

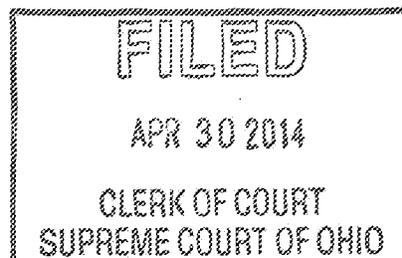
IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 2011-0538
Appellee, :
vs. : ON APPEAL FROM THE BUTLER
VON CLARK DAVIS, : COUNTY COURT OF APPEALS,
Appellant. : TWEFLTH APPELLATE DISTRICT.
: CASE NO. CA2009-10-263
: CAPITAL CASE

APPELLANT VON CLARK DAVIS' MOTION FOR RECONSIDERATION

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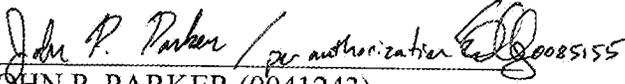
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: Appellant. : CAPITAL CASE

APPELLANT VON CLARK DAVIS' MOTION FOR RECONSIDERATION

Appellant Von Clark Davis requests that this Court reconsider its merits ruling of April 22, 2014, affirming his death sentence. This request is made under Sup. Ct. Prac. R. 18.02(B)(4). The reasons for this Motion are more fully set forth in the attached memorandum in support.

Respectfully submitted,


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Memorandum In Support

PROPOSITION OF LAW IV

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE AND INAPPROPRIATE.

Appellant respectfully requests that this Court reconsider its abbreviated proportionality finding that Appellant's death sentence is proportional. Without any analysis, this Court noted *in toto*: "We have approved death sentences in cases in which the prior-murder-conviction specification under R.C. 2929.04(A)(5) was the sole aggravating circumstance presented. *Taylor; State v. Mapes*, 19 Ohio St.3d 108, 19 Ohio B. 318, 484 N.E.2d 140 (1985)." *State v. Davis*, 2014 Ohio 1615, P117 (Ohio April 22, 2014). This truncated review is insufficient to comply with the Legislatively mandated proportionality review required by R.C. Section 2929.05(A), and the federal constitution.

Appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by *Furman v. Georgia*, 408 U.S. 238 (1972). In response to *Furman*, many states added the concept of proportionality review to their capital statutes. In a series of cases decided four years after *Furman*, the United States Supreme Court upheld the capital statutes of states that require proportionality review, *Gregg v. Georgia*, 428 U.S. 153, 198 (1976); the capital statutes of states that do not require proportionality but which the courts perform review anyway, *see Profitt v. Florida*, 428 U.S. 242

(1976); and the capital statutes of states which do not require proportionality review. *See Jurek v. Texas*, 428 U.S. 262 (1976).

In each case, the Court based its conclusion on the premise that those statutes insured that sentencers would be “given guidance regarding the factors about the crime and the defendant that the state, representing organized society, deems particularly relevant to the sentencing decision.” *Gregg*, 428 U.S. at 192 (plurality opinion of Stewart, Powell, and Stevens, JJ.) (Emphasis added) Deference is paid to the state legislatures to determine procedures that comport with Due Process and Equal Protection. *Gregg* particularly spoke of the useful function of proportionality review and characterized it as assuring that “no death sentence is affirmed unless in similar cases throughout the State the death penalty has been imposed generally. . . .” *Gregg*, 428 U.S. at 205, quoting *Moore v. State*, 233 Ga. 861 (1975).

Meaningful appellate review, undertaken in good faith, is a factor in determining constitutionality of death penalty statutes. That is what can be taken away from *Gregg*, 428 U.S. at 198, as well as its progeny, *Walton v. Arizona*, 497 U.S. 639, 655 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002). In *Walton*, the Supreme Court analyzed and held as follows:

Walton nevertheless contends that the heinous, cruel, or depraved factor has been applied in an arbitrary manner and, as applied, does not distinguish his case from cases in which the death sentence has not been imposed. In effect Walton challenges the proportionality review of the Arizona Supreme Court as erroneous and asks us to overturn it. This we decline to do, for we have just concluded that the challenged factor has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer. This being so, proportionality review is not constitutionally required, and we “lawfully may presume that [Walton’s] death sentence was not ‘wantonly and freakishly’ imposed -- and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment.” *McCleskey v. Kemp*, 481 U.S. 279, 306, 308 (1987); *Pulley v. Harris*, 465 U.S. 37, 43 (1984). Furthermore, the Arizona Supreme Court plainly undertook its proportionality review in good faith and found that Walton’s

sentence was proportional to the sentences imposed in cases similar to his. The Constitution does not require us to look behind that conclusion.

497 U.S. at 655 (Emphasis added). Indeed, courts must exercise special care to ensure proportionality when the state seeks to impose the most severe punishment of all – death. *See Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (“This [principle] is of particular concern... in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.”).

Further, while proportionality in capital cases is not required under the Eighth Amendment, if a state decides to create a right that is not mandated by the federal constitution, that right must be applied in a manner that comports with due process. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *Goss v. Lopez*, 419 U.S. 564 (1975) (holding that while a person does not have a federal constitutional right to public education, once that right is provided by a statute, it may not be extinguished without adherence to the due process clause); *Goldberg v. Kelly*, 397 U.S. 259, 261 (1970) (holding that although a person is not constitutionally entitled to public assistance, a state that chooses to provide it must adhere to the Fourteenth Amendment due process requirements in any termination of public assistance proceeding). By creating a statutory requirement that the appellate courts conduct proportionality review, there is constitutional right that the proportionality review be conducted consistent with the elements of due process. *See, e.g., Olim v. Wakinkona*, 461 U.S. 238 (1983). This Court’s proportionality review in Appellant’s case was not conducted in a manner sufficient to satisfy these federal constitutional principles.

In *State v. Issa*, 93 Ohio St.3d 49 (2001), in a noteworthy dissent, Justice Pfeifer informed that:

R.C. 2929.021 requires clerks of courts to file with this court certain basic information concerning each case in which a capital indictment is filed. R.C. 2929.03(F) requires trial courts to file a separate opinion here when they impose a life sentence under R.C. 2929.03(D). *This information would be helpful to this court but it is seriously incomplete. We should also receive information on every case in which a capital indictment could have been sought. We also should be informed of the ultimate resolution of each potential or actual capital case.* Without this information, our ability to conduct serious and thorough proportionality review is significantly compromised.

Id. at 76 (Pfeifer, J., dissenting in part)(emphasis added). Before that, in *State v. Simko*, 71 Ohio St.3d 483 (1994), in a dissenting opinion, Justice Pfeifer, was critical of a similarly conducted proportionality review process and wrote:

This court's role is also special in death-penalty cases. Unlike other criminal defendants, including non-death-penalty murderers, defendants eligible for the death penalty receive an automatic right of appeal to this court. Part of that appeal is our mandated consideration of "whether the sentence is excessive or disproportionate to the penalty imposed in similar cases." R.C. 2929.05(A). Proportionality review is a key part of this court's death-penalty review and, as the state's highest court, we are in a unique position to determine what is proportionate in a statewide sense. The focus in most death-penalty cases has been on issues other than proportionality. Typically, the court locates previous cases with similar statutory aggravating circumstances where the death penalty has been imposed, and thus finds proportionality to the case at issue. However, murders with the same statutorily defined aggravating circumstance are not necessarily crimes of the same character.

Id. at 500-501 (Pfeifer, J., dissenting in part); *See also State v. Niels*, 93 Ohio St. 3d 6 (2001) (Pfeifer, J., Dissenting)

Appellant's case suffers the identical flaw. It is bereft of analysis and is exactly what was warned of by Justice Wright earlier in Appellant's case that the "prior determination was entitled to a presumption of validity that needed to be overcome by appellant's argument." *State v. Davis*, 63 Ohio St. 3d 44, 53 (1992) (Wright, J., Dissenting).

In reviewing the cases cited by this Court in its minimal proportionality review, Appellant's case bears no semblance to the cases of Mr. Taylor and Mr. Mapes. Indeed, both men from those cases had their death sentences vacated.

A non-truncated proportionality review of the underlying nature and circumstances of the comparison cases demonstrates that Appellant's case is disproportionate. The federal court reversed this Court's affirmance of the conviction and death sentence from *State v. Taylor*, 78 Ohio St.3d 15 (1997) in *Taylor v. Mitchell*, 296 F.Supp.2d 784 (N.D. Ohio 2003). Setting aside the significance of a reversal on the sufficiency of the evidence, Mr. Taylor previously killed **two** people. *See Taylor*, 78 Ohio St.3d at 23. Thus, even though these cases share the same death-penalty-qualifying aggravating circumstance, the character of the aggravating circumstances differs markedly from Appellant's given that Mr. Taylor previously killed two others.

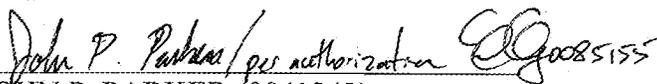
The federal court ultimately remanded for further consideration of this Court's affirmance of the death sentence from *State v. Mapes*, 19 Ohio St.3d 108 (1985) in *Mapes v. Tate*, 388 F.3d 187 (6th Cir. 2004). The Eighth Appellate District ultimately reversed the death sentence on the underlying claim originally missed due to appellate ineffectiveness. *State v. Mapes*, 2006 Ohio 294 (Ohio Ct. App., Cuyahoga County Jan. 26, 2006). This Court denied the State's appeal. *State v. Mapes*, 109 Ohio St. 3d 1506 (2006). Setting aside the significance of the death penalty reversal and the denial of the State's appeal there from by this Court, Mr. Mapes presented **no mitigation** other than an unsworn statement (related to one of the previous killings). And he had also previously killed **two** people. *See Mapes*, 19 Ohio St.3d at 119. Thus, even though these cases share the same death-penalty-qualifying aggravating circumstance, the character of the aggravating circumstances differs markedly from Appellant's

given that Mr. Mapes previously killed two others and Appellant's mitigation is significantly greater than presenting nothing but an unsworn statement.

The proportionality review conducted in Appellant's case fails to comply with the legislative-enacted requirements and violates the aforementioned federal constitutional principles. This is particular true in a case in which an Ohio Supreme Court Justice noted that there was a "presumption" of death, that the comparison cases have both had their sentences reversed (in one case a conviction), despite the killing of **two** people and, in one case, included no mitigation with the exception of an unsworn statement only. Further, the daughter of the victim from the previous killing has had a reconciliation with Appellant. In short, a non-truncated proportionality review of the underlying nature and circumstances of those cases demonstrates that Appellant's case is disproportionate in comparison to those cases. And certainly, now that both no longer face death sentences, Appellant's case is woefully disproportionate.

For the foregoing reasons, Appellant respectfully requests that this Court vacate its opinion and conduct the required proportionality review.

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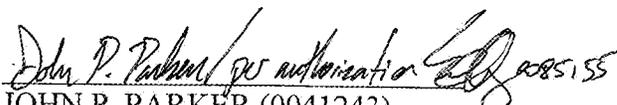
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CERTIFICATE OF SERVICE

I certify a copy of the foregoing **APPELLANT'S MOTION FOR RECONSIDERATION** was mailed regular U.S. Mail to Michael A. Oster, Jr. Assistant Butler County Prosecuting Attorneys at the Government Services Center, 315 High Street, Hamilton, Ohio 45011, on this the 30th day of April, 2014.


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