M]ost importantly, this court would emphasize that appellant's sole defense during the guilt phase of his trial was that he had acted in self-defense in the shooting of Fingerhut. Thus, the submission of evidence as to Roberts' manipulative ability would have resulted in the presentation of contradictory theories of the case to the jury." *State v. Jackson,* 11th Dist. No. 2004-T-0089, 2006-Ohio-2651, ¶¶133-135.

If the jury heard an underrepresentation of the Roberts factor during Appellant's guilt or penalty phase it is not because of a flaw in the system, but because of Appellant himself.

"Jackson displayed loyalty to Roberts and did not try to avoid responsibility and blame the murder on her." *State v. Jackson* 107 Ohio St.3d 300, 2006-Ohio-0001, 839 N.E.2d 362, ¶174. There is no evidence that Roberts "lured" Appellant clothes, drugs or money, only that she supplied him with same.

Appellant's death sentence is neither infirmed nor unreliable. The opinion of this very Court reflects the various snap shots into Appellant's life that he now claims were overlooked or omitted from the jury and the trial judge's consideration. A vacation of Appellant's death sentence is wholly unwarranted and this Proposition of Law lacks merit.

State's Answer to Appellant's Proposition of Law No. X:
A capital defendant waives constitutional challenges to Ohio's death penalty statutes when he fails to articulate with specificity those challenges in the trial court.

In his tenth Proposition of Law, Appellant argues Ohio's death penalty scheme impinges on his Eighth Amendment right to avoid cruel and unusual punishment and his Fourteenth Amendment right to equal protection. These arguments are without merit.

The State first submits that this argument is waived for purposes of appellate review because Appellant failed to raise the specific constitutional challenges in the lower court. While Appellant filed a "Motion to Dismiss Death Penalty Specifications" (T.d. 399) prior to his resentencing, he did not raise the objections in that motion that he posits here. Appellant made broad Eighth Amendment and Fourteenth Amendment arguments, but he failed to argue that his death would be cruel and unusual through the hypothetical infliction of severe physical and mental/psychological pain and suffering or that he suffers an equal protection violation due to pure speculation that his last words will be truncated by the warden, or that he qualifies as "class-of-one" for equal protection purposes.

This Court has held, "the failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Awan,* 22 Ohio St.3d 120, 489 N.E.2d 277 (1986) at syllabus. Therefore, this entire argument is waived.

Should this Court disagree and elect to consider these arguments, the State submits Appellant fashions the first part of this argument to aver that death by lethal injection, Ohio's sole method of execution, will violate the Eighth Amendment's prohibition against cruel and unusual punishment. This Court decided 13 years ago, in another Trumbull County capital case,

State v. Carter, 89 Ohio St.3d 593, 608, 2000–Ohio–172, 734 N.E.2d 345, that lethal injection was not violative of the Eighth Amendment. The U.S. Supreme Court followed suit eight years later in *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). Appellant cannot and does not cite to one decision from this Court or any federal court that holds execution by lethal injection is tantamount to cruel and unusual punishment.

Nevertheless, he argues, without any basis of authority, that Ohio's execution protocol will cause him to suffer "severe physical and mental/psychological pain and suffering." Appellant's Brf. at p. 69. In her concurring opinion in *Scott v. Houk*, 127 Ohio St.3d 317, 319-320, 2010-Ohio-5805, 939 N.E.2d 835, 837 former justice Evelyn Lundberg Stratton explained that no inmate can be guaranteed a pain-free execution. "Capital punishment is constitutional. *Gregg v. Georgia* (1976), 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859. Therefore, '[i]t necessarily follows that there must be a means of carrying it out. Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that *the Constitution does not demand the avoidance of all risk of pain in carrying out executions.*' *Baze,* 553 U.S. at 47, 128 S.Ct. 1520, 170 L.Ed.2d 420." (Emphasis added). *Scott* at ¶9

The *Baze* court likewise rejected Appellant's argument that lethal injection presents "an objectively intolerable risk of harm." (Appellant's brf. at p. 70). "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." *Baze, supra,* at 50. *Baze* further held that "[p]ermitting an Eighth Amendment violation to be established on [a showing that better alternatives exist] would threaten to transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling

supplanted by another round of litigation touting a new and improved methodology. Such an approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures—a role that by all accounts the States have fulfilled with an earnest desire to provide for a progressively more humane manner of death." Id. at 51. It should be noted that Appellant fails to suggest a better alternative to execution by lethal injection.

The last portion of his Eighth Amendment argument is too non-specific for response, which is somewhat ironic because he argues that each state's execution policy must be "fact-specific." Appellant posits absolutely no facts to suggest why lethal injection will cause *him* an "intolerable risk of serious physical harm," but not cause *other* condemned prisoners the same "intolerable risk." Suffice it to say that Appellant has failed to argue, much less demonstrate that the use of lethal injection presents a sure or very likely risk of serious pain and needless suffering.

Appellant next avers his execution will violate the Fourteenth Amendment's guarantee of equal protection. He concedes that R.C. 2949.22, Ohio's execution statute, is fair and impartial on its face. Appellant's Brf. at p. 71. Once again, Appellant fails to cite to a single case – state or federal – which holds that execution by lethal injection violates a condemned prisoner's right to equal protection under the law. He makes the unfounded and unsupported statement that Ohio has failed to strictly comply with R.C. 2949.22(A). The hypothetical example that he cites is that R.C. 2949.22(A) permits a warden to cut short a condemned prisoner's last words. R.C. 2949.22(A) reads as follows: "(A) Except as provided in division (C) of this section, a death sentence shall be executed by causing the application to the person, upon whom the sentence was

imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death. The application of the drug or combination of drugs shall be continued until the person is dead. The warden of the correctional institution in which the sentence is to be executed or another person selected by the director of rehabilitation and correction shall ensure that the death sentence is executed. R.C. § 2949.22." There are absolutely no references to a condemned prisoner's right to free speech or a warden's discretion in curtailing the prisoner's last words.

Even if one goes beyond the statute and considers the execution protocols, which Appellant fails to cite and which are not part of the appeal before this Court, his argument of free-speech/equal protection argument still fails: "[T]he Court again notes that 'the existence of discretion, standing alone, cannot be an equal protection violation.' *Towery,* 672 F.3d at 661. Even if it could, however, [a condemned prisoner] fails to establish that the relevant section of the protocol unconstitutionally burdens a fundamental right. While freedom of speech generally may be a 'fundamental right,' an inmate retains only 'those First Amendment rights that are not inconsistent with his status as a prisoner or with legitimate penological objectives of the corrections system.' *Pell v. Procunier,* 417 U.S. 817, 822, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). Thus, state regulations in the prison context are subject to a 'lesser standard' of review than strict scrutiny. *Turner v. Safley,* 482 U.S. 78, 81, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Such regulations are valid if they are reasonable related to legitimate penological interests. *Id.* at 89, 107 S.Ct. 2254. *See also Brown v. City of Pittsburgh,* 586 F.3d 263, 283 n. 22 (3d Cir.2009) (noting that if every regulation that burdened constitutionally protected speech were subject to strict scrutiny, the varying degrees of scrutiny that the First Amendment requires in different contexts would be 'rendered obsolete')." *In Re Ohio Execution Protocol Litigation,* 906 F. Supp.

2d 759, 787 (S.D.Ohio, 2012), citing *Towery v. Brewer*, 672 F. 3d 650 (9th Circ., 2012). Allowing the warden to turn off the inmate's microphone is rationally related to Ohio's interest in preserving order at the execution. Id. at 788.

Suffice it to say that once the prison door swings shut, that whole life-liberty-and-pursuit-of-happiness concept flies right out the barred penitentiary window. Moreover, even people who are not permanent guests of the Ohio Department of Rehabilitation do not enjoy an unbridled right to free speech. See, *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983) in addressing legislation that regulated free speech. ("The State may * * * enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."). In sum, prison by the very nature of being a prison, restricts certain personal, constitutional guarantees enjoyed by the law abiding population.

Appellant next evokes the so called "class-of-one" theory arguing that his equal protection claim is subject only to a "rational basis" analysis and not the more stringent "strict scrutiny standard" of review. Regardless of the standard of review, Appellant loses. He argues that because of past minor deviations in Ohio's execution protocol which have sparked several federal court interventions, he risks being treated differently than other condemned inmates, and therefore suffers as equal protection violation. It does not appear that this Court has weighed in on the "class-of-one" analysis yet. Ohio's federal courts give some guidance on this issue.

After extensively quoting the Ninth Circuit's decision in *Towery, supra,* Judge Gregory L. Frost came to the following conclusion: "The first point is that the evidence again does not rise to the level required for the Court to accept the contention that the past confusion invariably presents unconstitutionality." *In re Ohio Execution Protocol Litigation* 906 F.Supp.2d 759,

780 (S.D.Ohio,2012). It should be noted that *Towery,* the case upon which Judge Frost relies, noted that given the variety of factors which might overshadow a lethal injection execution, affording a prison warden discretion at various phases of an execution will not necessarily impinge upon the condemned prisoner's rights to equal protection: "It is entirely rational for these determinations to be made on a case-by-case basis, as they may well depend on individualized and changing factors such as the availability of particular people to participate in the execution, the supply of drugs available to the State at a given time, and the condition of the prisoner's veins. The Equal Protection claim, as framed here, cannot succeed on the merits." *Towery,* 672 F.3d at 661.

In other words, sometimes disparate treatment can be a beneficial happenstance for a condemned prisoner. Sometimes, the "individualized determinations" that Appellant complains about in his brief at p. 75, and which he says are "irrational" in his brief at p. 76 & 77, are in fact the most humane way to achieve the quick and painless execution required by R.C. 2949.22(A). Having considered the class-of-one argument, Judge Frost refused to grant inmate Brett Hartman a temporary restraining order or preliminary injunction to block his execution. *In re Ohio Execution Protocol Litigation,* 906 F.Supp.2d 759, 791 (S.D.Ohio,2012). Hartman was executed November 13, 2012.

Judge Frost also declined to apply the case-of-one argument to death row inmate Richard Cooey, stating, "the Court does not conclusively hold today that Ohio's method of execution practices are constitutional or unconstitutional. Today's decision merely recognizes that based on all of the record evidence, Plaintiff has not met his burden of persuading this Court that he is substantially likely to prove unconstitutionality and prevail in this litigation.***Based on the record evidence before this Court, there is no reason to conclude that Defendants will fail and

that Plaintiff is likely to prevail on his § 1983 claims." *Cooey v. Kasich,* S.D, Ohio Nos. Nos. 2:04–cv–1156, 2:09–cv–242, 2:09–cv–823, 2:10–cv–27. (Nov. 4, 2011) at *13. The State of Ohio executed Richard Cooey October 14, 2008.

With little commentary, an Ohio federal magistrate discounted the "class-of-one" argument and recommended against a grant of habeas corpus in another Ohio capital case: "This judge has still not been led to an understanding of how a blanket equal protection attack on lethal injection executions can arise anew from state adoption of a new protocol for such executions.***Accordingly, it is respectfully recommended that the Warden's Motion to Dismiss on the basis that Grounds Twenty–Four [cruel and unusual punishment] and Twenty–Five [equal protection/ class-of-one] are not cognizable in habeas corpus be denied on the authority of *Adams v. Bradshaw, supra.*" *Gapen v. Bobby,* S.D. Ohio No. 3:08-CV-280, 2012 WL 3686303 (Aug. 27, 2012). Larry Gapen remains on Ohio's death row.

Appellant neither argues nor demonstrates that he is being singled out as a "class of one" for disparate treatment. Even if he had been, the guidance supplied by Ohio's federal court have held there may be rational reasons for said treatment which may inure to the condemned inmate's benefit to achieve the statutory goal of a "quick and painless" execution. Therefore, he can show no equal protection violation.

For the reasons thus stated, Appellant fails to articulate either an Eighth Amendment or Fourteenth Amendment violation. Moreover, these arguments are waived because they were not raised in the court below. Appellant's Proposition of Law No. X is without merit.

State's Response to Appellant's Proposition of Law No. XI:
Since 1984, neither this Court, nor a federal court, has held that Ohio's death penalty statutes violate either the federal or state constitution.

Appellant makes his obligatory constitutional challenges to Ohio's death penalty statutes in his Eleventh Proposition of Law. As a preliminary matter, Appellant raised these same or very similar arguments to the ones raised here in his original appeal to this Court. This Court found no merit to any of these claims. "In propositions of law XI and XII, Jackson challenges Ohio's death-penalty statutes on numerous constitutional grounds and concedes that many of his constitutional claims have been rejected by this court in a number of cases. We summarily reject all of Jackson's constitutional claims. See, e.g., *State v. Jenkins* (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264; *State v. Buell* (1986), 22 Ohio St.3d 124, 22 OBR 203, 489 N.E.2d 795; *State v. McNeill* (1998), 83 Ohio St.3d 438, 700 N.E.2d 596; *State v. Bey* (1999), 85 Ohio St.3d 487, 502, 709 N.E.2d 484; *State v. Poindexter* (1988), 36 Ohio St.3d 1, 520 N.E.2d 568, syllabus." *State v. Jackson* 107 Ohio St.3d 300, 2006-Ohio-1, 839 N.E.2d 362, ¶161. The State submits that all of these arguments and sub-arguments are barred by the doctrine of res judicata. Where an argument could have been raised on an initial appeal, *res judicata* dictates that it is inappropriate to consider that same argument on a second appeal following remand." *State v. D'Ambrosio,* 73 Ohio St.3d 141, 143, 652 N.E.2d 710 (1995).

Should this court disagree, the State argues in the alternative that in his first subsection, Appellant claims a Fourteenth Amendment violation of his due process rights because, he submits, the death penalty is both arbitrary and unequally applied. However, it is well-settled that to challenge a statute, the challenger must overcome a strong presumption of constitutionality. *State v. Warner*, 55 Ohio St.3d 31, 43, 564 N.E.2d 18, 30–31. (1990). This Court tersely rejected the "arbitrary and unequal" claim in *State v. Ferguson,* 108 Ohio St. 3d, 2006-Ohio-1502, 844

N.E. 2d 806, ¶86, citing *State v. Jenkins*, 15 Ohio St.3d 164, 169–170, 15 OBR 311, 473 N.E.2d 264 (1984); *State v. Steffen* , 31 Ohio St.3d 111, 124–125, 31 OBR 273, 509 N.E.2d 383 (1987). Appellant provides no new authority to bolster this old argument.

Appellant in his subsection B argues, *inter alia*, that Ohio's death penalty scheme is "unconstitutionally vague" and that the sentencing procedures are unreliable. Appellant's brief at p. 79-80. This Court considered and rejected this contention. *State v. Buell,* 22 Ohio St.3d 124, 139-140, 489 N.E.2d 795 (1986), certiorari denied (1986), 479 U.S. 871, 107 S.Ct. 240, 93 L.Ed.2d 165. Appellant cites to no new case law to suggest a reversal of opinion on this issue.

In subsection C Appellant claims a capital defendant's right to trial by jury is burdened because there is an "impermissible risk of death" when a defendant elects to try a capital case rather than enter a plea. This Court has dismissed this argument noting there is no guarantee that a criminal defendant, by pleading guilty to aggravated murder with a capital specification, will necessarily avoid a death sentence. *Buell, supra,* at 124, 138-139.

Next, Appellant argues that R.C. 2929.03(D)(1)'s requirement that *upon request of the capital defendant* the trial court may submit a pre-sentence investigation report and a mental health evaluation to the jury. Appellant refers to these reports as "mandatory" but there is nothing mandatory about them because it is the capital defendant who controls whether the reports are compiled in the first place. Pursuant to R.C. 2929.03(D)(1), "the defendant decides whether to expose himself to the risk of potentially incriminating presentence investigations, including mental examinations. There is no constitutional infirmity in providing the defendant with such an option." *Buell,* 22 Ohio St .3d at 138. See, also, *State v. Esparza*, 39 Ohio St.3d 8, 10, (1988) certiorari denied (1989), 490 U.S. 1012, 109 S.Ct. 1657.

In subsection E, Appellant claims that R.C. 2929.03(D)(1) and R.C. 2929.04 are "unconstitutionally vague." Appellant's Brf. at 82. This Court considered and rejected this argument in *State v. McNeill*, 83 Ohio St.3d 438, 453, 700 N.E.2d 596 (1998), citing *Tuilaepa v. California* (1994), 512 U.S. 967, 973–980, 114 S.Ct. 2630, 129 L.Ed.2d 750. Again, Appellant provides no update to suggest either this Court or the federal courts have reconsidered prior holdings.

Appellant argues in subsection F that R.C.2929.05(A) is constitutionally infirmed claiming it fails to distinguish capital defendants who deserve the death penalty and those who do not. Appellant's Brf. at p. 84. This Court tersely dismissed this argument in Appellant's original appeal. "Proportionality review needs to entail only those cases in which the death sentence has been imposed." *State v. Jackson* 107 Ohio St.3d 300, 2006-Ohio-1, 839 N.E.2d 362, at ¶126, quoting *State v. Steffen* (1987), 31 Ohio St.3d 111, 123–124, 31 OBR 273, 509 N.E.2d 383; *State v. Jordan,* 101 Ohio St.3d 216, 2004-Ohio-783, 804 N.E.2d 1, ¶ 86. Again, Appellant fails to cite to any Ohio case wherein a capitally charged defendant did not receive the death penalty, which by comparison would cause this Court to believe Appellant is not worthy of the death penalty.

It is also noteworthy that there is no federal constitutional right to a proportionality review. See, *Pulley v. Harris* 465 U.S. 37 (1984). This Court has already reviewed the proportionality and appropriateness of Appellant's death sentence comparing it to other Ohio capital cases. "We further find that the death penalty is both appropriate and proportionate when compared with capital cases also involving aggravated murder during aggravated burglary, see *State v. Davie* (1997), 80 Ohio St.3d 311, 686 N.E.2d 245, and aggravated murder during aggravated robbery, see *State v. Burke* (1995), 73 Ohio St.3d 399, 653 N.E.2d 242; *State v.*

Raglin (1998), 83 Ohio St.3d 253, 699 N.E.2d 482." *State v. Jackson* 107 Ohio St.3d 300, 2006-Ohio-1, 839 N.E.2d 362, ¶184.

Despite his attacks on the data collection process promulgated in R.C. 2929.021 and 2929.03, Appellant provides absolutely no authority to demonstrate that this Court's finding in his case was wrong. Appellant was perfectly free to cite other capital or non-capital sentences to prove this Court's review and affirmation was incorrect, but he failed to do so. This argument is as rejection-worthy now as it was in 2006.

In the final six pages of this proposition, Appellant argues that Ohio's statutory death scheme violates international law. Appellant raised this argument in his original appeal to this Court. This Court completely disregarded such claims, opting to not even make mention of them. Despite his multiple arguments and sub-arguments on this topic, Appellant fails to cite to one court, domestic or international, that has held Ohio's death penalty scheme to be violative of international law.

On the other hand, this Court dismissed similar attacks in several other capital cases. This Court has re-visited the international-law-prohibition argument since Appellant's original appeal in *State v. Short,* 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121. In *Short,* this Court made short work of Appellant's claims: "Short's other international-law claims have all been rejected by this court and/or other courts. See *State v. Phillips* (1995), 74 Ohio St.3d 72, 101, 103–104, 656 N.E.2d 643; *Buell v. Mitchell* (C.A.6, 2001), 274 F.3d 337, 370–372 (death penalty does not violate International Covenant on Civil and Political Rights ('ICCPR') or the 'customary international law norm'); *People v. Perry* (2006), 38 Cal.4th 302, 322, 42 Cal.Rptr.3d 30, 132 P.3d 235 (death penalty does not violate ICCPR); *Sorto v. State*

(Tex.Crim.App.2005), 173 S.W.3d 469, 490 (death penalty does not violate United Nations Convention against Torture)." *Id.* ¶138.

This Court has repeatedly dismissed and rejected the multi-faceted arguments raised in this Proposition of Law. In the event the State has inadvertently omitted argumentation on any of the more nuanced points, the State does not concede any issue. This Proposition of Law is wholly without merit.

State's Answer to Appellant's Proposition of Law No. XII:
A defendant will not benefit from the cumulative error doctrine when he fails to demonstrate multiple errors.

In his twelfth and final Proposition of Law, Appellant argues he had an unfair trial because of the impact of so-called "cumulative errors" in his trial in the court below. This argument lacks merit.

In *State v. DeMarco*, 31 Ohio St.3d 191, 31 OBR 390, 509 N.E.2d 1256 (1987), paragraph two of the syllabus, this Court recognized the doctrine of cumulative error. Under this doctrine, a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial court error does not individually constitute cause for reversal. Id. at 196–197, 31 OBR 390, 509 N.E.2d 1256. See also *State v. Garner*, 74 Ohio St.3d 49, 64, 656 N.E.2d 623 (1995). However, the doctrine of cumulative error is not applicable to a case where there are no multiple errors. *State v. Hunter,* 131 Ohio St. 3d 67, 2011-Ohio-6524, 960 N.E. 2d 955, ¶132.

The State submits Appellant has not articulated any reversible error in his previous eleven Propositions of Law. At worst, any errors are harmless. Crim. 52(A). Nonetheless, Appellant summarizes a precious few of the previously stated allegations which he views as worthy of reversal. First, he restates his Proposition of Law II argument that he was prejudiced by the last- minute substitution of Atty. Thomas Wright before his mitigation hearing. Referring the Court to the State's response to Proposition of Law II, the State submits this argument is res judicata barred and invited error doctrine barred. See, *Roberts II,* at ¶95; *State v. Cunigan* 195 Ohio App.3d 162, 2011-Ohio-4010, 958 N.E. 2d 1290 (2nd Dist.), ¶12.

Next, he argues that the trial court "limited" his re-sentencing. As discussed previously in Proposition of Law V, the *Roberts II* decision completely ratified the trial court's limitations

imposed at Appellant's second sentencing because he was clearly not entitled to submit additional mitigation evidence. See *Roberts II*, ¶¶42-49. In fact, he received the added bonus of a second allocution which will not be afforded his co-defendant. *Roberts II,* ¶ 74. Further, the trial court committed no error, much less reversible error, in "refusing to appoint counsel" for the resentencing. Two death-qualified attorneys were in court with Appellant as he was re-sentenced. Atty. Parker had represented Appellant for five-a-half years in three Courts, including this one. After lobbying the three levels of Ohio courts for nearly six years for a new sentencing hearing, Atty. Parker made a disingenuous, last-minute motion for the trial court to appoint someone other than Atty. Porter just 13 days ahead of the scheduled re-sentencing. Naturally, this would require at least a six-month continuance so fresh counsel could get up to speed for Appellant's 20-minute resentencing hearing. The flimsy excuse for this last minute change of defense team partners was Atty. Parker's assignment to Appellant's federal case, an assignment that occurred *prior* to his voluntary notice of appearance in the trial court. The trial court committed no error in refusing to delay the court-ordered resentencing in deference to these specious delay tactics.

Finally, Appellant supplied absolutely no authority in his Proposition of Law VII to suggest a trial court cannot copy itself on a re-draft of a sentencing entry. Of particular note are the disciplinary proceeding resulting from the original entry which revealed that the prosecution, at worst, acted as a typist for the judge who had already designated and weighed aggravating circumstances and mitigating factors in compiling the original entry. While the judge may be accused of a lack of originality, he cannot be found to have committed reversible error in electing to rely on large portions of an entry already affirmed by this Court.

For the reasons thus stated, Appellant enjoyed a fair trial and a fair resentencing hearing. The cumulative error doctrine does not apply to this case because Appellant fails to demonstrate multiple errors. Appellant's Proposition of Law XII is without merit.

CONCLUSION

For the reasons stated above, Appellant is not entitled to a third sentencing hearing. The State respectfully requests this Court to affirm Appellant's death sentence.

Respectfully Submitted,

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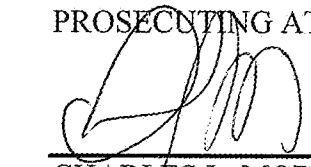
PROSECUTING ATTORNEY BY:



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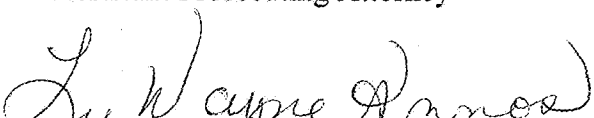

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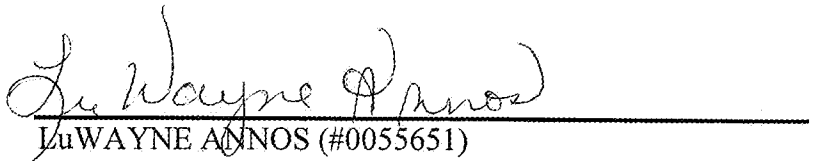
PROOF OF SERVICE

I do hereby certify that a copy of the foregoing brief was sent by ordinary U.S. Mail to Atty. Randall L. Porter, Assistant Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio, 43215, and Atty. Dennis L. Sipe, 322 Third St., Marietta, Ohio, 45750, Counsel for Appellant Nathaniel Jackson, on this 14th Day of November 2013.



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