

ORIGINAL

In The Supreme Court of Ohio

State of Ohio, :  
 Appellee, : Case No. 12-1644  
 -vs- : Appeal taken from Trumbull  
 County Court of Common Pleas  
 Nathaniel Jackson, : Case No. CR 01-CR-794  
 Appellant. : This is a death penalty case

APPELLANT NATHANIEL JACKSON'S REPLY BRIEF

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## Preface

Appellant Nathaniel Jackson stands on each of the arguments and authorities cited in his Merit Brief. He submits this Reply Brief solely to correct the State's mischaracterizations of the record and to rebut those arguments that the State raised in its Answer Brief that Appellant did not already address in his Merit Brief.

This Court should not construe the lack of response by Appellant to an argument made by the State in its Answer Brief as an implied admission as to the correctness of the argument. Instead, the Court should construe the lack of response by Appellant as an indication that he already addressed the argument in his Merit Brief.

### Statement of the Facts

The State does not contest most of the assertions contained in Jackson's Statement of the Facts. [Appellee's Answer Brief, pp. 1-2]. Specifically, in its response to Jackson's Statement of the Facts, the State has not contested the following:

- One of the defense lawyers at the initial mitigation hearing knew nothing about the case. The other lawyer knew very little about the sentencing phase.
- The lawyer who only become involved with the case on the day of the mitigation hearing and therefore knew nothing about the case, saw no need to request a continuance to familiarize himself with the case.
- Defense counsel did not give an opening statement.
- Defense Counsel's direct examination of the lay witness produced inaccurate, prejudicial testimony.
- Defense counsel's direct examination of the retained Psychologist, Dr. Sandra McPherson produced inaccurate and prejudicial testimony.
- Dr. McPherson did not understand the most basic psychological concepts concerning mental retardation. She incorrectly administered and scored Jackson's IQ Test which in turn tainted much of her testimony.
- The Prosecutor Relied Upon the Inaccurate Lay and Expert Testimony In His Closing Argument
- The trial judge relied upon the inaccurate lay and expert testimony when imposing Jackson's sentence of death.

[Jackson's Merit Brief, pp. 4-11].

These uncontroverted facts, even without the benefit of argument, demonstrate the miscarriage of justice that occurred at Jackson's initial sentencing hearing. While the trial court has resentenced Jackson, given the limited nature of the resentencing hearing, the basis for his death sentence remains the initial sentencing. At the initial sentencing hearing only one of his attorneys knew just a few facts about the case, and the other attorney knew nothing. Furthermore at the initial sentencing hearing most of both the lay and expert testimony was both incorrect and

incomplete. These critical flaws tainted the trial court's sentencing opinion that it filed subsequent to the resentencing

## Proposition of Law No. 1

### **This Court Lacks Jurisdiction to Hear a Direct Appeal in a Capital Case When the Trial Court Fails to Enter a Sentencing Opinion that Complies with R.C. 2929.03(F).**

Jackson limits this Proposition to whether the trial court issued a final appealable order. [Appellant's Merit Brief, pp. 12-17]. He relies on this Court's decision that in a case in which a sentence of death is imposed, the final appealable order consists of two documents, the sentencing entry and the sentencing opinion. [*Id.* at p. 13]. He then asserts that when the sentencing opinion is infirm, then the trial court has not issued a final appealable order. [*Id.*]. Finally, Jackson argues that because the trial judge in his case did not consider any evidence from the resentencing hearing as evidenced by his statements in open court and his sentencing opinion, then there is no final appealable order. [*Id.* at pp. 14-17].

#### **A. The State relies on the wrong law**

The State begins its response by reviewing what it incorrectly believes is the law with respect to final appealable orders. [Appellee's Brief, pp. 4-5]. However, the State only relies on the law with respect to noncapital prosecutions. [*Id.*]. As a result it ignores the importance that the sentencing opinion plays in a capital case with respect to issue of the existence of a final appealable order.

#### **B. The trial court was required to consider newly submitted evidence at the sentencing hearing.**

The State relies upon this Court's decision in *State v. Roberts*, \_\_\_ Ohio St.3d \_\_\_, 2013-Ohio-4580, \_\_\_ N.E.2d \_\_\_, ("*Roberts II*") which this Court issued subsequent to Appellant's filing of his merit brief. [Appellee's Answer Brief, p. 6]. The State argues, pursuant to *Roberts II*, that Jackson was not entitled to present any new evidence at the resentencing hearing. [*Id.*].

But that is exactly what this Court permitted in *Roberts II*. Roberts at her initial sentencing hearing waived the opportunity to present any evidence. Despite this waiver, which this Court upheld in *Roberts I*, this Court held that the trial judge erred when at the resentencing he did not consider any of the information contained in Robert's allocution. *Id.* at ¶¶ 55-66. Since Roberts did not present any evidence at her initial sentencing hearing, any evidence that she presented at the resentencing hearing had to constitute new evidence.

There is no reason to treat the new evidence that Jackson presented at his resentencing hearing any differently than the evidence Roberts presented at her resentencing hearing. Jackson at his initial sentencing hearing did not waive the presentation of his mitigation evidence nor did he limit the presentation by his trial attorneys. However, the presentation of his mitigation was limited by the fact that one of the attorneys had just been assigned to his case on the day of the mitigation hearing and the other attorney was unprepared because he had counted on the attorney who withdrew from the case to prepare the mitigation presentation. *See* Proposition of Law No II [Appellant's Merit Brief, pp. 17-31].

If Roberts was to get a second bite of the apple after she waived her first bite, elementary fairness dictates that Jackson, whose first bite was limited not by his own actions, but the acts and omissions of trial counsel, should get a second bite of the apple. Therefore, the trial court erred when it failed to consider Jackson's new evidence rendering his sentencing opinion incomplete. Thus, there is no final appealable order.

### **C. The trial court denied Jackson his right of allocution**

The State argues that the trial court permitted Jackson to make two statements at his resentencing and therefore it afforded him his right of allocution. [Appellee's Answer Brief, pp. 6-7]. While Jackson disputes this assertion because the trial court did not reference his allocution

in its resentencing opinion, *See Roberts II* at ¶ 64, it is immaterial because the fact remains that the trial judge did not consider any evidence contained in his counsel's proffer or Jackson's allocution. That failure to consider evidence is dispositive of the final appealable order issue.

**D. The trial judge's pre-drafting of his resentencing opinion together with his announcements in open court is conclusive evidence that the trial judge did not consider any new evidence.**

The State asserts that the fact that the trial judge prepared his sentencing opinion prior to the sentencing hearing is not dispositive, because if Jackson had offered any relevant evidence that trial judge could have modified his sentencing opinion . [Appellee's Answer Brief, pp. 8-10]. However, that argument is not persuasive given that that trial judge announce that as a matter of law, he believed, *albeit* incorrectly, could not consider any new evidence. [8/14/12 Tr. 5, 14]. Those two facts deprived the sentencing opinion from constituting a final appealable order.

**E. The doctrine of harmless error is inapplicable.**

The State argues that the trial court's refusal to consider any evidence and argument error offered at the resentencing evidence constituted harmless error. [Appellee's Answer Brief, pp. 10-12]. However, the issues involving this Court's jurisdiction are not subject to harmless error analysis.

This Court should sustain this Proposition of Law and dismiss this appeal for lack of a final appealable order.

## Proposition of Law No. II

**A Defendant Is Deprived of the Effective Assistance of Counsel at the Mitigation Hearing In a Capital Case When The Attorney Who Was Supposed to Present the Sentencing Phase Evidence Case Becomes Ill, The Court at the Commencement of the Hearing Appoints Substitute Counsel Who Has No Knowledge of the Case, And Remaining Counsel, Who Had Relied Upon the Ill Attorney to Make the Mitigation Presentation, Has Limited Knowledge of the Sentencing Phase Presentation.**

On the day of the sentencing hearing, Attorney Wright substituted for Attorney James Lewis who was supposed to make the sentencing presentation. [Sent. Tr. 7-8]. Attorney Consoldane who made the sentencing presentation believed that Attorney Lewis would make the sentencing presentation. [*Id.*]. The State does not dispute these two critical facts. [Appellee's Brief, pp. 13-18].

### **A. This Court Should Not Apply the Procedural Bar of Res Judicata.**

The State first claims that this claim of mitigation ineffectiveness is barred by res judicata. [Appellee's Answer Brief, pp. 13-14]. Res judicata is a rule of fundamental and substantial justice, *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568 ¶25; *State v. Szeftcyk*, 77 Ohio St.3d 93, 95, 671 N.E.2d 233 (1996). It is "is to be applied in particular situations as fairness and justice require, and \* \* \* is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice." *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 386-87, 653 N.E.2d 226 (1995) (Douglas, J., dissenting). To apply the doctrine to uphold Jackson's death sentence would work an injustice given that he was represented by one attorney who knew nothing and a second attorney who knew very little.

The State cites this Court's ruling in *Roberts II*, in which this Court found that Roberts' mitigation ineffectiveness claim was waived. [Appellee's Answer Brief, p. 13]. Her case is distinguishable. Roberts waived her right to present mitigation evidence after consulting with

two attorneys who were very knowledgeable about her case. Thus there was no reason for this Court to find that it would work an injustice to apply the procedural bar of res judicata. She had caused the failure to present mitigation evidence. In this case Jackson did not waive mitigation. The limited mitigation was caused not by Jackson but his two attorneys who knew little and nothing about his case.

**B. The Prior Appellate Rulings Do Not Bar Granting Sentencing Relief.**

The State cites to this Court's prior ruling in Jackson's first appeal involving a claim of ineffective assistance of counsel. [Appellee's Answer Brief, p. 14]. However, that claim involved the trial, not the mitigation phase. *State v. Jackson*, 107 Ohio St.3d 300, 2006-Ohio-1, 839 N.E.2d 362, ¶¶ 127-141.

The State also cites to the court of appeals ruling on Jackson's post-conviction petition. [Appellee's Answer Brief, p. 14]. As the State notes, given that is a lower court ruling, it is not controlling. [*Id.*]. Furthermore, given the appellate court's subsequent vacation of Jackson's death sentence, that decision has ceased to have any vitality. *See State v. Roberts*, 11th Dist. No. 2005-T-034, 2007-Ohio-5616 at ¶7. ("it logically follows that when the Supreme Court vacated appellant's sentence, its ruling also had the effect of nullifying all of the proceedings in regard to her original and amended post-conviction petitions. That would include the trial court's judgment granting the state's motion to dismiss appellant's two petitions.")

**C. The Attorney's and Jackson's Assent to Proceeding Did Not Waive this Issue.**

The State cites to the fact that Attorney Consoldane twice declined to accept the court's offer for a continuance. [Appellee's Answer Brief, p. 15]. That an attorney in a capital case would elect to go forward even though: 1) he was not prepared (because he believed that the other attorney who withdrew from his case would made the mitigation presentation) and 2) his

replacement co-counsel had just been appointed the day of the sentencing hearing, is the epitome of ineffective assistance of counsel. Telling is Attorney Consoldane's motion to permit the psychologist to remain in the courtroom during the lay witness testimony because "I think that it would be better able to help me in court, when I am *interviewing* the family members if she's [the psychologist] here with me. She knows far more about the background of the family that I do, and it was - - *I got a little shorthanded with Mr. Lewis going into the hospital . . .*" [Sent. Tr. 7] (emphasis added).

The State also points to Jackson's agreement to proceed with Attorney Wright as one of his attorneys. [Appellee's Answer Brief, p. 15]. Jackson had previously received IQ scores in the low 70's when he was in the seventh and tenth grades. [Sent. Tr. 46]. He received an IQ score of 75 while in post-conviction. [T.D. 407, Exhibit 78, ¶ 15]. These scores placed him in the low mentally retarded borderline range. He lacked the ability to intelligently determine the need for a continuance and accept a replacement attorney. He was most likely following the lead of Attorney Consoldane.

#### **D. Attorney Wright Knew Nothing About Jackson's Case**

The State claims that there is nothing in the record about Attorney Wright's knowledge of the case. [Appellee's Answer Brief, p. 16]. That is incorrect. First, Attorney Wright initially appeared in the case on the day the mitigation hearing commenced. [Sent Tr. 4]. Second Attorney Consoldane stated on the day of the commencement of the sentencing hearing that "he had just got hold of Mr. Wright *this morning*" to substitute for Attorney Lewis. [*Id.* at Tr. 7] (emphasis added). Finally, Attorney Wright's participation in the sentencing hearing was limited to making one statement. [Sent. Tr. 11].

### **E. The State's Citation to Authorities Is Not Persuasive.**

The State cites to *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984) and *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989) as support its defense counsel provided effective assistance of counsel in the mitigation phase. [State's Answer Brief, pp. 17-18]. However, in neither of those cases did the attorney who was prepared to make the sentencing presentation not appear and another attorney "just off the street," substitute for the first attorney.

This Court should sustain Proposition of Law No. II.

### **Proposition of Law No. III**

**A Defendant Is Denied His Right to A Fair and Impartial Tribunal When A Trial Judge, Who Has Been Found to Have Committed Misconduct that Constitutes an Ethical Violation, Refuses to Accept the Findings of this Court and the Mandate of the Lower Appellate Court With Respect to His Misconduct.**

The State first claims that this proposition is barred by res judicata. [Appellee's Merit Brief, p. 21]. The State cites to the two rulings made by the late Chief Justice Moyer in response to affidavits of disqualification filed by Jackson. [*Id.*]. First, those two decisions did not constitute rulings on the Fourteenth Amendment due process issue. Instead, they constituted rulings premised upon the Code of Judicial Conduct. Nowhere in his decisions did Chief Justice Moyer cite to any federal constitutional provision. Second, even if Chief Justice Moyer's decision could serve as a basis for the application of a procedural bar, events that transpired after his second ruling preclude application of the bar.

In this case the juxtaposition of the various rulings is the telling factor. Judge Stuard adopts one position with respect to the ex parte communications and drafting of the sentencing

opinion when he has proceedings pending against him in this Court. After all of those proceedings were terminated he adopted a drastically different position in his own court.

On October 5, 2006, Appellant filed an application for disqualification with the late Chief Justice Moyer. *State v. Jackson*, Ohio Supreme Court Case No. 06AP102. Judge Stuard filed an affidavit in which he opposed the application:

7. I had essentially the same type of communications with the Assistant Prosecuting Attorneys in Jackson as I had with the Assistant Prosecuting Attorneys in Roberts, and for the same reasons and purpose. (There is no reason to have a hearing in the Jackson case to establish these facts.)

[T.d. 406, Affidavit of Randall Porter, Exhibit 4, Judge Stuard Affidavit]

On November 29, 2006, the late Chief Justice Moyer denied Jackson's first application for disqualification. *In re Disqualification of Stuard*, 113 Ohio St.3d 1236, 2006-Ohio-7233, 863 N.E.2d 636. He found therein:

Judge Stuard has responded in writing to the affidavit. *He acknowledges 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, and he denies that any hearing is needed in his court in the Jackson case to establish that fact. The judge states that he is prepared to reconsider the evidence and impose a new sentence in this case just as he has been ordered to do in the related Roberts case. . . .

[*Id.* at ¶ 4].

After Appellant became aware of the ongoing disciplinary proceedings against the trial judge, Appellant filed a second motion for disqualification with the Chief Justice. *State v. Jackson*, Supreme Court Case No. 08-AP-043. The trial judge filed an affidavit opposing the application for disqualification. [T.D. 404, Affidavit of Randall L. Porter, Exhibit 8 Stuard

Affidavit]. In his affidavit, the trial judge acknowledged that he had engaged in the same drafting process that this Court found to be infirm in *Roberts*:

14. Since I engaged in the same conduct determined by the Ohio Supreme Court to be error in *State v. Roberts* then, and in that event, the same results should obtain in this companion case involving Nathaniel Jackson. I should remain the trial judge in *State v. Jackson* just as I was ordered to remain in *State v. Roberts*. The remedy under these circumstances is not the removal of the trial judge, as the court's opinion in *State v. Roberts* indicates. Ms. Roberts did not get a new judge and Mr. Jackson should not get one either.

15. There is no factual or legal reason why Mr. Jackson should be given a remedy different from that given to Donna Roberts.

16. I am able and willing to undertake the obligations imposed upon me by this court's opinion in *State v. Roberts* and to apply those requirements to the further handling of the case involving the defendant Jackson.

[*Id.*].

On August 20, 2008, the late Chief Justice Moyer denied Jackson's second application for disqualification. *State v. Jackson*, Ohio Supreme Court Case No. 08-AP-043 (Judgment Entry).

On January 29, 2009, this Court issued its opinion in Judge Stuard's disciplinary proceedings. *Disciplinary Counsel v. Stuard, Judge*, 121 Ohio St.3d 29, 2009-Ohio-261, 901 N.E.2d 788. This Court made the following findings concerning Judge Stuard:

Judge Stuard concedes and the board found that his ex parte communications with 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 \* \* \*").

*Id.* at ¶ 10.

At this point Judge Stuard had told the Chief Justice and this Court that the communications with the prosecutor were ethically incorrect. He also told the Chief Justice that due to these improper communications in Jackson's case, Jackson is entitled to the same relief as Roberts.

However, once Judge Stuard returned to his own court, his position changed one-hundred-eighty degrees. On May 1, 2009, the trial judge denied Jackson's Motion for a New Sentencing Hearing. [T.d. 381]. He did not reference this Court's decision in *Roberts* or the confessions he made in the various proceedings in this Court. [*Id.*]. Instead, he characterized the facts underlying Jackson's motion for a new sentencing hearing as "the *alleged involvement* of the Trumbull County Prosecutor's Office in the preparation of the sentencing entry." [*Id.* at p. 1] (emphasis added).

On October 18, 2010, the Trumbull County Court of Appeals unanimously vacated Appellant's death sentence. *State v. Jackson*, 190 Ohio App.3d 319, 2010-Ohio-5054, 941 N.E.2d 1221, ¶ 29 (11th Dist.). Judge Cannon in his concurring opinion found, "In November 2006, the trial judge filed an affidavit in response, opposing disqualification. In that affidavit, the trial judge acknowledged doing the same thing in this case that he did in *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168 . . . And, by opposing disqualification, the trial judge implicitly represented he could remain on the case for purposes of curing that error." *Id.* at ¶¶35, 41].

When the case returned to Judge Stuard's court, he again refused to concede any misconduct on his part despite the findings of this Court and the Eleventh District Court of Appeals. He announced in open court that "[t]he Supreme Court I think misunderstood what occurred, but they have made their ruling and abide by it." [8/14/12 Tr. 6]. Judge Stuard's

response to the appellate court's order to draft and file a new sentencing opinion was to file almost an identical copy of his prior sentencing opinion that the court of appeals had found was tainted by the prosecutor's involvement. *See* Proposition of Law No. VII. [Appellant's Merit Brief, pp. 55-58].

Appellant started litigating the *Roberts* error on August 15, 2006, when he filed his motion for leave to file his motion for a new trial. [T.d. 331]. It has now been more than seven years and he has yet to receive a review of the evidence that is not tainted by prosecutorial involvement. It has come time for him to be granted that most basic constitutional right.

This Court should sustain Proposition of Law No. III.

#### **Proposition of Law No. IV**

##### **A Defendant Is Entitled to Two Appointed Counsel at a Resentencing Hearing in a Capital Case.**

Jackson focuses in this Proposition on the fact that he was entitled to two appointed counsel for purposes of his resentencing. He did not have two attorneys. John Parker, who had previously represented Jackson, adopted the position that he had developed a conflict that did not have in his earlier representation of Jackson. [8/14/12 Tr. 7-9]. The trial judge deferred to Attorney Parker and concluded that "I am merely saying that that [sic] is up to Mr. Parker. If he feels there is some conflict, I am not going to insist that he proceed as this time." [*Id.* at Tr. 12].

The trial court attempted to cure the problem by finding that the court's resentencing did not involve "pending charges against Mr. Jackson," but was part of "the appeal that was filed from the original trial." [8/14/12 Tr. 7]. The court's statement was incorrect for two reasons. First, the resentencing was not part of the appeal process. Jackson was not there contesting a sentence that had already been imposed, but instead to have the court impose sentence. Even if

the trial court was correct that the resentencing is part of the appeal process, Jackson was entitled to two appointed counsel at the resentencing hearing. Ohio Sup. R. 20 II(B).

The State spends its response claiming that Attorney Parker did not have a conflict and therefore this proposition is just a smoke screen to challenge the trial court's failure to grant a continuance to permit the appointment of new counsel. [Appellee's Answer Brief, pp. 26-31]. The State's brief misses the point. The trial court accepted the fact that Attorney Parker had a conflict and therefore Jackson only had one attorney at the resentencing. [8/14/12, Tr. 12]. Thus, whether a conflict actually existed is beside the point. Jackson had only one attorney at the resentencing.<sup>1</sup>

This Court should sustain Proposition of Law No. IV.

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<sup>1</sup> On March 27, 2007, Federal District Court Judge Gwin appointed Attorney Parker to represent Jackson in his federal habeas proceedings. *Jackson v. Houk*, N.D. Ohio 4:07 CV 0080. On April 27, 2007, Attorney Parker filed his notice of appearance with respect to Jackson's collateral proceedings. [T.d. 351]. The law in existence on that date did not permit the ineffective assistance of post-conviction or collateral review counsel to serve as cause to excuse a procedural default. *Coleman v. Thompson*, 501 U.S. 722, 753-54, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). Thus, Attorney Parker did not have to worry that his participation in the state court collateral litigation would lead to him having to call himself ineffective to excuse a procedural default. Five years later, on March 12, 2012, the United States Supreme Court held that the ineffective assistance of collateral review counsel could constitute cause to excuse a procedural default. *Martinez v. Ryan*, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012). At that point Attorney Parker faced a potential conflict. His performance (potential ineffectiveness) could lead to him having to raise an ineffectiveness claim against himself. He was ethically barred from raising such a claim against himself. *State v. Cole*, 2 Ohio St.3d 112, 113, 443 N.E.2d 169 (1982); Board of Commissioners on Grievances and Discipline Opinion No. 2010-5, 2010 Ohio Griev. Discip. LEXIS 5. Hence, his refusal to participate further on the case at the resentencing hearing was solely attributable to the sea change in the law brought out by the decision in *Martinez*.

**Proposition of Law No. V**

**A Trial Court at a Resentencing Hearing Is Required to Consider All Relevant Evidence that a Defendant Submits In Support of A Sentence of Less Than Death.**

At the resentencing, the trial judge three times stated that he would not consider any new or additional evidence that supported a sentence of less than death. [8/14/12 Tr. 5, 14]. Twice he stated that he had already drafted his sentencing opinion. [*Id.* at Tr. 22, 27]. His sentencing opinion, that he filed immediately after the resentencing hearing, reflected that the judge had not considered any new evidence that Appellant had proffered in support of a sentence of less than death. [T.d. 410]. The State in responding to this proposition of law does not dispute any of those underlying facts. [Appellee's Brief, pp. 31-37].

**A. The Trial Court Did Not Personally Review Any of the Mitigation Evidence.**

The State in its brief emphasizes that the court of appeals required the trial judge to “personally review and evaluate” and “personally prepare an entirely new opinion.” [Appellee's Answer Brief, p. 31]. The trial judge never personally did any of these tasks, but instead just filed an almost verbatim copy of his prior sentencing opinion. *See* Proposition of Law No. VII [Appellant's Merit Brief, pp. 44-50].

This fact is critical. This Court in *Roberts II* distinguished between evidence that had been presented to the trial court at the initial sentencing hearing and evidence that was initially presented at the resentencing hearing. *Id.* at ¶ ¶ 23-39. Because the judge filed a copy of the flawed first sentencing opinion after the resentencing hearing, it follows that he did not personally consider any of the evidence from either sentencing hearing.

### **B. Jackson's Case Is Distinguishable From Roberts' Case.**

The State relies on this Court's decision in *Roberts II*. [Appellee's Answer Brief, pp. 32, 37]. Jackson previously in this Brief distinguished *Roberts II*. See Proposition of Law No. I, pp. 3-4, *supra*. In *Roberts*, the judge after the resentencing hearing drafted a new sentencing opinion, thereby complying with the remand order. In this case, the trial judge merely re-filed his flawed sentencing opinion, except for minor changes, thereby not complying with the remand order.

In addition, both cases involve the presentation of "new evidence." Roberts waived presentation of mitigating evidence at her initial sentencing hearing, and therefore all of the information contained in her allocution at the resentencing hearing constituted "new evidence." However, the new evidence (the proffered evidence) that Jackson at his resentencing hearing would have been presented at the initial sentencing hearing if his attorneys had not performed deficiently. Again, it is fundamentally unfair to give Roberts a second bite of the apple when her own actions necessitated a second bite, while denying Jackson a second bite because his attorneys had failed him and not because of his own doing.

### **C. This Court Should Not Attempt to Distinguish the Decision in *Davis v. Coyle*.**

The State concedes that the Sixth Circuit in *Davis v. Coyle*, 475 F.3d 761 (6th Cir. 2007), vacated a death sentence involving the same fact patterns, the three judge panel had refused to consider new or additional evidence at the resentencing hearing. [Appellee's Brief, p. 33].

The State argues that the Sixth Circuit in *Moore v. Mitchell*, 708 F.3d 760, 840-05 (6th Cir. 2013) distinguished *Davis*. [Appellee's Brief, p. 34]. The Court in that case held "[i]n 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." In Jackson's case the court excluded the evidence from the record altogether

and only permitted it to be proffered. [8/14/12 Tr. 14]. The trial court herein did not consider the evidence in dispute, contrary to *Moore*. Jackson's case is like *Davis*, not *Moore*.

In the co-defendant's case, this Court held that it was not bound by the holding in *Davis*, because it had been issued "by a federal court other than the United States Supreme Court." *Roberts II* at ¶ 33. However, this Court failed to acknowledge that other federal courts of appeals had reached the same conclusion. *See Robinson v. Moore*, 300 F.3d 1320, 1345-48 (11th Cir. 2002); *Smith v. Stewart*, 189 F.3d 1004, 1008-14 (9th Cir. 1999); *Spaziano v. Singletary*, 36 F.3d 1028, 1032-35 (11th Cir. 1994); *Alderman v. Zant*, 22 F.3d 1541, 1556-57 (11th Cir. 1994); *Creech v. Arave*, 947 F.2d 873, 881-82 (9th Cir. 1991). The Sixth Circuit holding in *Davis* is not an outlier, but instead represents the consensus of several federal courts.

Finally, even though this Court is not bound by the decision in *Davis*, it should still apply the holding. This Court is charged with the duty of insuring that the death penalty is fairly and consistently applied. *See* R.C. 2929.05. By not following the decision in *Davis*, this court insures just the opposite; the decision of who lives and dies is determined by which court reviews a defendant's case and that defendants with identical errors are not treated the same.

#### **D. This Court's Prior Appropriateness Review Is Not Relevant.**

The State cites to this Court's review of Jackson's mitigation evidence on his initial appeal to the Court. [Appellee's Brief, pp. 36-37]. The State's argument misses the point. Jackson's argues that the trial court did not consider the evidence he offered supporting a sentence of less than death. [Appellant's Merit Brief, pp. 44-51]. The State's argument is one of harmless error. However, this Court has rejected the applicability of harmless error when the prosecutor was involved in the writing of the opinion. *Roberts I* at ¶ 163. This Court has also

reached the same conclusion when the three judge panel refused to consider specific types of mitigation evidence. *State v. Green*, 90 Ohio St.3d 352, 363, 738 N.E.2d 1208 (2000).

Finally, the evidence that the trial judge refused to consider at the resentencing hearing was much different than the evidence that this Court considered in Jackson's first direct appeal. *See* Proposition of Law No. IX, [Appellant's Merit Brief, pp. 64-67]. For instance when this Court initially reviewed the evidence it was uncontested that Jackson had an IQ of 84 and was a good student. This is not true. He operated in the borderline mentally retarded range and dropped out of school after being a constant behavioral problem. In addition, the prior record reflected that Jackson was raised by loving grandmother and mother. Again, nothing could further from the truth.

This Court should sustain Proposition of Law No. V.

#### **Proposition of Law No. VI**

#### **A Trial Court Denies a Capitally Convicted Defendant His Right of Allocution When He Holds That As a Matter of Law He Cannot Consider the Defendant's Statement for the Purpose of Determining the Appropriate Sentence.**

The trial judge at the commencement of the resentencing proceeding emphasized two points. First, he would not consider any new evidence and information that Jackson or his counsel offered in support of a sentence of less than death. [8/14/12 Tr. 5, 14]. Second, he would be filing his sentencing opinion at the conclusion of the hearing. [*Id.* at Tr. 22, 27]. The State does not dispute the existence of both of these statements. [Appellee's Answer Brief, pp. 38-42].

#### **A. This Court's Holding in *Roberts II* Does Not Render This Proposition "Moot."**

The State contends that this Court's holding in *Roberts II* renders this proposition "moot." [Appellee's Brief, pp. 38, 42]. Jackson will assume, for purposes of this reply, that the State meant to argue that this Court's holding in *Roberts II* is controlling and therefore does not

have merit, as opposed to this Court's holding renders this proposition "moot." Even with this clarification, the State's argument is not well taken.

**B. The Trial Judge Did Not Afford Jackson His Right of Allocution.**

The State repeatedly points to the fact that the trial court permitted Jackson to make not one, but two statements at the resentencing hearing. [Appellee's Answer Brief, pp. 39, 41]. This Court addressed this issue in *Roberts II*. This Court held that the right of allocution affords a defendant more than just the right to make a statement at the time of sentencing, it also includes the right to have the trial court consider the contents of the defendant's statement. *Roberts II*, at ¶¶ 55, 63-65. Furthermore, this Court held that a trial court's failure to consider a defendant's allocution violated the Eighth Amendment. *Id.* at ¶ 69.

In *Roberts II* this Court found that the trial court's failure to reference Roberts' allocution permitted this Court to draw "the inference that when the trial judge weighed the aggravating circumstances against the mitigating factors, he did not consider Roberts' allocution." *Roberts II* at ¶ 64. In this case, the trial judge also failed to reference Jackson's allocution in his sentencing opinion. The drawing of the identical inference is equally warranted.

In addition, in this case the trial judge three times stated that he would not consider any new or additional evidence that supported a sentence of less than death. [8/14/12 Tr. 5, 14]. These statements constitute direct, as opposed to inferential evidence, that he did not consider Jackson's allocution.

**C. The Trial Judge Was Not Going to Change his Mind.**

The State argues that the trial judge could have changed his mind and modified his sentencing opinion if he believed that Jackson's statement had contained noteworthy information with respect to sentencing. [Appellee's Answer Brief, pp. 40-41]. However, this assertion is

incorrect. The trial judge specifically stated that as a matter of law he was precluded from considering Jackson's allocution. [8/14/12 Tr. 5, 14]. Thus the trial judge would never have changed his mind given the trial judge mistaken belief concerning the law.

**D. The Holding in *Roberts II* Is Not Controlling With Respect to the Contents of the Allocution.**

For purposes of allocution, in the co-defendant's case, this Court drew a distinction between old evidence and new evidence. *Roberts II* at ¶¶ 23-50. Jackson has previously distinguished this Court's holding in *Roberts II*. See Proposition of Law No. I, pp. 3-4, *supra* and Proposition of Law No. V, p. 16, *infra*. For the sake of brevity and to avoid repetition, Jackson incorporates those arguments herein.

In addition, the right of allocution incorporates both the right of the defendant to speak on his own behalf and for defense counsel to speak on the defendant's behalf. Crim. R. 32(A) ("At the time of imposing sentence, the court shall do all of the following: (1) Afford counsel an opportunity to speak on behalf of the defendant. . ."). Defense counsel, because the trial court announced that he would not consider any new evidence [Tr. 8/14/12 Tr. 5, 14], proffered three volumes of evidence. [T.d. 406-08]. Unlike Jackson's statement, counsel's proffer relied exclusively on evidence that was available at the time of Jackson's initial sentencing hearing. If trial counsel at the initial sentencing hearing had provided effective assistance of counsel, the information contained in the proffer would have already been in the record for the trial judge's consideration at the resentencing hearing. See Appellant's Merit Brief, Proposition of Law No. II, pp. 17-31. The trial court did not reference any of counsel's proffered evidence in the sentencing opinion that it filed immediately after the sentencing hearing.

This Court should sustain this Proposition of Law.

## Proposition of Law No. VII

### **A Trial Court Commits Prejudicial Error in a Capital Case When It Delegates Any Degree of Its Responsibility to the Prosecution For the Drafting of the Sentencing Opinion.**

On October 15, 2010, the Trumbull County Court of Appeals vacated Appellant's death sentence. *State v. Jackson*, 190 Ohio App.3d 319, 2010-Ohio-5054, 941 N.E.2d 1211, ¶ 33 (11th Dist). The Court of Appeals found that the trial judge had involved the prosecution in the drafting of its sentencing opinion. *Id.* at ¶ 29. It ordered that the trial judge "prepare an *entirely new sentencing entry . . .*" *Id.* (emphasis added). The State does not contest that the trial judge did not write an entirely new sentencing opinion. [Appellee's Answer Brief, pp. 45-46]. The State concedes that the second sentencing opinion contains "many similarities" to the initial sentencing opinion. [*Id.* at p. 45]. The State subsequently further concedes "that the trial court apparently copied large portions of its original sentencing opinion in to the new opinion." [*Id.* at p. 46].

Even the State's second concession understates the manner in which the two opinions were almost identical. The trial judge added three introductory paragraphs to update the case history since the original sentencing hearing, added two paragraphs, and omitted two paragraphs with respect to the facts. The judge left the remainder of the initial sentencing opinion unchanged (the last fourteen pages of the August 14, 2012, opinion). He left in its entirety those portions of the December 9, 2002, sentencing opinion that identified the aggravating circumstances and the mitigating factors, and the reasons the former outweighed the latter by proof beyond a reasonable doubt.

The State makes three assertions in support of its argument that the trial court did not err when it drafted/copied its second opinion. The State made the identical argument in support of

the first sentencing opinion. The State's arguments are no more persuasive now, than when it made them in the case in which the Court of Appeals vacated Jackson's death sentence.

**A. This Court Found the Existence of Constitutional Error in *Roberts I*.**

The State contends that this Court in *Roberts I* found only a statutory violation as opposed to a constitutional violation. [Appellee's Answer Brief, p. 43]. This is simply incorrect.

This Court in *Roberts I* specifically found that the involvement of the prosecutor in the drafting of the sentencing opinion violated the Fourteenth Amendment to the United States Constitution, "[t]he trial court's consultation with the prosecutor, particularly when undertaken without the knowledge or participation of defense counsel, can neither be ignored nor found to be harmless error. Cf. *Gardner v. Florida*, 430 U.S. 349, 362, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (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')." *State v. Roberts*, 2006-Ohio-3665, ¶162. In *Gardner*, the United States Supreme Court found that the trial court's sentencing procedure violated the federal constitution. 430 U.S. at 362. Thus, by citing to *Gardner*, this Court found the existence of a federal constitutional violation.

Whether this Court in *Roberts I*, found a violation of the federal constitution or R.C. 2929.03 the result remains the same, a defendant's death sentence must be vacated when the prosecution is involved in the drafting process of the sentencing opinion. As this Court concluded "[t]he trial court's delegation of any degree of responsibility in this sentencing opinion does not comply with R.C. 2929.03(F). . . . Given the prosecutor's direct role in the preparation of the sentencing opinion, we cannot conclude that the proper process was followed here." *Roberts I*, ¶ 160.

**B. This Court Has Already Addressed The Significance of the Prosecutor's Involvement in the Drafting Process.**

The State contends it was appropriate for the judge to merely copy his prior sentencing opinion because the prosecutor's involvement was only minimal; the prosecution merely served as the judge's typist. [Appellee's Answer Brief, pp. 43-46]. This argument contains two flaws.

First, this Court rejected the same argument in *Robert's I*. This Court found that "[t]he trial judge stated that he had given notes to the prosecutor and had instructed the prosecutor . . ." *Roberts I*, at ¶ 155. From that finding, this Court concluded "that the trial judge provided his notes to the prosecutor to guide the prosecutor in drafting the sentencing opinion does not change the result." *Id.* at ¶ 159. This Court further held "[t]he trial court's delegation of any degree of responsibility in this sentencing opinion does not comply with R.C. 2929.03(F)." *Id.* at ¶ 160.

Second, the prosecutor does not address the fact that the Court of Appeals ordered the trial judge to "prepare an *entirely new sentencing entry* . . ." *State v. Jackson*, 2010-Ohio-5054 at ¶ 29. The trial judge did not prepare an entirely new sentencing entry. Instead, he merely copied almost entirely his old sentencing entry.

**C. The Error Is Not Harmless.**

The State, in one last effort to have this Court uphold the trial judge's copying of his prior sentencing opinion contends that "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." [Appellee's Answer Brief, p. 46].

This Court has already rejected the harmless error analysis in the context of the prosecutor's involvement in the drafting of a capital sentencing opinion. This Court has found that "[t]he trial court's consultation with the prosecutor [concerning the drafting of the sentencing opinion], particularly when undertaken without the knowledge or participation of defense

counsel, can neither be ignored nor found to be harmless error.” *Roberts I*, at ¶ 162. This Court further held “[i]t is so severe a violation that independent reweighing cannot serve as an adequate remedy. . . . 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.” *Id.* at ¶ 163.

This Court should sustain this Proposition of Law.

**Proposition of Law No. VIII**

**The Accused May Not Be Punished Multiple Times For Crimes  
Of Similar Import That Are Committed During One  
Indivisible Course Of Conduct.**

The trial court sentenced Jackson for aggravated murder (prior calculation and design) with two capital specifications (aggravated robbery and aggravated burglary) and the separate offenses of aggravated robbery and aggravated burglary. [8/14/12, Tr. 22, 24-25]. The trial court erred when it failed to merge the two aggravators, the separate felonies, and the underlying felonies into the aggravators. Merger was required pursuant to this Court’s decision in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061.

**A. The Two Capital Specifications Should Have Been Merged.**

The State begins its analysis by asserting that it does not matter whether the trial court merged the two aggravators because one aggravator serves as a sufficient basis for imposing a sentence of death. [Appellee’s Answer Brief, p. 49]. However, it does make a difference. The trial court instructed the jury that it should consider the two aggravator circumstances in its sentencing phase deliberations. [Sent. Tr. 163, 164, 168, 171- 173. The presence of a second aggravating circumstance may have unfairly tilted the weighing process in favor of death.

The State relies, to support its position, on this Court's decision in *State v. Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383 (1987). [Appellee's Answer Brief, pp. 49-50]. However, that case supports Jackson's position as to the merger of the two capital specifications. This Court held therein that when a defendant lawfully entered the premises and later assaulted the owner of the premises, the burglary occurs at the time of the assault. *Id.* at 115. It was the State's theory that Jackson entered the Fingerhut residence with Roberts' permission. Thus, Jackson did not commit the aggravated burglary until Fingerhut entered the residence and the fatal confrontation occurred. To hold otherwise would not make sense because Jackson after he entered the residence could have had a change of heart and left without confronting the victim.

That the aggravated burglary did not occur until the confrontation is critical. Again, it was the State's theory that Jackson fatally assaulted Fingerhut on the doorway leading from the garage to the kitchen and then immediately fled in Fingerhut's vehicle that was parked in the garage. This was all one act. This Court has warned that for purposes of merger analysis the courts should "not parse" a defendant's conduct "in order to sustain multiple convictions . . ." *Johnson* at ¶ 56. In that case, the offenses were "arguably two separate incidents . . . separated by time and brief intervention . . ." but this Court found that the offenses should have been merged. The State's effort to avoid the merging of the specifications requires this Court to engage in the same parsing of conduct that this Court rejected in *Johnson*.

The State suggests that if Jackson'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 own home and execute him." [Appellee's Answer Brief, p. 53]. However for purposes of merger, the facts of the State's hypothetical the facts of this case are

indistinguishable. Under both, Jackson enters the house with permission, confronts Fingerhut in the residence, murders Fingerhut and then takes Fingerhut's vehicle.

To accept the State's argument would mean that the offenses would rarely be merged because the defendant will rarely if ever rob the victim in the exact moment that he enters the residence. Finally, it is important to note that the cases that the State cites were decided prior to this Court's decision in *Johnson*. [Appellee's Answer Brief, p. 49-53]. This Court in *Johnson* specifically recognized that it was overruling the prior controlling case law. *Johnson*, at ¶ 44.

**B. The Two Underlying Felonies Should Have Been Merged Into the Capital Specifications.**

The State characterizes Jackson's assertion as a "novel argument." [Appellee's Answer Brief, p. 53]. The State, without any citation, contends that Jackson "admits the that a specification that elevates and [sic] a predicate offense in a felony murder charge and an aggravated murder specification represent separate legal theories." [Appellee's Answer Brief, p. 53]. Jackson never made such a concession. The State does not purport to explain the manner in which a felony which elevates a murder into an aggravated murder should be treated any differently for purposes of merger than a felony that elevates an aggravated murder into capital murder. [Appellee's Answer Brief, pp. 53-54].

Finally, the State argues that the doctrine of merger is inapplicable because the jury was instructed to make distinct findings as to the specifications and the underlying capital specifications. [Appellee's Answer Brief, p. 54]. However, a trial court does not reach the merger issue until a jury has made separate findings as to felonies in question. The State's argument would eliminate the merger doctrine all together.

### C. The Two Underlying Felonies Should Have Been Merged.<sup>2</sup>

The State argues that the appellate court's decision in *State v. Jarvi*, 11th Dist. No. 2011-A-0063, 2012-Ohio-5590 supports its position that the offenses of aggravated burglary and aggravated robbery need not be merged. [Appellee's Answer Brief, pp. 54-55]. The State begins by observing that because "Jarvi pled guilty rather than proceeding to trial, the facts are somewhat thin." [*Id.* at p. 54]. The State then proceeds to use the "thin" facts to attempt to distinguish Jackson's case. In *Jarvi*, the defendant trespassed into the victim's residence to obtain money from the victim who had previously given the defendant financial assistance. *Id.* at ¶ 2. When the victim refused to "give appellant any money on that occasion," one of the defendant's companions struck the victim in the head with a wooden club. *Id.* The State contends that the defendant in that case entered the victim's residence for purposes of obtaining money. After making this assertion as to intent, the State claims that Jackson had a different intent when he entered the Fingerhut residence, to murder the victim. [Appellee's Answer Brief, pp. 54].

The State's argument with respect to *Jarvi* contains two flaws. First, the defendant therein had no intent to rob the victim until he refused to provide money as the victim had in the past. Second, the State does not explain the reason that the intent to commit a different felony makes any difference as long as a robbery takes place. The appellate court in *Jarvi* did not address this supposed distinction between the two intents.

Finally, the State cites this Court to *State v. Frazier*, 58 Ohio St.3d 235, 389 N.E.2d 1118 (1979). [Appellee's Answer Brief, p. 55]. But again this Court decided that case prior to its decision in *Johnson*, in which there was a sea change in the law with respect to merger.

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<sup>2</sup> This Court only need reach this argument if it rejects the preceding argument that the underlying felonies should have been merged into the capital specifications.

#### **D. The Merger Issues Are Not Waived**

The State argues this proposition is waived because “[w]hile Appellant’s counsel argued the merger issues at this resentencing, his trial counsel never argued merger before the case went to the jury at trial.” [Appellee’s Answer Brief, p. 56]. The State’s waiver argument contains two flaws.

First, this Court has held that a defendant is not barred by the doctrine of res judicata from raising issues on appeal that arose at a resentencing hearing, even if similar issues arose and were not objected to at the original sentencing hearing. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 30. This Court reasoned that because the defendant in the later appeal is taking an appeal from the judgment entered at the new sentencing hearing, res judicata is inapplicable. *Id.* That is the exact situation in this case.

Second, when a trial court fails to merge offenses at sentencing, it committed plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶¶31-32. The cases that the State cites to support its waiver argument were once again decided prior to *Johnson*. [Appellee’s Answer, Brief, 56].

This Court should sustain this Proposition of Law.

#### **Proposition of Law No. IX**

#### **A Death Sentence Is Inappropriate When It Is the Product of Unreliable Procedures and Is Based Upon Unreliable Evidence That Infects the Weighing Process.**

Jackson, in this proposition, cited to five procedural irregularities that led to him receiving an inappropriate death sentence. [Appellant’s Merit Brief, pp. 65-66]. He also cited to six factual areas in which the jury heard inaccurate information. [*Id.* at 66-67]. The State has responded accordingly. [Appellee’s Answer Brief, pp. 57-65]. For the sake of brevity, Jackson

will reply to only the more egregious responses by the State. As to those procedural irregularities and factual areas that Jackson does not respond, he stands on the accuracy of his analysis in his merit brief and does not concede that the State's response was persuasive.

**A. This proposition is not barred by res judicata.**

The State first points to this Court's appropriateness analysis in Jackson's first direct appeal. [Appellee's Answer Brief, p. 57]. However, this Court's prior analysis is undercut by the vacation of Jackson's death sentence because the prosecutor was involved in the drafting of the sentencing opinion. In both *Roberts I* and *Roberts II*, this Court did not conduct an appropriateness analysis. While this Court did not state its reasons, it can be inferred that it determined that it could not conduct an appropriate assessment until the trial court filed a sentencing opinion that complied with R.C. 2929.03(F). This Court did not have such an opinion when Jackson's first direct appeal was before it because the prosecutor had engaged in the drafting of the sentencing opinion. Thus, this Court's earlier appropriateness analysis in Jackson's case should not be given any effect.

The State also suggests that Jackson's arguments in support of this proposition should have been raised in his first appeal and therefore are barred by res judicata. [Appellee's Answer Brief, pp. 57-58]. That is not the law. a defendant is not barred by res judicata from raising issues on appeal that arose at a resentencing hearing, even if similar issues arose and were not objected to at the original sentencing hearing. *State v. Wilson*, 129 Ohio St.3d 214, 2011-Ohio-2669, 951 N.E.2d 381, ¶ 30.

**B. Trial Attorney Consoldane knew little or nothing about the case.**

The State claims that Attorney Consoldane was knowledgeable about Jackson's case as evidenced by his statement, "For 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 them to have to come back." [Appellee's Answer Brief, citing Sent. Tr. 157]. This statement demonstrates at best that Attorney Consoldane believed that he was familiar with the procedures invoked in capital cases. The statement does not demonstrate that he was familiar with the unique facts in Jackson's case in support of a sentence of less than death.

In fact the record demonstrate just the opposite, that Attorney Consoldane was not familiar with the facts that supported a sentence of less than death. Attorney Consoldane moved the trial court to permit the psychologist to remain in the courtroom "I think that it would be better able to help me in court, when I am *interviewing* the family members if she's here with me. She knows far more about the background of the family than I do, and it was - - *I got a little shorthanded with Mr. Lewis going into the hospital . . .*" [Sent. Tr. 7] (emphasis added).

**C. Jackson should be afforded the same opportunity as Roberts to add facts to the record on remand.**

The State asserts that Jackson has an "even less expectation of contributing additional materials to the resentencing proceeding because unlike his co-defendant, Appellant presented mitigating evidence." [Appellee's Answer Brief, p. 59]. Jackson previously addressed the same argument in Propositions of Law Nos. I and V, *supra*, pp. 3-4, 16. The reason the record in *Roberts* was not more fully developed when her direct appeal was initially before this Court was attributable to the fact that Roberts waived the presentation of mitigation evidence. The reason that the record was not more fully developed when Jackson's direct appeal was initially before this Court was one of Jackson's attorneys knew nothing about the case and the other attorney was only familiar with the procedures employed in capital cases. The equities favored Jackson, not Roberts, with respect to the expansion of the record at resentencing.

**D. Jackson's limited intelligence is relevant to sentencing.**

On his initial direct appeal, this Court found that “(a)lthough Jackson's IQ had twice been tested at 70 in grade school, a more recent test put him at a full-scale IQ of 84. Dr. McPherson . . . Taking into account Jackson's minimal education, Dr. McPherson believes him to be of average ability.” *Jackson* at ¶ 173. During the post-conviction proceedings, Appellant had another IQ test administered to him. [T.d. 407, Exhibit 78 ¶ 15]. He received a full scale IQ score of 75. [*Id.*].

The State contends this evidence of an the invalidity of the IQ score of 84 is not persuasive because it was submitted in a post-conviction affidavit as opposed to live testimony. [Appellee Brief, p. 61]. The affidavit was sworn. The affiant was precluded from presenting live testimony because the trial court at the behest of the State denied Jackson an evidentiary hearing on his post-conviction petition. *State v. Jackson*, 11th Dist. No. 2004-T-0089, 2006-Ohio-2651, ¶ 12. In addition, the Jackson's post-conviction IQ score was consistent with all of his other scores with exception of the test administered by McPherson. This post-conviction testing result was convergent with the IQ scores that Appellant received in school, not the outlier results that Dr. McPherson reported. *See State v. White*, 118 Ohio St.3d 12, 2008-Ohio-1623, 885 N.E.2d 905, ¶ 29.

The State cites to the court of appeals' post-conviction opinion in which the court held that the flawed score would not have made a difference. [Appellee's Answer Brief, pp. 61-62. However, the appellate court only took into account McPherson's scoring errors and not that Jackson had scored much lower during the post-conviction proceedings, but yet consistent with his scores prior to McPherson.

This Court noted that “Dr. McPherson believes him [Jackson], to be of average intelligence.” Jackson's consistent IQ scores do not demonstrate that he is of average intelligence.

More importantly, the jury that sentenced Jackson to death heard that Jackson had “average” [Sent. Tr. 48], and “low average or better” intelligence [*Id.* at Tr. 83]. This Court has held that low intelligence, though not low enough to constitute mental retardation, is a mitigating factor. *See i.e. State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶ 164; *State v. Jones*, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶ 261,

**E. That Jackson’s mother suffered from substance abuse is relevant.**

The State claims that “since his mother was not on trial, her drinking habits are not relevant.” [Appellee’s Answer Brief, p. 62]. In approximately sixty cases this Court has held that a poor family environment is a relevant mitigating factor. *See i.e. State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, 767 N.E.2d 678, ¶ 167; *State v. Hughbanks*, 99 Ohio St.3d 365, 3002-Ohio-4121, 792 N.E.2d 1081, ¶ 136; *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, 855 N.E.2d 48, ¶ 199. In none of those cases or the other approximately sixty capital cases before this Court was the defendant’s family on trial.

**F. Jackson was not living with his grandmother, but living on the street<sup>3</sup>**

The State goes to some length concerning the fact that Jackson was not living with his grandmother. [Appellee’s Answer Brief, p. 67]. Jackson’s sister testified that he was living with his grandmother. [Sent. Tr. 26-27]. This Court found otherwise, that Jackson lived on the street, presumably based upon the testimony of Dr. McPherson. *Jackson* at ¶ 171. The point, that the State misses, is that because counsel was unprepared, the jury heard conflicting testimony concerning where Jackson lived as well as background information. Counsel’s sentencing presentation would not have been persuasive given the conflicting testimony.

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<sup>3</sup> Appellate counsel in the merit brief inadvertently phrased the issue as “The jury heard that Appellant was living with his grandmother at the time of the murder.” In fact it should have been worded, “They jury heard that Appellant was living with his grandmother.” Jackson’s sister testify he was living with his grandmother, Dr. McPherson testified otherwise.

**G. Roberts' role as the instigator of the plan to murder her husband and that she had the most to gain (the vehicle, house, bus franchises, and life insurance policies were in her name) constituted substantial mitigating evidence.**

The State points to the post-conviction appellate decision that Roberts' involvement in the murder would not the would not have been a persuasive mitigating factor. [Appellee's Answer Brief, p. 64]. However, the court of appeals, finding was flawed.

This Court recently found that Roberts: 1) had worked in a plastic surgeon's office for "almost 23 years," 2) she had treated wounded soldiers in Israel, 3) raised funds to rescue a person from Ethiopia, 4) ran a restaurant in a bus terminal, and 5) given several thousand dollars to her family members. *Roberts II*, ¶ 161. This is to be contrasted to Jackson, whose IQ was in the low to mid 70's, suffered from attention deficit disorder, was dependent upon cocaine and marijuana, lived on the streets since a young age, and dropped out of school in the eighth grade. *Jackson* at ¶¶ 169-171, 173. Roberts certainly possessed more intelligence and reasoning skills than Jackson.

Roberts had a history of currying favor with African-American males by supplying them with clothes, money, fast cars and sex [T.d. 407, Exhibits 65, 66, 67]. Roberts had previously tried to recruit another African male to commit the homicide. [*Id.* at Exhibit 67]. She "played Petitioner" by giving him drugs, money and cars [T.d. 406, Exhibits 50 ¶ 10; 51, ¶ 7; 53, ¶ 5; 53, ¶ 14.]

**H. Conclusion: Jackson's death sentence is unreliable.**

The jury was exposed to inaccurate, conflicting and incomplete information concerning Jackson. That information pertained to his: 1) background, 2) level of functioning, and 3) his involvement in the offense visa-a-vi the codefendant.

This Court should sustain this Proposition of Law.

### Proposition of Law No. X

#### **A Defendant's Death Sentence Is Invalid When the State Is Unable to Carry Out His Execution in a Manner that is Consistent with the Constitution.**

The State's response leaves the impression that the State of Ohio's execution of its inmates has been without any issues. [Appellee's Answer Brief, pp. 66-72]. That is not accurate. In fact Ohio has the worst track record for being able to execute its citizens in a manner consistent with the Eighth and Fourteenth Amendments to the United States Constitution.

During the execution of Joseph Clark on May 2, 2006, prison officials could find only one accessible vein in Clark's arms to establish a heparin lock instead of the required two sites. Once Defendants and their agents began administering the first drug of the three-drug policy then employed, the vein collapsed. Clark informed the execution team that the process was not working, and the execution was halted.

On May 24, 2007, the State of Ohio executed Christopher Newton. It took approximately twenty-two minutes to insert the first IV into Newton's arm. It took approximately one hour and fifteen minutes to place the second IV. Placing the IVs took so long that Newton had to take a short bathroom break.

On September 15, 2009, the State of Ohio attempted to execute Romell Broom. The execution team unsuccessfully attempted to insert IV lines in eighteen different spots on Broom's body, making approximately fifty needle insertions over the course of two hours. Personnel involved in attempting to execute Broom included at least one physician, Dr. Carmelita Bautista, who was not part of the execution team and who was untrained in the written execution protocol. The State of Ohio has consistently asserted they are unable to procure participation of a physician in the execution process. The written protocol in effect at the time did not provide for physician

participation, and Dr. Bautista's participation in the failed Broom execution came as a distinct surprise to participating execution team members. After two hours of Defendants causing substantial, torturous physical and psychological pain to Broom, the Department of Rehabilitation and Corrections Director Terry Collins requested that Governor Ted Strickland grant a reprieve to postpone the execution process for one week. Broom, during the course of this two-hour ordeal, requested to speak with his counsel on at least one occasion and perhaps more. The State of Ohio denied these requests, citing their execution policy, and then denied counsel's request to speak with Broom.

On July 8, 2011, Federal District Court Judge Frost issued a preliminary injunction and restraining order to preclude the State of Ohio from executing Kenneth Smith. *Cooey (Kenneth Smith) v. Kasich*, 801 F. Supp.2d 623, 657 (S.D. Ohio 2011). The Judge began his opinion by stating that “[i]t is the policy of the State of Ohio that the State follows its written execution protocol, except when it does not. This is nonsense.” *Id.* at 624. Later, Judge Frost observed that “Plaintiff has demonstrated that the only rationale for core deviations that eliminate safeguards and introduce greater uncertainty into the execution process is to simply complete the executions at all or nearly all costs. Mere pursuit of administrative convenience that risks flawed executions is not a legitimate state interest.” *Id.* at 653 (citation omitted) Finally, he concluded “[t]he perplexing if not often shocking departures from the core components of the execution process that are set forth in the written protocol not only offend the Constitution based on irrationality but also disturb fundamental rights that the law bestows on every individual under the Constitution, regardless of the depraved nature of his or her crimes.” *Id.* at 656.

On January 11, 2012, Judge Frost issued another restraining order and preliminary injunction, this time to preclude the State of Ohio from executing Charles Lorraine. *In re: Ohio*

*Execution Protocol Litigation (Lorraine)*, 840 F. Supp.2d 1044, 1059 (S.D. Ohio 2012). Judge Frost found “[t]his is what frustrates the Court. Do not lie to the Court, do not fail to do what you tell this Court you must do, and do not place the Court in the position of being required to change course in this litigation after every hearing. It should not be so hard for Ohio to follow procedures that the state itself created. Today's adverse decision against Defendants is again a curiously if not inexplicably self-inflicted wound.” *Id.* at 1058.

The State of Ohio appealed the order in *Lorraine* and requested that the appellate court vacate the order staying *Lorraine*'s execution. The Sixth Circuit denied the motion to lift the stay. *In re: Ohio Execution Protocol Litigation (Lorraine)*, 671 F.3d 601, 602 (6th Cir. 2012). The appellate court concluded “[w]e agree with the district court that the State should do what it agreed to do: in other words it should adhere to the execution protocol it adopted.” *Id.* The Sixth Circuit concluded that “the State's ongoing conduct requires the federal courts to monitor every execution on an ad hoc basis, because the State cannot be trusted to fulfill its otherwise lawful duty to execute inmates sentenced to death.” *Id.* The State unsuccessfully sought to have the United States Supreme Court review the case. *Kasich v. Lorraine*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1306, 181 L. Ed. 2d 1034 (2012).

Prior to each scheduled execution of an Ohio prisoner, Judge Frost now conducts a lengthy evidentiary hearing to insure that the State of Ohio is now complying with its execution protocol. On October 10, 2013, the State of Ohio's most recent protocol became effective. This is the State of Ohio's sixth new protocol since 2009.

This Court should sustain this Proposition of Law.

### Proposition of Law No. XI

**Ohio's Death Penalty Law Is Unconstitutional. R.C. 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 Do Not Meet The Prescribed Constitutional Requirements And Are Unconstitutional On Their Face And As Applied To Appellant. U.S. Const. Amends. V, VI, VIII, And XIV; Ohio Const. Art. I, §§ 2, 9, 10, And 16. Further, Ohio's Death Penalty Statute Violates The United States' Obligations Under International Law.**

The State argues that this Court has addressed most if not all of the arguments that Jackson has raised in support of this proposition. [State's Answer Brief, pp. 73-77]. To the extent that the State is correct, then this Court should reconsider those decisions for the reasons articulated in Jackson's Merit Brief. To the extent that the State is incorrect, this Court should grant Jackson relief for the reasons set forth in his merit brief.

This Court should sustain this Proposition of Law.

### Proposition of Law No. XII

**A Conviction Will Be Reversed When The Cumulative Effect Of The Errors Deprives A Defendant Of The Constitutional Right To A Fair Trial.**

The accumulation of errors raised in his merit brief and this reply brief tainted Jackson's convictions and death sentence. Each of these constitutional defects shows that Jackson should not have been convicted and sentenced to death. Taken together, these errors overwhelmingly establish that there is no question that Jackson was denied a constitutionally fair hearing as to his guilt and penalty.

This Court should sustain this proposition of law.

**Conclusion**

The State in its Answer Brief has failed to meaningfully rebut the factual and legal arguments that he raised in his merit brief, For all of the reasons set forth in this reply brief, Jackson's July 22, 2013 merit brief, and any other reasons that are apparent on the face of the record, this Court should vacate Appellant's convictions and remand the matter a new trial. In the alternative, this Court should remand the matter for a new sentencing hearing.

Respectfully submitted,

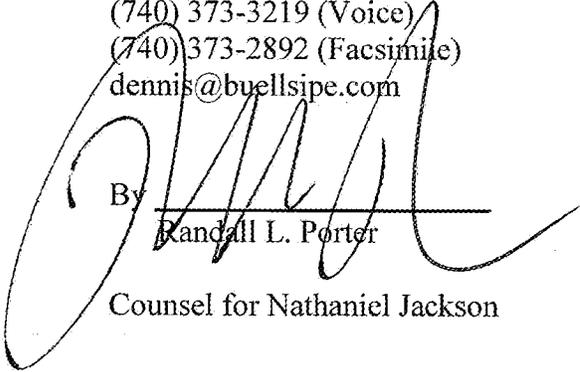
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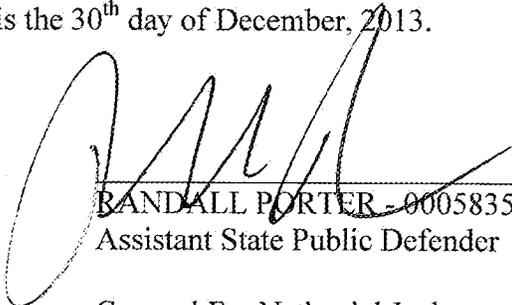
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**Certificate of Service**

I hereby certify that a true copy of the foregoing *Appellant Nathaniel Jackson's Reply Brief* was forwarded by electronic and regular U.S. Mail to Luwayne Annos and Charles Morrow, Assistant Prosecuting Attorneys, 160 High Street, N.W., 4th Floor Administration Building, Warren, Ohio 44481 on this the 30<sup>th</sup> day of December, 2013.



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