

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	
-vs-	:	Case No. 2013-0915
STEVEN CEPEC,	:	Death Penalty Case
Appellant	:	

*On Appeal from the Medina County
Court Of Common Pleas
Medina County, Ohio, Case No. 10 CR 0588*

MERIT BRIEF OF APPELLANT STEVEN CEPEC

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STATEMENT OF THE CASE

By indictment filed on November 23, 2010, Defendant/Appellant, Steven E. Cepec, was charged with the Aggravated Murder of Frank Munz. This was an eight count indictment. Count One of the Indictment charged Appellant in that he "...unlawfully did purposely, and with prior calculation and design, cause the death of Frank Munz in violation of § 2903.01(A) of the Ohio Revised Code." Count Two of the indictment charged Appellant in that he "...unlawfully did purposely cause the death of Frank Munz while committing, or attempting to commit, or while fleeing immediately after committing or attempting to commit the offense of Aggravated Robbery in violation of § 2903.01(B) of the Ohio Revised Code." Count Three of the Indictment charged Appellant in that he "...unlawfully did purposely cause the death of Frank Munz while committing, or attempting to commit, or while fleeing immediately after committing or attempting to commit the offense of Kidnapping in violation of § 2903.01(B) of the Ohio Revised Code." Count Four of the Indictment charged Appellant in that he "...unlawfully did purposely cause the death of Frank Munz while committing, or attempting to commit, or while fleeing immediately after committing or attempting to commit the offense of Aggravated Burglary in violation of § 2903.01(B) of the Ohio Revised Code." Attached to Counts One through Four were four capital specifications. Specification one to Counts One through Four was that Appellant "...was committing, attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Robbery, and either the offender, Steven E. Cepec, was the principal offender in the commission of the Aggravated Murder or if not the principal offender, committed the Aggravated Murder with prior calculation and design, in violation of § 2929.04(A)(7) and 2941.14 of the Ohio Revised Code." Specification Two to Counts One through Four was that Appellant "...was committing, attempting to commit or fleeing

immediately after committing or attempting to commit Kidnapping, and either the offender, Steven E. Cepec, was the principal offender in the commission of the Aggravated Murder or if not the principal offender, committed the Aggravated Murder with prior calculation and design, in violation of § 2929.04(A)(7) and 2941.14 of the Ohio Revised Code.” Specification Three to Counts One through Four was that Appellant “...was committing, attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Burglary, and either the offender, Steven E. Cepec, was the principal offender in the commission of the Aggravated Murder or if not the principal offender, committed the Aggravated Murder with prior calculation and design, in violation of § 2929.04(A)(7) and 2941.14 of the Ohio Revised Code.”

Specification Four to Counts One through Four was that the offenses were “...committed while the offender, Steven E. Cepec, was under detention or while the offender was at large after having broken detention, in violation of § 2929.04(A)(4) and 2941.14 of the Ohio Revised Code.”

Count Five of the Indictment charged Appellant in that he “...unlawfully did purposely cause the death of Frank Munz, in violation of § 2903.02(A) of the Ohio Revised Code.” Count Six of the Indictment charged Appellant in that he “...unlawfully did cause the death of Frank Munz as a proximate result of committing, or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of § 2903.03 or 2903.04 of the Ohio Revised Code, in violation of § 2903.02(B) of the Ohio Revised Code.”

Count Seven of the Indictment charged Appellant in that he “...unlawfully did knowingly and purposely, in attempting or committing a theft offense, as defined in § 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, inflict, or attempt to inflict, serious physical harm on Frank Munz in violation of § 2911.01(A)(3) of the Ohio Revised Code”.

Count Eight of the Indictment charged Appellant in that he "...unlawfully and knowingly did by force, stealth, or deception, trespass in 5394 Richmond Road, an occupied structure, as defined in § 2909.01 of the Revised Code, or in a separately secured or separately occupied portion of an occupied structure, when another person, other than an accomplice of the offender is present, with purpose to commit therein a criminal offense, and the said Steven E. Cepec inflicts or attempts or threatens to inflict physical harm to Frank Munz, or the said Steven E. Cepec has a deadly weapon, as defined in § 2923.11 of the Revised Code, on or about his person or under his control, to-wit: a hammer and an electrical cord, in violation of § 2911.11(A)(1) and 2911.11(A)(2) of the Ohio Revised Code." Attached to Counts Seven and Eight was a Repeat Violent Offender Specification setting forth that Appellant "...is a repeat violent offender as defined in R.C. 2929.01 (DD) having previously been convicted of Aggravated Burglary, in violation of § 2941.149 of the Ohio Revised Code." Each of the charged offenses was to have occurred on or about June 3, 2010.

Appellant was arraigned on December 23, 2010. On January 10, 2013, the trial court conducted a hearing on Appellant's Motion to Suppress (Motions Transcript, January 10, 2013). The Court determined that there was no basis for the Motion and admitted all statements of the Appellant. Trial in this case began in February 2013, the delays being due to several competency examinations of Appellant as well as a number of pretrial motions. Jury selection in this case began on February 4, 2013 and concluded on February 8, 2013, (Jury Selection Transcript, Vol. I – VII). On February 11, 2013, the state began its case in chief and concluded the case on February 21, 2013 (Trial Phase Transcript, Vol. VIII – XVI). The defense presented no defense and rested. On February 21, 2013, Appellant was acquitted of Count One of the Indictment and was convicted of all remaining Counts and Specifications as set forth in the Indictment.

As the Indictment was for a capital offense, a sentencing phase was held. On March 4, 2013, the defense began the presentation of mitigation. On March 6, 2013, the parties presented closing arguments. The jury thereafter recommended that the penalty of death be imposed on Appellant (Sentencing Phase Transcript, Vol. I - V). On April 25, 2013, the trial court found that death was the appropriate sentence in this case (Sentencing Transcript, April 25, 2013).

Appellant timely filed with this Court a Notice of Appeal from the Judgment and Conviction.

STATEMENT OF THE FACTS

On June 3, 2010, at approximately 2:37 p.m., a 911 call went out from 5394 Richmond Road to the Medina County dispatch office. The caller, Mr. Paul Munz, had resided at 5394 Richmond Road since 1971 with his grandparents and uncle. His uncle was the victim, Mr. Frank Munz, who was the twin brother of the witness's father (Tr. Vol. X, p.1963-1964). Paul Munz had seen Appellant at the residence in the week leading up to his uncle's death (Tr. Vol. X, p.1969). Two or three days prior to June 3, 2010, Appellant had come to the residence and used the phone. Paul Munz heard Appellant standing by the front door using the phone asking people for money (Tr. Vol. X, p.1970-1971). On June 3, 2010, Paul Munz was home. He heard Appellant's voice with that of his uncle (Tr. Vol. X, p.1979). It sounded like his uncle had let the Appellant in to the home. He heard two loud thumps, heard his uncle say "cut it out asshole" and then there was nothing (Tr. Vol. X, p.1979). Paul Munz had gone into the hallway where he had heard someone choking and then silence. He went back into his bedroom and locked the door (Tr. Vol. X, p.1980). After he returned to his room, Mr. Munz heard a person walking around the house. That person tried to get in his bedroom but the door was locked (Tr. Vol. X, p.1982). At that time, Mr. Munz called 911. Later, Mr. Munz pushed the screen out of his window in an attempt to leave (Tr. Vol. X, p.1986).

All of the officers that arrived on scene on June 3, 2010, after being advised of the burglary in progress at 5394 Richmond Road, approached the home without their lights or sirens on. The house itself was set back off the road a ways. The officers proceeded from the road where they parked their cruisers to the residence on foot. The officers arrived on scene within minutes of receiving the 911 call.

One of the first deputies on the scene was Sgt. Steven Herte with the Medina County Sheriff's Office. As Sgt. Herte approached the home, he observed an individual in the attached garage of the home (Tr. Vol. VIII, p.1600). As Sgt. Herte approached the garage, the individual in the garage heard a noise and turned around and for the first time saw the deputy. The individual in the garage made eye contact with the deputy, who then began ordering the individual on the ground by saying "sheriff's office, get down on the ground." (Tr. Vol. VIII p.1602). The individual in the garage began to step towards the sergeant and appeared as if he was going to get on the ground, however, at that point he began to run away from the deputy (Tr. Vol. VIII, p.1602). There were other deputies who had arrived at the residence by this time and they began to fan out through the fields surrounding the home. During the search for the individual who had run from the garage, the deputies lost visual contact with him. As the deputies searched through the field that was by the house, they would pick up a footprint here or there where it jumped the creek in the soft earth. They observed things on the ground that had been disturbed by someone running through the area. They continued to follow the tracks until they got to an open soybean field. After walking into the field approximately 100 yards or so they didn't find any more tracks (Tr. Vol. VIII, p.1604). As they continued to search Sgt. Herte heard another deputy yelling "show me your hands" and observed the deputy pointing his service pistol towards a bush. As Sgt. Herte approached the bush where the other deputy was pointing his pistol, an individual crawled out from under the bush, at which time Sgt. Herte put his knee in his back to keep him on the ground so they could secure him in handcuffs (Tr. Vol. VIII, p.1605). The individual under the bush turned out to be Steven Cepec, the Appellant herein. After placing Appellant in custody, there was radio traffic over the officer's radio, which

indicated that the victim in the house had been severely injured. According to Sgt. Herte, Appellant's response was "I did not do anything to him." (Tr. Vol. VIII, p.1606).

There were a number of Medina County Deputies that arrived on scene that day. One of them was Dan Kohler. When Deputy Kohler arrived on scene, he had his K9 with him. After arresting Appellant, the deputies did a reverse search on the property to attempt to locate anything that Appellant might have dropped. The deputies did not locate anything (Tr. Vol. VIII, p.1621). Deputy David Pries, arrived at the residence on June 3, 2010 and was involved in the chase of the individual who left the garage that day. During the course of the search for the individual he saw a large bush and in approaching it saw feet and jeans in the bush (Tr. Vol. VIII, p.1635). Deputy Pries ordered him out at which time the individual was placed in handcuffs (Tr. Vol. VIII, p.1635).

Another deputy on scene was Frank Telatko. When he arrived at the residence, he saw a male in the garage and saw the male flee the residence. Deputy Telatko was not involved in the search for the Appellant, but remained in front of the house (Tr. Vol. VIII, p.1665). He cleared the garage and went into the house. When he entered the kitchen he saw a white male lying face down on the floor, with no shirt (Tr. Vol. VIII, p.1667). The individual had major head trauma, no pulse and air was escaping from his lungs (Tr. Vol. VIII, p.1668). He cleared the house at that time but left the individual who made the 911 call in the bedroom (Tr. Vol. VIII, p.1672). After the home was secured he then got the caller out of the bedroom who was Paul Munz (Tr. Vol. VIII, p.1673).

J. Tadd Davis is a Detective with the Medina County Sheriff's Office. Det. Davis was involved in the interviews of the Appellant. The interviews were audio and video recorded. The witness interviewed the Appellant on June 3 and 4, 2010. On June 3, 2010, Appellant denied

any involvement with the crimes. However, on June 4, 2010, Appellant made an admission to the detective that he had committed the crimes in this case (Tr. Vol. XIV, p.2758).

Eugene Rice is the Chief of the Village of Spencer. On June 3, 2010, he went to Richmond Road to provide assistance in setting up a perimeter due to a male running from the residence. After the Appellant was taken into custody he was placed in the passenger side of the witness's cruiser in the backseat (Tr. Vol. IX, p.1812). He was later taken from the Chief's cruiser and placed into a deputy's cruiser for transport to the Medina County Jail (Tr. Vol. IX, p.1814). On June 4, 2010, James Bradley, an officer with the Spencer Police Department, searched the backseat of the cruise that Appellant had been placed in the day before. On the rear floor and under the driver's seat he found a set of keys (Tr. Vol. IX, p.1817). As Medina County Sheriff's Office had called inquiring about a set of keys he turned them over to Detective Davis (Tr. Vol. IX, p.1819).

On June 5, 2010, Russell Fisher, also with the Spencer Police Department, he did a pre-shift vehicle inspection of the cruiser that Appellant had been placed in on June 3, 2010. During his search of the vehicle he looked underneath the driver's seat and once again found a ring of keys with four keys on it (Tr. Vol. IX, p.1827). These keys were also turned over to Det. Davis. Det. Davis took the keys to the residence on June 8, 2010, where he found that the keys fit vehicles on the property and the door lock going into the main residence from the garage (Tr. Vol. XIV, p.2785).

Sherry Clouser is a supervisor with the Ohio Adult Parole Authority. On May 4, 2010, Appellant was under the supervision of the Adult Parole Authority as he had recently been released from a prison institution. On May 4, an order was issued by a hearing officer sanctioning Appellant for a parole violation. The officer's sanction was for Appellant to enter

and successfully complete the halfway house program in lieu of a parole revocation. Appellant was staying at the Lorain Correctional until the transfer to the Oriana House could take place (Tr. Vol. IX, p.1760). David Pummel is with the Adult Parole Authority where he is a senior parole officer. He testified that on May 28, 2010, the parole supervisor of Appellant was Jeff Taraschke. On that date the witness, together with Mr. Taraschke, took Appellant from the Lorain Correctional Institution to the Oriana House in Akron (Tr. Vol. IX, p.1752). On May 28, 2010, the date Appellant was taken to Oriana House, Appellant signed himself out to go to the hospital. On May 29, 2010, at 12:25 a.m., Amanda Cates, a worker with the Oriana House, contacted Jennifer Boswell of the Adult Parole Authority to notify her that Appellant was AWOL (Tr. Vol. IX, p.1787). A warrant was issued for the Appellant on May 29, 2010 (Tr. Vol. IX, p.1764). Appellant remained at large until his arrest in this matter.

Agent Mark Kollar with the Bureau of Criminal Identification testified in this case. On June 3, 2010, he went to 5394 Richmond Road. At that time he took notes and photographs, identified potential evidence and collected it. In his investigation he started in the foyer off of the garage and then went into the home itself (Tr. Vol. X, p.2032). In the foyer he found stains which were reddish in color and consistent with passive blood droppings. These were collected for testing (Tr. Vol. X, p.2034). In the kitchen he found a large saturation of pooling blood stain in the center of the floor in a carpeted area (Tr. Vol. X, p.2041). Agent Kollar found five different areas in the kitchen for blood splatter or castoff (Tr. Vol. X, p.2042). In his opinion, based upon the blood pattern analysis, the blood setting event that occurred in the kitchen was near the center of the kitchen. Based on the castoff pattern it was potentially a beating with more than one blow (Tr. Vol. X, p.2070). In the living room he located three bags, a blue gostex bag with a substantial amount of change in U.S. Currency, a pillow case used as a bag with U.S.

Currency inside and a clear plastic bag like what holds a sleeping bag and inside were numerous other bags, a BB gun, hammer with blood stain, blood stained clothing, towels, washcloth, duct tape and a cord from the lamp (Tr. Vol. X, p.2073).

Doctor Andrea McCollom is the Deputy Medical Examiner with the Cuyahoga County Medical Office. On June 4, 2010, she conducted the autopsy of Frank Munz. Her opinion was that Mr. Munz died from blunt impact injuries to his head. All of the injuries concentrated around the back of the head (Tr. Vol. XI, p.2452-2454). According to Doctor McCollom, the cause of death was blunt impact to the head, trunk extremity with skeletal and brain injuries and other condition of asphyxia by strangulation (Tr. Vol. XI, p.2496). Either the blunt impact or the asphyxia was sufficient to cause death in this case (Tr. Vol. XI, p.2497).

Lynda Eveleth is with the Bureau of Criminal Identification as a forensic scientist in the DNA section. Ms. Eveleth testified that the DNA testing conducted in this case showed several results. The DNA profile on a white shirt was consistent with the contribution of Frank Munz (Tr. Vol. XIII, p.2643). On a second shirt there was a DNA profile of a mixture consistent with a contributions of Frank Munz, Appellant and a third individual (Tr. Vol. XIII, p.2647). An additional swab from that shirt was consistent with contributions from the Appellant, an unknown female and an additional individual (Tr. Vol. XIII, p.2651). On Appellant's jeans there was also a DNA profile, which was consistent with the contribution of Frank Munz (Tr. Vol. XIII, p.2662). There was a partial DNA profile from a swab from Appellant's shoes which was consistent with the contributions of Frank Munz and the Appellant (Tr. Vol. XIII, p.2665).

On June 2, 2010, Appellant and Michelle Palmer arrived at the home of Duane Morris, who lives in Cleveland, Ohio. Morris works the 11:00 p.m. to 6:00 a.m. shift, and when he left for work that evening Appellant was still there (Tr. Vol. XI, p.2179). When he got home the

next morning Appellant was still there. Appellant told him he didn't have a ride. He also told Morris that he was a run away from a halfway house (Tr. Vol. XI, p.2181). Sometime before noon, on June 3, 2010, Morris took Michelle and Appellant to Michelle's sister's house, Renee (Tr. Vol. XI, p.2182). When they arrived at Renee's house Appellant got out of the vehicle but Michelle stayed in it. Morris then took Michelle to her kid's house which was also in Cleveland (Tr. Vol. XI, p.2184).

Thomas Bolon lives in Cleveland with his girlfriend Renee. He testified that on June 3, 2010, Appellant had been dropped off at his house by Duane Morris (Tr. Vol. XI, p.2194). While Appellant asked Bolon for money and a pair of shoes, he only gave Appellant a pair of shoes. Bolon then drove Appellant to Ted Palmer's pole barn in Medina County (Tr. Vol. XI, p.2197). Sarah Syverson testified that on June 3, 2010, she saw Appellant. Syverson saw Appellant at the pole barn at approximately 1:30 to 1:45 (Tr. Vol. XI, p.2240). She went to the barn because Appellant called her that morning asking her to come to the barn. Appellant wanted a ride to Medina to get food stamp card. She did not give him a ride as they didn't have the gas (Tr. Vol. XI, p.2242).

Ted Palmer testified that on June 3, 2010, he owned 10101 Garver Road, which contained the pole barn where Appellant was dropped off at (Tr. Vol. XIII, p.2719). On June 7, 2010 the police came to the pole barn looking for items. The police showed him pictures of a BB gun and hammer and duct tape (Tr. Vol. XIII, p.2722). He could not find a BB gun in the barn. He could not find a hammer and he could not find the duct tape (Tr. Vol. XIV, p.2724).

In his mitigation hearing, Appellant submitted the testimony and evidence of his uncle, Ricky Cepec; his half-brother, Shawn Cepec; his third grade teacher, Carl Medure; Appellant's school psychologist, Terry Shumen; Appellant's former employer, Kevin Minor; Michael Beebe

from the Ohio Adult Parole Office; Brenda Okorochoa, a nurse who treated Appellant in prison; Bruce Maaser, a psychologist who treated and provided diagnoses from Appellant while he was in prison; Sagi Raju, a psychologist who had treated Appellant at Warren Correctional Institution; Mujgan Inciler, another psychologist from Warren Correctional; William Jefferson Taraschke, Appellant's Parole Officer prior to the murder; Jody Albertson from the Medina County Juvenile Probation Department; and James Siddall, a psychologist employed by the defense.

Appellant's two family members mostly discussed his life growing up. Ricky Cepec, Appellant's paternal uncle, laid out the dynamic of Appellant's family. He indicated how Appellant's mother, Shelia, had passed away, and how Appellant was raised mostly by his paternal grandparents. (Tr. Vol. I, Mitigation, p. 52). He indicated that Appellant had witnessed constant arguing and been the victim of various forms of discipline and domestic violence. (Tr. Vol. I, Mitigation, p. 54-55, 60).

Ricky Cepec also indicated how he knew about Appellant's criminal and substance abuse history. (Tr. Vol. I, Mitigation, p. 57-59, 64). At the same time, Ricky Cepec indicated that he was surprised to learn that Appellant described his house as one that was loving, and indicated under cross-examination that it would have surprised that other family members had testified that there was not abuse in the household. (Tr. Vol. I, Mitigation, p. 62-63). He also testified that Appellant's siblings also turned out well. (Tr. Vol. I, Mitigation, p. 64).

Similarly, Appellant's half-brother testified about how most of the attention Appellant received was from his paternal grandparents. (Tr. Vol. I, Mitigation, p. 75). He indicated that the grandparents fought everyday, and that Appellant's father also had temper issues. (Tr. Vol. I, Mitigation, p. 72). However, he also testified that there was not sexual or physical abuse in the

family, but was not sure about if there was emotional abuse. (Tr. Vol. I, Mitigation, p. 77). However, he also testified that he had worked in law enforcement and despite his financial problems, he had not resorted to crime. (Vol. I, Mitigation, p. 67-69, 74-75, 80).

Carl Medure testified about Appellant's elementary school years. He indicated that Appellant had problems in his early elementary years, and that his teachers had eventually had his tested for learning disabilities. (Tr. Vol. I, Mitigation, p. 90-91). He indicated that Appellant could not concentrate on his class work or work well with other children despite his higher IQ. (Tr. Vol. I, Mitigation, p. 92-93). Medure further indicated that Appellant's main issue was in following rules. Tr. Vol. I, Mitigation, p. 94).

Similarly, Terry Shuman, a school psychologist who had worked with Appellant, testified that he had received referrals for behavioral issues. He indicated that the schools had initially asked for permission to test Steven, but that the initially lacked parental permission. (Tr. Vol. I, Mitigation, p. 103-104). Shuman indicated that while Appellant initially had an above-average intelligence and was college capable, Appellant suffered from behavioral issues. (Tr. Vol. I, Mitigation, p 107-111). He indicated that he was an underachiever who had problem making and keeping friends. (Tr. Vol. I, Mitigation, p. 105, 109-111). As a result, Appellant was considered to have a severe behavioral handicap. (Tr. Vol. I, Mitigation, p. 112).

Shuman also indicated that family involvement, or lack thereof, had always been a concern with Appellant. (Tr. Vol. I, Mitigation, p. 104, 114-115). He further indicated that Appellant had suffered from symptoms consistent with Attention Deficit Hyperactivity Disorder (ADHD), but that he did not receive the treatment necessary to combat the disorder. (Tr. Vol. I, Mitigation, p. 117-119, 137-140). Despite the fact that medication may have helped Appellant, and that his lack of a structured home worsened the problem, he did not receive treatment and

experienced a downward spiral in his behavioral issues. (Tr. Vol. I, Mitigation, p. 123-131). Appellant's behavioral problems were exacerbated by drug use, which began during his school years. (Tr. Vol. I, Mitigation, p. 126-129, 134-135). According to the records, Appellant finally graduated from high school – not in Medina – but from a juvenile correctional facility. (Tr. Vol. I, Mitigation, p. 133).

The jury also heard from two representatives from Medina County Juvenile Court. Jody Albertson testified as to testing given to Appellant while he was a juvenile. (Tr. Vol. II, Mitigation, p. 378-383). Emily Sanderson, who had been a psychologist working through the Medina County Juvenile Court, testified about how the Appellant's family was uncooperative when he was involved in his treatment. (Tr. Vol. II, Mitigation, p. 391-392). However, Sanderson admitted that Appellant's father had consented to him being treated for substance abuse issues in Minnesota. (Tr. Vol. II, Mitigation, p. 396).

Two employees of the Ohio Adult Parole Authority testified on behalf of Appellant. First, the jury heard from Michael Beebe, who testified as to the potential ramifications of various sentencing options for the jury. (Tr. Vol. I, Mitigation, p. 177). Presumably, Mr. Beebe's testimony was to demonstrate that if the jury selected a sentence other than the death penalty, he would be facing a punishment that would ensure that he would spend the remainder of his life in prison.

The jury also heard from Appellant's parole officer, William Taraschke. Taraschke testified about Appellant's progress – or lack thereof – while on parole. Under direct examination, Taraschke testified that Appellant was out of control and “almost a train wreck waiting to happen.” (Tr. Vol. II, Mitigation, p. 324). He also testified that Appellant's father had asked him to keep an eye on his son. (Tr. Vol. II, Mitigation, p. 332).

He indicated that he had recommended that Appellant be returned on multiple occasions for violations of the rules of parole. (Tr. Vol. II, Mitigation, p. 322). Taraschke also testified as to the reasons for parole violations, including fights and substance abuse issues. (Tr. Vol. II, Mitigation, p. 319-321, 337). He also testified that Appellant engaged in risky behavior, and that Appellant denied physical and sexual abuse. (Tr. Vol. II, Mitigation, p. 356-357, 375). He indicated that Appellant was highly manipulative. (Tr. Vol. II, Mitigation, p. 345).

Taraschke also testified to Appellant's prior criminal history, including that he had previously been convicted of an Aggravated Burglary that had not been previously admitted into evidence before the jury. (Tr. Vol. II, Mitigation, p. 359-360). Following these statements by Taraschke, the Court denied Appellant's Motion for a Mistrial. (Tr. Vol. II, Mitigation, p. 361).

The Court also heard from several witnesses on the mental health of the Appellant. The jury heard from Brenda Okorochoa, a nurse in the Ohio prison system. While she indicated that Appellant was a polite inmate who took his medications, she also indicated that he had engaged in self-injurious behavior. (Tr. Vol. I, Mitigation, p. 189-190, 194-196).

Bruce Maaser, a psychologist with the Ohio prison system, testified that Appellant suffered from major depressive disorder. (Tr. Vol. II, Mitigation, p. 208). He testified that while Appellant was depressed, concerned and anxious, he was also cooperative, respectful and remorseful. (Tr. Vol. II, Mitigation, p. 210). He indicated that while Appellant was self-injurious, he did not present a threat of harm to others. (Tr. Vol. II, Mitigation, p. 211-212, 231-232). However, despite being asked about attacking female guards, Maaser testified that he did not change his opinion as to Appellant's risk of future dangerousness to others. (Tr. Vol. II, Mitigation, p. 227-228).

Maaser also indicated that Appellant was suffering from Post Traumatic Stress Disorder that stemmed from the murder itself. (Tr. Vol. II, Mitigation, p. 208, 255). He suffered from anti-social personality disorder and depression, which he conceded was common for prisoners. (Tr. Vol. II, Mitigation, p. 234-237). Maaser also testified about Appellant's behaviors being consistent with being manipulative, as well as his history of anti-social behavior.

Similarly to the school psychologist, Maaser testified that Appellant had problem obeying rules. (Tr. Vol. II, Mitigation, p. 237). While Maaser testified that Appellant had remorse, prosecutors pointed out that blaming someone else for the crime was inconsistent with a showing of remorse. (Tr. Vol. II, Mitigation, p. 210, 260). He also testified that there was no test to determine if Appellant was malingering, or if he was actually suffering from actual medical conditions.

Dr. Sagi Raju of the Warren Correctional Institution also testified about Appellant's mental condition. He indicated that Appellant was on Desipramine, Zoloft, Lithium, Clonazepam and Naltrexone. (Tr. Vol. II, Mitigation, p. 282). He also testified as to the various illnesses that Appellant experienced, but also indicated that Cepec was trying to accentuate his mental health problems to mitigate the sentence of death. (Tr. Vol. II, Mitigation, p. 284-290). Under cross-examination, Raju admitted that Appellant had not been fully compliant with his medications, and that his medications were not for the use to control ADHD. (Tr. Vol. II, Mitigation, p. 291-296).

Dr. Mujgan Inciler, a psychologist at the Warren Correctional Facility, also testified as to the various ailments that Appellant suffered. He mentioned major depressive disorder; posttraumatic stress disorder; anti-social personality disorder; and borderline personality disorder. (Tr. Vol. II, Mitigation, p. 300). For the first time, it was disclosed that Appellant

suffers from Hepatitis C, a disease that impacts the liver. (Tr. Vol. II, Mitigation, p. 200). Inciler also testified that Appellant told him that he hoped to not be found competent to stand trial. (Tr. Vol. II, Mitigation, p. 204-306).

The defense also called James Siddall, a psychologist specializing in chemical dependency hired as an expert witness for the defense. He indicated that he had performed psychological testing on Appellant, as well as looked at his social, educational family history. (Tr. Vol. III, Mitigation, p. 406-408). He indicated that Appellant had a multigenerational history of substance abuse; instability in the home with a lack of real parenting; and a mother who was severely addicted with a father who was an alcoholic. (Tr. Vol. III, Mitigation, p. 408-409).

Siddall also indicated that Appellant had a sporadic history of employment and numerous educational-issues from childhood, including disciplinary problems. He further testified as to the significant history of substance abuse and alcoholism that Appellant experienced, indicating that Appellant began abusing substances at the age of twelve. (Tr. Vol. III, Mitigation, p. 414). His testing put Appellant's IQ at approximately 89, but indicated that stress and drug use could have played a role in the test scores being so low. (Tr. Vol. III, Mitigation, p. 419-422).

Siddall indicated that he believed that the mitigating factors favoring the Appellant were his dysfunctional background; a history of alcohol and drug dependency; early developmental problems, which contributed to personality disorders; and educational under-accomplishments. (Tr. Vol. III, Mitigation, p. 430). Siddall also put forth that while Appellant had been incarcerated for most of his life and unable to work, his crimes had been non-confrontational crimes done to support his drug habit(Tr. Vol. III, Mitigation, p. 432).

Siddall acknowledged that there was evidence of Appellant being violent in prison, as well as evidence of him faking and exaggerating symptoms. (Tr. Vol. III, Mitigation, p. 444-452, 459). Siddall acknowledged that Appellant did not avail himself to programming while incarcerated and that many of the steps Appellant took during the course of the robbery demonstrate planning, not that the crime was one of impulse. (Tr. Vol. III, Mitigation, p. 466-468). In the end, Siddall admitted that Appellant had made choices about his behavior. (Tr. Vol. III, Mitigation, p. 478-484).

In rebuttal, the State of Ohio presented one witness: Dennis Eshbaugh, a psychologist. Eshbaugh testified that there had been no diagnosis in the records he had reviewed for ADD/ADHD or posttraumatic stress disorder. (Tr. Vol. IV, Mitigation, p. 502-505). To the contrary, he testified that it was the victim of a crime who suffers actual PTSD, not the perpetrator. (Tr. Vol. IV, Mitigation, p. 504-505). He also testified as to the inconsistency between the various evaluations Appellant had over his life, and that he had faked symptoms to obtain drugs. (Tr. Vol. IV, Mitigation, p. 509-512). However, Eshbaugh admitted that inmates with longer sentences tend to have a lower risk of institutional violence and that Appellant's write-ups had decreased in recent years. (Tr. Vol. IV, Mitigation, p. 532, 571).

Appellant also gave an unsworn statement in his defense. In his statement, Appellant went through a number of the events that had shaped him. He discussed how he had never really met his mother until he was older, and how his paternal grandmother and father had raised him. (Tr. Vol. V, Mitigation, p. 617, 622-624). He said how he witnessed domestic violence in his home. (Tr. Vol. V, Mitigation, p. 617-619).

He then walked through the events on the day of the murder, including how he had used a number of drugs in the period shortly before the homicide. (Tr. Vol. V, Mitigation, p. 628-630,

637). He then described his account of what happened on the day of the robbery. (Tr. Vol. V, Mitigation, p. 630-633). He indicated how he was suicidal and wanted to die, but then asked for mercy. (Tr. Vol. V, Mitigation, p. 634-635).

PROPOSITION OF LAW NUMBER NO. ONE

THE TRIAL COURT ERRED IN FAILING TO HAVE A COMPETENCY HEARING AFTER THE COMPETENCY OF A STATE'S WITNESS WAS CALLED INTO QUESTION IN VIOLATION OF APPELLANT'S RIGHT TO A FAIR TRIAL IN VIOLATION OF THE FIFTH AND FOURTEEN AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Evidence Rule 601(A) provides that "Every person is competent to be a witness except * * * those of unsound mind, and children under 10 years of age, who appear incapable of receiving just impression of the facts and transactions respective which they are examined, or of relating them truthfully." If the witness is not of unsound mind and is over 10 years of age, he or she is presumed to be competent to testify. *State v. Clark*, 71 Ohio St.3d 466 (1994). As the *Clark* court noted "The rule favors competency, conferring that even on those who do not benefit from the presumption, such as children under 10, if they are shown to be capable of receiving 'just impressions of the facts and transactions respective which they are examined' and capable of 'relating them truly'". *Turner v. Turner*, 67 Ohio St.3d 337, 343 (1993). The presumption established by Evidence Rule 601(A) recedes in those cases where a witness is either of unsound mind or under the age of 10. In such cases, the burden falls on the proponent of the witness to establish that the witness exhibits certain indicia of competency. This Court determined the test for determining competency in *State v. Frazier*, 61 Ohio St.3d 247 (1991). In *State v. Wilson*, 156 Ohio St. 525 (1952), this Court noted that, as the trier of fact, a trial Judge is required to make a preliminary determination as to the competency of all witnesses, including children. Absent abuse of discretion, a competency determination of a witness made by the trial Judge will not be disturbed on appeal.

During the testimony of Paul Munz, the trial court requested that counsel come to sidebar (Tr. Vol. X, p.1973). At that time, the Court questioned “[i]s there a reason why - - is this witness developmentally challenged?” The prosecution replied “we don’t know, do we.” The prosecution then added “No, I don’t know that Judge. He’s different, but I don’t know that he’s developmentally challenged.” The Court “Alright. So don’t lead him.” (Tr. Vol. X, p.1973-1974). Here, the trial court was obviously concerned about whether or not this witness was developmentally challenged. The only way to have resolved this issue would have been for the Court to have conducted a hearing to determine whether or not this witness was competent. As the prosecutors themselves did not know whether he was developmentally challenged, the Court should have held a hearing to determine the competency of this witness. Here, the question as to this witness was two-fold, first was he been able to receive accurate impressions with respect to what he saw, and second, whether he was able to accurately relate those impressions truthfully.

Paul Munz was the primary witness against Appellant. He described what was transpiring in the house, as well as the fact that he thought there was only the Appellant in the house with his uncle on June 3, 2010. It was incumbent on the trial court to hold a competency hearing at the point he questioned Paul Munz’s competency. The failure to do so denied Appellant a fair trial in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

PROPOSITION OF LAW NUMBER NO. TWO

THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT DEFENSE COUNSEL'S REQUEST FOR A MISTRIAL FOLLOWING THE COURT'S QUESTIONING OF A DEFENSE WITNESS IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mistrials need to be declared only when the ends of justice so require, and a fair trial is no longer possible. *State v. Garner*, 74 Ohio St.3d 49 (1995). The *Garner* Court went on to note that the decision of whether to grant a mistrial lies within the trial court's sound discretion. In order to demonstrate that a trial court has abused its discretion in denying a motion for a mistrial, a criminal appellant must show that the trial court's decision was arbitrary, unreasonable or unconscionable. *State v. Nichols*, 85 Ohio App.3d 65 (1993). In determining whether a trial court properly exercised its discretion, reviewing courts look to whether "(1) there was a manifest necessity or a high degree of necessity for ordering a mistrial; or (2) the ends of public justice would otherwise be defeated." *State v. Widner*, 68 Ohio St.2d 188-190 (1981), quoting *Arizona v. Washington*, 434 U.S. 497 (1978). A "manifest necessity" for a mistrial does not mean that a mistrial was absolutely necessary or that there was no other alternative. *Id.* at 511. In order to exercise "sound discretion" in determining that a mistrial is necessary, the trial Judge should allow the defense and prosecution to state their positions on the issue, consider their competing interests, and explore some reasonable alternatives before declaring a mistrial. *Id.* at 514-515. The Sixth Amendment to the United States Constitution guarantees that "the accused shall enjoy a right to a * * * trial, by an impartial jury * * * to be confronted with the witnesses before him." *Parker v. Gladden*, 385 U.S. 363 (1966). "The evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."

Turner v. Louisiana, 379 U.S. 466, 472-473 (1965). “The entire thrust of rules of evidence and the other protections attendant upon the modern trial need to keep extraneous influences out of the courtroom.” *Stestes v. Texas*, 381 U.S. 532, 592 (1965).

Throughout Appellant’s trial, the trial Judge continuously questioned witnesses. This was during both the trial as well as the sentencing phases. However, there was one exchange between the trial Judge and a witness that caused defense counsel to request a mistrial.

Defense counsel questioned a witness as follows:

Q. Mr. Taraschke, prior to June 3rd, 2010, did you ever see any indication with respect to Steve Cepec that he would be committing a murder?

MR. HOLMAN: Objection, Your Honor. Speculative anyway. I mean, do people go out and say, “Hey, I’m going to kill somebody next week”?

THE COURT: Well, sometimes they do, and it’s call prior calculation and design.

MR. HOLMAN: No.

THE WITNESS: I was familiar - -

THE COURT: Hold on second. What are you objecting to exactly?

MR. HOLMAN: Your Honor, it’s speculation. The whole area is speculation.

THE COURT: Well, he has experience of a parole office, what, 14 years?

THE WITNESS: Correct

THE COURT: You’ve supervised how many defendants - -

THE WITNESS: I’ve supervised - -

THE COURT: - - over that 14 year period?

THE WITNESS: I would have to say thousands.

THE COURT: He’s supervised thousands of people. He has 14 years’ experience. He’s known Mr. Cepec as a parole officer. He’s allowed to give an opinion based on experience and based on training.

So quite frankly, the objection's not well taken. It's overruled, but to clarify it, why don't you rephrase the question and ask it as an opinion.

Let me ask it this way: Do you have an opinion based on a reasonable degree of professional certainty as a parole officer whether or not, prior to June 3rd, Mr. Cepec was capable of the offense of murder?

THE WITNESS: I believe I can answer that without speculation.

THE COURT: All right.

THE WITNESS: As a parole officer, I'm familiar with Mr. Cepec's past history. Many of his offenses that he committed, Mr. - - this was not the first aggravated burglary. He committed numerous on multiple occasions. It was always the same pattern of daytime burglaries and - -

THE COURT: Do you want me to stop him?

MR. O'BRIEN: Well, I think he's answering your question, Judge.

THE COURT: Do you want me to stop him?

MR. O'BRIEN: Yes.

MR. HOLMAN: Your Honor, I would object for the record and just - -

THE COURT: The question I asked him called for a yes-or-no answer.

THE WITNESS: In any of his past history - -

THE COURT: Hold on. Send the jury to the jury room.

(Thereupon, the further following proceedings were then held out of the hearing of the jurors.)

THE COURT: Does the State have a motion it wishes to make?

MR. HOLMAN: Your Honor, I think they should - - I'm trying to think of how to say it. I'm tired. Excuse me if I'm being disrespectful.

I think they should be - - I move to strike that last testimony. They should get a limine instruction, Your Honor.

MR. O'BRIEN: I'm not exactly sure what his - -

THE COURT: He wants me to strike the testimony of the aggravated burglary and give a limine instruction not to consider.

MR. HOLMAN: Past aggravated burglaries.

THE COURT: Right.

MR. O'BRIEN: That I would agree with.

THE COURT: Okay. Anything else?

MR. O'BRIEN: Your Honor, I would make a motion for a mistrial.

THE COURT: That's not going to happen. That's overruled.

MR. O'BRIEN: Okay.

(Tr. Vol. III, Mitigation, p.358-360).

In an attempt to cure the fact that the jury had been advised of Appellant's criminal background, the Court instructed the jury that they were "to disregard those and not consider those" (Tr. Vol. III, Mitigation, p.365). A jury will normally be presumed to follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury would be unable to follow the Court's instructions and a strong likelihood that the effect would be devastating to the defendant. *Greer v. Miller*, 483 U.S. 756 (1987). Here, the jury was advised that this was not Mr. Cepec's first Aggravated Burglary. The jury was further advised that Cepec committed numerous on burglaries on multiple occasions and further advised that it was always the same pattern of daytime burglaries (Tr. Vol. III, Mitigation, p.359-360). In this case, the trial Judge's instruction to the jurors was insufficient as a matter of law to cure the prejudicial effect of the parole officer's statements.

Here, the trial court failed to provide counsel for either side an opportunity to state their position on the issue, consider their competing positions and explore other alternatives. When defense counsel requested the mistrial the trial court summarily denied it. The trial court did not exercise “sound discretion” in denying the motion. The court considered no impute from the parties, most importantly the defense, as to why the mistrial was appropriate. But the court knew he would deny the request for a mistrial since his questioning led to the inadmissible testimony. As set forth above, the state had objected to a question asked by defense counsel. Rather than ruling on the states objection, the trial court usurped his role in the court room and questioned the witness himself. His questioning opened the door for the inadmissible 609 evidence to come into evidence. Evid. R. 609(F) sets forth that “...the fact of the conviction may be proved only by the testimony of the witness on direct or cross-examination, or by the public record shown to the witness during his or her examination.” Appellant’s criminal convictions, since he did not testify, were not admissible. There admission through the testimony of the parole office was error.

To further compound the prejudicial effect on Appellant, the jury heard this inadmissible evidence after the trial court vouched for the credibility and trustworthiness of the witness. The court noted that “he’s (the witness) supervised thousands of people. He has 14 years’ experience. He’s known Mr. Cepec as a parole officer. He’s allowed to give an opinion based on experience and based on training” (Vol. III, Mitigation, p.359).

There was a manifest necessity or high degree of necessity for ordering a mistrial here. It was the trial courts vouching for this witness considered together with the fact that the courts own questioning elicited the inadmissible testimony that mandated a mistrial. As has been noted, the right to a trial by an impartial jury is at the very heart of due process. *Irvin v. Dowd*, 366

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U.S. 717, 721-722 (1961). The ends of justice and due process required that the court declare a mistrial.

PROPOSITION OF LAW NUMBER NO. THREE

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS STATEMENTS TO THE POLICE IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Statements made by a defendant in response to interrogation while in police custody are not admissible unless the defendant has first been advised of the constitutional right against self-incrimination and has validly waived this right. See *Miranda v. Arizona*, 384 U.S. 436, 478-479 (1966). To protect an accused's rights against self-incrimination "prior to any questioning" law enforcement officers must inform an accused "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479. Here, it is recognized that on June 3, 2010, prior to interviewing Appellant, the Medina County Detectives mirandized him. However, as has been recognized, once the Miranda rights have been given, if a defendant requests counsel, then all questioning must cease. Here, the trial court did not address the issue of Appellant's request for counsel. In its Findings of Fact and Conclusions of Law, the trial court determined that at no time during the June 3, 2010 interrogation did he (Steven Cepec) ask to speak to an attorney (Journal Entry, February 4, 2013 at p.4). However, as came out at the suppression hearing, the Appellant and the detectives talked about the use of Luminol being used on Appellant's hands to determine whether or not there was any blood on them. At that time, Appellant asked "well before you use it, can I have a lawyer here?" To which the detective replied "No. I don't think we need one for that. If you didn't do nothing, why do you need a lawyer?" Appellant then replied "Oh okay, well ok, I'm so used to saying it." (June 3, 2010, Suppression Transcript,

p.31). It is recognized that “a request for counsel must be clear and unequivocal.” *Davis v. United States*, 512 U.S. 452, 459 (1994). “If an accused makes a statement concerning their right to counsel ‘that is an ambiguous or unequivocal’ or makes no statement, the police are not required to end the interrogation or ask question to clarify whether the accused wants to invoke his or her Miranda rights.” *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) citing *Davis*, at 459. This Court noted in *State v. Murphy*, 91 Ohio St.3d 516, 520-521, 2001-Ohio-112 that whether a suspect invokes his right to counsel is a question that must be examined “not in isolation but in context.”

Here, Appellant, when talking about the luminal specifically stated “...can I have a lawyer here.” The detective replied “[n]o.” However, Appellant did have the right to have a lawyer present. The officer’s statement was incorrect and all statements obtained from Appellant after that request should have been suppressed.

PROPOSITION OF LAW NO. FOUR

THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHEN COUNSEL'S DEFICIENT PERFORMANCE RESULTS IN PREJUDICE TO THE DEFENDANT IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 5, 9, 10, AND 16 OF THE OHIO CONSTITUTION.

Steven Cepec's Sixth Amendment right to effective counsel was violated by the cumulative effect of errors and omissions by his trial counsel.¹

The standard for assessing attorney performance found in *Strickland v. Washington*, 466 U.S. 668 (1984), applies to this claim. Under *Strickland*, this Court must determine if counsel's performance was deficient in view of "prevailing professional norms." 466 U.S. at 687, 689. Counsel's actions are presumed reasonable. But *Strickland* also establishes that a reasonable investigation of both law and facts is required before a choice by counsel may be deemed strategic or tactical. *Id.* at 691. "[S]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation. ... A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003), (citations and internal quotation marks omitted). When assessing the performance prong in a capital case, this Court is informed by the American Bar Association Guidelines for the Appointment of Counsel in Death Penalty Cases (ABA Guidelines). *See Wiggins*, 539 U.S. at 524.

¹ While Appellant Cepec believes that counsel's ineffective assistance is present in the record of this case, if this Court were to determine that this issue cannot be decided without information that is not in the record of the case, the Court should defer any ruling on the issue and allow it to be addressed in post-conviction proceedings. *State v. Madrigal*,

If counsel's performance is deficient, this Court must determine whether Appellant suffered prejudice resulting from counsel's error. *Strickland*, 466 U.S. at 687. Prejudice results when this Court's confidence in the result of Appellant's trial is undermined by counsel's error. *Id.* at 694. Appellant has no requirement to demonstrate that counsel's error was outcome determinative under the *Strickland* prejudice prong. *Id.* at 693.

1. Ineffective Assistance of Counsel at Trial Phase

This was a capital case. As such, defense counsel was aware that if Mr. Cepec was convicted of capital specifications in the first portion of the trial, that it would necessitate a second phase of the trial for the mitigation hearing. As such, there has to be continuity throughout the trial as to how defense counsel presents its case. Counsel also has to be aware of the facts of a case when presenting an opening statement to the jury. Here, trial counsel, who could not have been fully aware of the facts failed to maintain continuity from its opening statement to its closing argument in the trial phase, thereby failing to preserve credibility for the mitigation stage of this trial. In its opening, counsel asked the jury "...to keep your eye on the clock, because part of what we didn't hear in the opening of the state's case as we went through, and I counted it, some thirty different actions that Mr. Steven Cepec took. This event as it's portrayed by the State and in its own records starts at 2:37 p.m. on June 3, 2010, and all of these events that you heard about that took place in this house, according to their theory of the case, has to end at 2:57 p.m. Now, 2:37, 2:57, that's twenty minutes, so in a 20 minute span when we're keeping our eye on the clock, a lot had to occur." (Tr. Vol. VIII, p.1587). Defense counsel finished the opening by stating "...I'm going to ask you to please keep your eye on the clock, because the clocks running in a different fashion as it relates to the allegations, and the clock was running on the investigation as the evidence will show in this case, and the time on the

clock doesn't match what is alleged to have occurred by our client." (Tr. Vol. VIII, p.1594).

Defense counsel also talked in opening about an individual named Tom Bolon and advised the jury that the state's case "...starts to unravel with an investigation of Mr. Tom Bolon." (Tr. Vol. VIII, p.1589). Defense counsel discussed the fact that Steven Cepec, at the time that he was arrested, was wearing Bolon's shoes. Counsel talked about the fact that Mr. Bolon and other individuals dropped Appellant off in Medina and asked the question "where did Mr. Bolon go and the other individuals that were in this car?" (Tr. Vol. VIII, p.1590). Counsel then went on to discuss the fact that "...the DNA that they acquired comes from the unknown female and an additional individual." (Tr. Vol. VIII, p.1590). Absolutely no evidence or testimony came out at trial that Tom Bolon or any other individual in the car that dropped Appellant off on June 3, 2010 at the pole barn was involved in this case.

Defense counsel then suggested that Mr. Paul Munz, the nephew of Mr. Frank Munz, who lived in the house with his uncle, might somehow be involved in this case. Defense counsel noted that "[i]t is my understanding that, as a result of Mr. Frank Munz's demise, and there's public documents to this effect, there was an estate of almost a million dollars at stake. Now, that we didn't hear about, but these are public documents, and you're going to hear about it during the case." (Tr. Vol. VIII, p.1591). None of this information came out during the course of the trial.

Defense counsel also talked about the fact that Michelle Palmer, when interviewed by Det. Hicks, advised him that Steven didn't kill Mr. Frank Munz, that he couldn't have killed Mr. Frank Munz. Defense counsel advised the jury that they were going to hear this information, however, it never came out during the course of the trial (Tr. Vol. VIII, p.1591). Defense counsel went on to state that Michelle Palmer has stabbed Mr. Cepec previously, that she's a

violent individual and that she uses violence to get what she wants (Tr. Vol. VIII, p.1592). This information never came out during the course of the trial.

Defense counsel talked about an individual named Teresa Morris and advised the jury that they were going to hear about her involvement in this case and her denial about it, and then after the detective leaves the room and the camera still running, that she finally spilled the beans about her involvement in the portion of this case (Tr. Vol. VIII, p.1592). The jury never heard any testimony that Ms. Morris was involved in this case.

Defense counsel suggested to the jury that in 2012 the prosecution had reasonable doubt about their theory of the case because of the fact that Appellant's confession leaves out two important details, and that Appellant would never had known about these two details. Defense counsel never suggests what these two details were, however, suggests that the reasoning will be found in the actual testimony and suggests that they would let the evidence speak for itself (Tr. Vol. VIII, p.1593). There was never any testimony during the course of the trial, either on direct or cross-examination, as to these two important details that were allegedly left out.

After advising the jury of potential other suspects and asking the jury to keep their eye on the clock in opening statement, defense counsel in closing argument switched theories completely. In closing, counsel argued Appellant's lack of purpose and lack of prior calculation and design in causing the death. Counsel in closing discussed the items that Appellant had taken with him to the Munz resident, such as the BB gun, the hammer and the duct tape. Counsel then stated as follows, "Steve Cepec goes in to the house and a struggle ensues. Steve hit Mr. Munz with the hammer because of the struggle, not because he wanted to kill him. He tied Mr. Munz up with the duct tape and then he goes around the house and then he comes back, and what happened? Mr. Munz had broken loose from the duct tape" (Tr. Vol. XVI, p.3057). In opening

defense counsel suggested to the jury that they would hear about other persons who committed these crimes, but never did. In closing, defense counsel told the jury that the Appellant committed the crimes, just didn't do it on purpose. There was no consistency between the opening and closing, and no credibility for the mitigation phase.

In its rebuttal closing at the trial phase, the state pointed out the inconsistent theories between defense counsels opening and closing to the jury "[i] found it interesting in Mr. O'Brien's remarks that now he admits that he had the BB gun, the hammer, and the duct tape, because like all of these ideas Mr. Cepec put forward, Paul Munz did it. Remember, that Michelle was involved in it, told me to do it, Michelle did it. And then in opening statement this innuendo and baseless fact that Paul Munz did it for the estate. I think he said something like that, and someone else admitted to it, he said. There has been no evidence of that." (Tr. Vol. XVI, p.3082-3083). The prosecutor then indicated "[i]t's like a Bermuda triangle of defenses sitting off to the side. They wanted you to get lost and look over these defenses that frankly, there not even presenting now in their closing argument. They just mentioned them in passing. They don't want you to look at the evidence, don't look at the law" (Tr. Vol. XVI, p.3084). The prosecution further noted that "[o]ver there in the wreckage of these other defenses you will recall some statements about watching the clock. I heard that in opening statements. I'm not sure what it means or what it meant, . . ." (Tr. Vol. XVI, p.3087).

In its closing at the mitigation phase, the prosecution once again reminded the jury of the defense's opening statement. There, the prosecution argued "[a]nd then when we get here to trial - - by the way, this is where it gets really interesting. When he get here to trial in February, a few weeks ago, they raised the spectrum that was never supported by any evidence and he knows it's not true by all accounts that Paul Munz, if you remember from the opening statements, did

this for the money. Now, this is a guy that looks to you and asks for mercy and says, you know ‘I’d do anything for the family. I feel so bad for the family.’” (Tr. Vol. V, Mitigation, p.678-679). The prosecution went on to argue “. . . if he’s so sad and he’s so remorseful for Paul Munz, he chooses to accuse him of being the murderer himself, not just in the days after the crime but in this courtroom. That was part of the opening statement.” (Tr. Vol. V, Mitigation, p.679). The prosecution continued to remind the jury as follows, “[c]learly he doesn’t have any remorse for this family when, up until this trial, he is blaming Paul Munz, putting out in the public forum that Paul Munz did this for the estate, and now looks you in the eye and asks you for mercy and says he feels so bad for that family.” (Tr. Vol. V, Mitigation, p.680).

When counsels opening statement fails to have any conformity with the facts of the trial, and provides the state with the opportunity to remind the jury of that fact at both the trial and sentencing phases, counsel has provided deficient performance. Credibility of counsel is imperative in a capital case. When defense counsel advises a jury in opening of false innuendos and facts in suggesting other suspects, but in closing advises that jury that Appellant committed the murder, just not purposely, there is no credibility left for mitigation. Counsel’s deficient performance prejudiced Appellant. The same counsel who implored the jury in the trial phase to consider false facts and innuendos was now asking the jury in mitigation to save Appellants life. Counsels deficient performance allowed the state to argue in closing why death was the appropriate sentence, as follows: “[w]hen he get[s] here to trial in February, a few weeks ago, they raised the spectrum that was never supported by any evidence and he knows it’s not true by all accounts that Paul Munz, if you remember from the opening statements, did this for the money. Now, this is a guy that looks to you and asks for mercy and says, you know ‘I’d do anything for the family. I feel so bad for the family.’” (Tr. Vol. V, Mitigation, p.678-679);

“[c]learly he doesn’t have any remorse for this family when, up until this trial, he is blaming Paul Munz, putting out in the public forum that Paul Munz did this for the estate, and now looks you in the eye and asks you for mercy and says he feels so bad for that family.” (Tr. Vol. V, Mitigation, p.680). Appellant was prejudiced by counsel’s deficient performance and denied the right to effective assistance of counsel.

Counsel was also ineffective at the trial phase by failing to object to pre-trial statements made by Appellant as irrelevant and prejudicial. Evidence Rule 401 provides: “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence” The admissibility of relevant evidence rests within the sound discretion of the trial court. *State v. Drummond*, 111 Ohio St. 3d 14, 28 (2006).

Evidence Rule 403(A) provides that evidence is not admissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." The determination of whether a piece of evidence is inadmissible under this standard is left to the sound discretion of the trial court. *State v. Crotts*, 104 Ohio St. 3d 432, 437 (2004). All evidence that tends to prove the State’s version of the facts necessarily is prejudicial to the defendant. *Id.* Thus, the Rules of Evidence do not bar all prejudicial evidence, only unfairly prejudicial evidence is excludable. *Id.*

Evidence is unfairly prejudicial when it may result in an improper basis for the jury's decision. *Id.* If the evidence “arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly

prejudicial.” *Id.* In other words, if the evidence appeals to the jury’s emotions rather than its intellect, it is usually prejudicial. *Id.*

Further, a Rule 403 objection requires heightened scrutiny in capital cases. *State v. Morales*, 32 Ohio St. 3d 252, 257-58 (1987). Whereas exclusion under 403 generally requires that the probative value of the evidence be minimal and the prejudice great, in capital cases, the probative value of each piece of evidence must outweigh any potential danger of prejudice to the defendant. *Id.* at 258. If the probative worth of the evidence does not outweigh the danger of prejudice to the defendant, it must be excluded. *Id.*

Here, the jury heard from numerous deputies that were with Appellant that he said he wanted to die for killing Frank Munz. On June 4, 2010, Deputy Maria Kriz was with Appellant at the Medina City Hospital as a transport officer when Appellant stated “he was sorry he did it, that he killed Mr. Munz, and he wanted to die for it” (Tr. Vol. XI, p.2277). On June 5, 2010, Kriz was again with Appellant, this time at the Cleveland Clinic when Appellant again said “he did it and wanted to die for it” (Tr. Vol. XI, p.2279). On June 5, 2010, Deputy Chris Falkenstein was with Appellant at the Cleveland Clinic (Tr. Vol. XI, p.2285). While Falkenstein was on his laptop, Appellant asked him to check regarding “voluntarily being able to get the death penalty.” Appellant went on to say that he “wasn’t going to do anything unless he could get the death penalty” (Tr. Vol. XI, p.2285). Deputy Steven Clark was transporting Appellant when Appellant said “I believe I should die for what I’ve done. I believe in the bible, an eye for an eye.” (Tr. Vol. XI, p.2332). Deputy Todd Hicks was transporting Appellant when Appellant made the statement that he “deserved the death penalty.” Hicks asked Appellant if he wanted to die to which Appellant replied “an eye for an eye” (Tr. Vol. X, p.1936). Trial counsel moved to suppress these statements in violation of

Miranda. But counsel never objected to these statements on the basis of relevancy or prejudicial.

First, they were irrelevant, in that they did nothing to support the state's case. What could be argued as relevant was a statement by Appellant that he committed the crime, which would support the states position. But the statement that he "wanted to die for it" added nothing. It was irrelevant and extremely prejudicial. When evidence is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Moreover, when an individual's life is at stake, the Supreme Court has repeatedly insisted upon higher standards of reliability and fairness. *See, e.g. Beck v. Alabama*, 447 U.S. 625 (1980) (need for heightened reliability); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (the penalty of death is qualitatively different from any other sentence and requires a heightened degree of reliability).

Just as counsel's deficient performance in opening statements carried over into the mitigation phase of the trial, so did the failure to object to Appellant's statements that he wished to die for what he had done. Recognizing this, the trial court gave an instruction that "[y]ou may not consider the following evidence admitted during the guilt phase in this mitigation phase. The testimony of Deputy Marie Kriz, Deputy Chris Falkenstein, Deputy Todd Hicks, or Deputy Steve Clark regarding Steven E. Cepec's desire for a particular sentence to be imposed." (Tr. Vol. V, Mitigation, p.733). A jury will normally be presumed to follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury would be unable to follow the Court's instructions and a strong likelihood that the effect would be devastating to the defendant. *Greer v. Miller*, 483 U.S. 756 (1987). Here, this

jury was repeatedly advised that Appellant wanted to die for killing Frank Munz. Such statements cannot be forgotten. The Appellants request for mercy must have sounded as hollow nothings to the jury. There can be no doubt that there was an overwhelming probability that the jury would be unable to follow the Court's instructions and a strong likelihood that the effect would be devastating to the defendant. The unfortunate effect in this case was that Appellant did receive the death penalty.

The prejudicial impact of the jury's exposure to this inflammatory evidence deprived Appellant of his right to a fair trial, due process, and a reliable determination of his guilt and punishment in a capital case as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I of the Ohio Constitution. For these reasons Appellant's convictions should be overturned, or, at a minimum, his death sentence vacated.

2. Ineffective Assistance at Mitigation

As with the trial phase of the case, the mitigation phase lacked any semblance of organization. In all practicality, Steven Cepec would have been better off had his defense attorneys presented no evidence than present the mitigation that they did.

Of all of the witnesses the jury heard from, only one – his third grade teacher, Carl Medure – did not talk about his adult criminal or juvenile delinquency record. Of the fourteen witnesses called by Appellant in his mitigation hearing, eight of those witnesses were connected with the criminal justice system, including six employees of the Ohio Parole Authority or Ohio Department of Rehabilitations and Corrections.

In their mitigation, Appellant's attorneys presented a scattershot defense with no focus, and the end result was that the amount of damage inflicted on Appellant's case was insurmountable. As a result of either a lack of research or foresight, Appellant's attorneys

opened the door and introduced testimony about his spending the majority of his life in prison; his prior criminal record, including prior instances of violence; problems in the prison system, including disciplinary issues; and a history of malingering and faking illnesses.

Appellant's attorneys even opened the door to evidence being introduced regarding his future dangerousness which, given his lengthy criminal history, showed their lack of preparation and/or presentation. Unlike in other cases, where the defendant may have had a limited or non-violent record, Appellant had a lengthy criminal history. He also had a history of issues surrounding his behavior in prison which was preceded by a history of behavioral issues while in school. Given the totality of the circumstances, the jury was left with the picture of a defendant who could not conform to rules in any setting — and thus the picture of someone who continued to pose a danger to society.

The jury also heard how many of the illnesses he complained of, such as ADHD, were not verified by records, as well as the likelihood of Appellant to have a future propensity for violence. The jury heard constant themes as a result of Counsel's failure to properly prepare and present evidence at mitigation, including that Appellant was violent; had a lengthy criminal history; was a malingerer and a faker; and was unable to conform with prison and parole rules.

This case has a number of similarities with *Mitts v. Bagley*. 620 F.3d 650 (6th Cir. 2010) (*rev'd on other grounds*, *Bobby v. Mitts*, 131 S.Ct. 1762 (2011)). In *Mitts*, which this Court reviewed in *State v. Mitts*, 81 Ohio St.3d 223, 690 N.E.2d 552 (1998), the defense presented the mitigation that:

In contrast, Mitts's history, character, and background are entitled to some mitigating weight. As several witnesses testified, Mitts was respected and loved by his family and was a devoted father. Mitts's brother testified that Mitts was the oldest child in the family and that while growing up Mitts looked after the younger children. Mitts's sister described Mitts as “laid-back” and a “gentle giant,”

who was very protective of his brothers and sisters. Mitts served honorably for four years in the Coast Guard, and he was gainfully employed all of his life. We accord all of these factors some mitigating weight.

R.C. 2929.04(B)(1) through (4) and (6) are not applicable in this case. The victims did not “induce or facilitate” the offenses and Mitts did not act under “duress, coercion or strong provocation.” (R.C. 2929.04[B][1] and [2].) The expert opinion testimony confirmed that Mitts did not suffer from any “mental disease or defect.” (R.C. 2929.04[B][3].) Mitts was forty-two years old at the time of the offenses and was the principal offender. (R.C. 2929.04[B][4] and [6].)

Mitts had no criminal record, and this “noteworthy” mitigating factor in R.C. 2929.04(B)(5) is entitled to significant mitigating weight.

As to “other factors” (R.C. 2929.04B)[7]), Mitts claims remorse for his actions as well as the influence of alcohol as mitigating factors. Mitts's expression of *237 remorse in his unsworn statement is entitled to some weight. As to alcohol, Mitts presented no evidence that he was an alcoholic, and voluntary drunkenness is entitled to very little mitigating weight.

Mitts, 81 Ohio St.3d at 236-237, 690 N.E.2d at 553 (citations omitted).

In it's review of the same circumstances and facts, the Sixth Circuit recognized that there was a deficient performance as counsel presented a defense that he knew was not supported by the facts or law. In *Mitts*, the attorney presented a defense of amnesia caused by an alcoholic blackout. 620 F.3d at 658-659; 91 Ohio St.3d at 226, 690 N.E.2d at 526. Both this Court and the federal appellate court recognized that by introducing this defense, and then attempting to use it as mitigating evidence in his case, the performance of Mitts' trial attorney satisfied the deficient performance prong of *Strickland v. Washington*. 466 U.S. 688 (1984).

However, this Court recognized that the attorney in *Mitts* presented evidence regarding positive family history; a history in the Coast Guard; a lifetime of being gainfully employed;

remorse for the crime; the influence of alcohol; and the lack of a criminal record. *Mitts*, 81 Ohio St.3d at 236-7, 690 N.E.2d at 533.

Unlike in the case at bar, the attorney in *Mitts* did not “bring out damaging information about Mitts, make him seem dangerous, or express contempt for him. He cross-examined the state’s witnesses and brought out evidence in the guilt phase that laid the groundwork for the mitigation phase of the trial.” *Mitts*, 620 F.3d at 661. As such, the *Mitts* court found that the prejudice prong of *Strickland* was not satisfied.

This was not the case in Steven Cepec’s case. In Appellant’s case, his attorneys introduced testimony that Counsel should reasonably anticipated would be refuted, thus killing any credibility in Appellant’s claims that he should be spared the death penalty. The majority of their mitigation defense surrounded the criminal and institutional history of the Appellant, introducing witness after witness to discuss his criminal history, behavior in prison and attempts to provide him Appellant with assistance. These witnesses also opened up the door for testimony about fighting, non-compliance and future dangerousness.

Further, while Appellant’s attorneys attempted to portray Appellant’s family life as chaotic and unloving, the State was easily able to demonstrate that this was not the case. While there was no question that Appellant’s biological mother was absent from his life, the defense attempted to present evidence that Appellant’s background included absent and abusive parents; all the while, the State was able to easily contradict this testimony with evidence that directly contradicted that testimony, showing that Appellant’s father and step-mother were participating in school activities and attempting to get Appellant assistance for his substance abuse issues.

Through the testimony of the only two family members of Appellant to testify, Shawn and Ricky Cepec, Appellant’s attorneys demonstrated that there was no sexual or physical abuse

of Appellant. While the two family members described a less-than-ideal situation in the Cepec home, they did not establish that Appellant was the victim of emotional abuse.

To the contrary, through the testimony of Shawn and Ricky Cepec, Appellant's counsel allowed the State to demonstrate that other members of the Cepec family were productive members of society capable of maintaining jobs. The State was also able to easily establish through cross-examination the inference that other members of the Cepec family had not indicated any sort of abuse in the home. Given the totality of the circumstances, Appellant's counsel successfully established that even in his own family, Appellant was the oddball by living a life where he spent more of his adult life in prison than out of it.

Finally, Appellant's attorneys failed to demonstrate that he had actual brain impairment or mental health issues. While Medure and Shuman testified about Appellant's educational and behavioral issues, they also testified that he had an above-average IQ and was considered to be an underachiever. While Shuman suspected ADHD, the State's expert, Dennis Eshbaugh, was easily able to counter this by pointing out that there had never been a formal diagnosis of ADHD or ADD despite decades of testing on Appellant.

Given the totality of the circumstances, unlike in *Mitts*, Appellant's attorneys did bring out damaging information about Cepec and make him seem dangerous. While Counsel did not express contempt for Appellant, they did fail to humanize him in front of the jury. Further, unlike in *Mitts*, Counsel failed to carry over any strategy from the trial phase to the mitigation phase, a fact that resulted in the prosecutor pointing out that the original defense argument was not one of remorse, but blame-shifting. (Vol. V, Mitigation, p. 678-679).

Therefore, pursuant to *Strickland v. Washington* and its progeny, there is no question that counsel was deficient in their performance. Counsel failed to present mitigating evidence that

was not directly contradicted by other records in evidence or that did not surround Appellant's juvenile and/or adult criminal history. As a result of their failure, the picture of Cepec that was presented to the jury was one of a career criminal with an inability to conform to the rules of society or the rules of prison or parole.

As the Third Circuit has said, and has been recognized by the Sixth Circuit,

[T]he preparation and investigation for the penalty phase are different from the guilt phase. The penalty phase focuses not on absolving the defendant from guilt, but rather on the production of evidence to make a case for life. The purpose of investigation is to find witnesses to help humanize the defendant, given that a jury has found him guilty of a capital offense.

Marshall v. Hendricks, 307 F.3d 36, 103 (3rd Cir. 2002). See also *Johnson v. Mitchell*, 585 F.3d 923, 940 (2010).

In the case *sub judice*, evidence was not produced to make the case for life, nor was there an adequate attempt made to humanize Cepec. Similar to *Johnson, supra*, the jurors in Cepec's case were let with no choice but to view Appellant as a calculating and manipulative individual with a lengthy criminal and substance abuse history capable of violence and with a propensity to commit violence in the future. Compare with *Johnson, supra* at 945. Given the lack of a coherent presentation by Appellant's attorneys, as well as their introduction of evidence that opened doors to much more damaging evidence being introduced, Counsel failed to perform their duty to present mitigating evidence to the jury.

With the performance prong being satisfied, the prejudice prong. In the instant case, the evidence was that Appellant had committed an aggravated murder while in the course of committing an aggravated burglary and aggravated robbery. While the crime itself was bad, the jury had only a little picture of Appellant's background and situation following the guilt phase of

the trial. However, after the mitigation phase and as the result of counsel's performance, they were presented with an image of Appellant that could only take them to one conclusion: death.

Had counsel presented evidence that would not have opened the door to more damaging evidence, there is a reasonable probability that the jury would have found for a verdict of life imprisonment with either no possibility of parole or parole eligibility in several decades. Instead, through the introduction of the various witnesses, Appellant's attorneys made the State's case for them that Cepec deserved the death penalty -- instead of providing him a fighting chance at obtaining a life sentence.

For these reasons, Appellant was deprived of his Sixth Amendment right to the effective assistance of counsel under the United States Constitution. Likewise, Appellant was deprived of the effective assistance of counsel under Article One, Section Ten of the Ohio Constitution. For these reasons, this Court should reverse Appellant's sentence of death and remand the case to the Medina County Court of Common Pleas for a new mitigation hearing.

3. Ineffective Assistance During Jury Selection

As in all other areas of the case, Appellant was entitled to the effective representation of counsel at during jury selection. However, in the voir dire process, as with the rest of the case, Appellant was prejudiced by ineffective assistance. In their defense of Appellant, who had confessed to the crime and who had a lengthy criminal history, Appellant's counsel failed to properly lay the foundation for a sentence of less than death.

The prime example of Counsel's failure to lay the proper mitigation is with Juror 213, Monet Godbolt. During his individual questioning of Ms. Godbolt, Attorney Buzzelli limited his questions to two themes: the Biblical reference to an eye for an eye and Appellant's involvement

with the white supremacist group, the Aryan Brotherhood. (Tr. Vol. VI, Voir Dire, p. 1143-1148).

Counsel had essentially poisoned Ms. Godbolt, who was the sole African-American on the jury. (Tr. Vol. VI, Voir Dire, p. 1482-1483, 1485). There was no logical reason for the jury to hear about Appellant's activity with the Aryan Brotherhood. The murder of Frank Munz had nothing to do with the Brotherhood, i.e. it being a gang-related murder or a killing that was the result of some sort of hate crime. The only purpose for the introduction of any testimony about Appellant and the Aryan Brotherhood would have been to inflame the jurors, and thus been irrelevant and in violation of the Ohio Rules of Evidence. Evid. R. 401, 402, 403(A), 405.

The examination of Ms. Godbolt was so bad that even the State attempted to excuse Ms. Godbolt as a preemptory challenge. (Tr. Vol. VI, Voir Dire, p. 1481-1482). Attorney O'Brien objected pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). The State then went on to state that it had no intention of introducing any testimony about Appellant's involvement in the Aryan Brotherhood, and that Godbolt's inclusion in the jury would potentially raise an appellate issue. (Tr. Vol. VI, Voir Dire, p. 1482). Even Prosecutor Holman stated "There was not a need to tell this lady that Mr. Cepec was a member of the Aryan Brotherhood." (Tr. Vol. VI, Voir Dire, p. 1488).

While the Court ultimately denied the State's request to strike Godbolt, leaving her on the jury, the damage was done. (Tr. Vol. VI, Voir Dire, p. 1489-1490). Appellant's attorneys had already poisoned her. They brought up issues that could cause prejudice by Godbolt against their client, issues that had no evidentiary value in either the guilt or mitigation phases of the trial.

Clearly, the raising of non-issues that could cause juror prejudice is deficient performance, satisfying the first prong of *Strickland*. However, in Ohio, where it only takes one

juror to stop a death sentence from being imposed. By poisoning one-twelfth of the jury pool, and risking her conveying that information to the remaining jurors as to Appellant's involvement in a racist organization during deliberations, Counsel's actions create the reasonable probability that but for his deficient performance, Appellant might have been spared the death penalty.

Adding to the situation was the fact that the Appellant's attorney failed to perform any major questioning as to the remaining jurors as to factors that could help them support a sentence of life imprisonment instead of a death sentence. Appellant's attorneys failed to bring out factors that the jurors might consider in imposing a sentence of less than death, or under the circumstances in which they believed the death penalty was inappropriate.

Given the totality of the circumstances, counsel was deficient in the conduct of their voir dire. Further, Counsel's failure create the reasonable probability that but for their failure to properly question the jurors, there is a reasonable probability that the jury would have been considered a sentence other than death.

PROPOSITION OF LAW NUMBER NO. FIVE

APPELLANT WAS DENIED A FAIR TRIAL DUE TO THE PROSECUTION'S IMPROPER CLOSING ARGUMENT DURING THE PENALTY PHASE, WHERE THE PROSECUTION ARGUED THE NATURE AND CIRCUMSTANCES OF THE CRIME ITSELF AS BEING THE AGGRAVATING CIRCUMSTANCES IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

It is Appellant's position that during the penalty phase closing argument, the prosecution referred to the nature and circumstances of the offense in this case as aggravating circumstances.

In *State v. Wogenstahl*, 75 Ohio St.3d 344 (1996) this Court set forth the following language relating to this issue, “. . . as we have pointed out, the nature and circumstances of the offense may only enter into the statutory weigh in process on the side of *mitigation*. See R.C. 2929.04(B). Thus, we modify *Gumm*² to the extent that that opinion indicates anything to the contrary. Again and again and again, we hold that in the penalty phase of a capital trial, the ‘aggravating circumstances’ against which the mitigating evidence is to be weighed are limited to the specifications of aggravating circumstances set forth in R.C. 2929.04(A)(1) through (8) that have been alleged in the indictment and proved beyond a reasonable doubt. In this regard, it is improper for the prosecutors in the penalty phase of a capital trial to make any comment before a jury that the nature and circumstances of the offense are ‘aggravating circumstances.’” In *Wogenstahl*, this Court found that the prosecutor's comments could be considered objectionable for two reasons. First, the prosecutor obviously invited the jury to concentrate on what the victim experienced and was thinking in her last moments of life. . . . Second, we are somewhat troubled by the prosecutor's statement: “That is the kidnapping, that is the aggravated circumstance. These statements are legally defensible, since the kidnapping was, in fact, the predicate for one of the R.C. 2929.04(A) specifications of aggravating circumstances alleged in

² *State v. Gumm*, 73 Ohio St.3d 413 (1995)

the indictment. However, the statements were made in the mist of the prosecutor's description of some of the nature and circumstances of the crime and, thus, could be construed as suggesting that the nature and circumstances of the offense were 'aggravating circumstances'" *Wogenstahl* at p.358.

In Appellant's case, the prosecution argued as follows: "Steven Cepec - - and I'm here - - and you're going to hear in the instructions, we're not here to talk to you about the murder itself. We're here to talk about the aggravating circumstances. So that's what I will, for the most part, reserve my comments about. Steven Cepec committed the aggravated robbery during the course of the murder of Frank Munz, and he did it with great force and great brutality and to facilitate that robbery, he took that hammer and, four times, plunged it deep into his head. He tied him up with duct tape. I'm asking you to consider the facts of this aggravated robbery, the amount of force that was used in this aggravated murder. You know what it was, and it was, I suggest to you, a severe and brutal robbery committed on Frank Munz (Tr. Vol. V, Mitigation, p.650). The prosecution went on as follows: "[t]hen the burglary, Ladies and Gentlemen, you can consider that burglary that occurred. It's been proven to you beyond a reasonable doubt. Currently, Mr. Cepec has finally taken full account, and we'll talk about that. And that burglary, Ladies and Gentlemen, was committed in such a calculated and careful manner. He took all the tools of the robbery and burglary over there, and mostly the tools of robbery by his own statement. Although, he changed it today saying something about a safe. All of the statements before said the hammer and gun were to rob him and that duct tape, but after he had either killed or mortally wounded Mr. Munz and he laid there bleeding, maybe passing away, his last breathe as his nephew hid in the backroom, Steven Cepec methodically burglarized the house for about 20 minutes." (Tr. Vol. V, Mitigation, p.651-652). In the rebuttal portion of the state's closing at

the penalty phase, the prosecution argued as follows: “[a]nd in this trial, the aggravating circumstances, the commission of the murder in the course of aggravated burglary and after he broken detention while he was under detention, those are the aggravating circumstances, and you can take into account the force he used in the aggravated robbery. The two different types - - and the aggravated burglary and the two types of weapons he used, that he used force to beat Frank Munz in the head to take his money and his property, and the fact that he used a ligature to choke the living air, to choke Frank Munz to death. And when you consider those aggravating - - when you consider whether or not the aggravating circumstances outweigh the mitigating factors” (Tr. Vol. V, Mitigation, p.702-703). The prosecution then went on as follows: “[w]hen you consider the force, you have to look at that. You should look back at the evidence of what Mr. Cepec did to Mr. Munz. The force he used to put eight holes in his head, the ligature he drew around his neck, broke the thyroid cartilage. You can take into account that force. You can take into account the fact that he trespassed into Frank’s house, into Frank Munz’s home and did this aggravated robbery and he used the force that he did.” (Tr. Vol. V, Mitigation, p.704).

Here, defense counsel never objected to the prosecutor’s remarks at the time they were made. As this Court has noted, “...appellant’s contentions of error based upon the state’s initial closing argument have been waived. Accordingly, our review of Appellant’s contentions must proceed, if at all, under the plain error analysis of Crim.R.52(B). Plain error does not exist unless it can be said but for the error, the outcome of the trial would clearly have been otherwise. See, e.g. *State v. Wickline*, (1990), 50 Ohio St.3d 114, 119-120.” *Id.* at 357.

As set forth above, this Court has recognized in several cases going back a number of years that what the state did here, arguing the nature and circumstances of the case as aggravating circumstances, is improper, and yet state attorneys continue to make this argument.

They argue it because it appeals to the passions of the jury. Which is why this Court has determined such argument to be improper. Arguments such as “and he did it with great force and great brutality and to facilitate that robbery, he took that hammer and, four times, plunged it deep into his head.”, or “[t]he force he used to put eight holes in his head, the ligature he drew around his neck, broke the thyroid cartilage. You can take into account that force.”

It is Appellant’s position that the outcome would have been different had the state not argued the nature and circumstances as aggravating circumstances. Appellant bases his position on the states arguments themselves. Imploring the jury to consider the force as an aggravating circumstance and to give Appellant the death penalty.

PROPOSITION OF LAW NUMBER NO. SIX

APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL BY THE TRIAL COURT'S REPEATED INTERRUPTIONS OF WITNESSES TO QUESTION THEM AND INTERJECT HIS THOUGHTS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

It is firmly established constitutional law that "a fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955); *see also, Tumey v. Ohio*, 273 U.S. 510 (1927); *Offutt v. United States*, 348 U.S. 11 (1954).

A trial judge is more than a mere moderator. Instead, he or she is the governor of the trial for the purpose of assuring its proper functioning. *Quercia v. United States*, 289 U.S. 466, 469 (1933). It is the trial court's duty to conduct the trial in an orderly manner with a view to eliciting the truth and to attaining justice between the parties. *Glasser v. United States*, 315 U.S. 60, 82-83 (1942).

During this trial there were repeated interruptions and interjections by the trial court. For example, during defense counsels questioning of a witness, the court stopped counsel, without an objection from the prosecution, with the following interjection, "[w]ait a minute. How would she know that? She wouldn't probable know that. She wasn't there. The only way she would know that is if somebody told her." The court continued to admonish defense counsel by stating ""[y]es. You would be limiting yourself to her observations. You cannot get into what she was told by other people because that's hearsay, or another way of putting it is she would have no foundation of making the testimony other than hearsay" (Tr. Vol. X, p.1889-1890). There were several times when the court interrupted defense counsel and took over the questioning of witnesses during the trial (See, Tr. Vol. XII, pgs.2416-2418, 2419-2421, 2425-2430; Tr. Vol. XIII, pgs.2606-2607; 2609-2610, 2627-2629, 2678, 2697-2698). However, it was at the

mitigation phase that the trial court interjected himself the most. During the testimony of Terry Shuman, the trial court interrupted defense counsel five times to question the witness (Tr. Vol. I, Mitigation, pgs.122, 124-129, 131-135, 138-143, 152-153). During the testimony of Dr. Bruce Maaser, the trial court questioned the witness on four separate occasions (Tr. Vol. II, Mitigation, pgs.205-206, 212-213, 256-257, 276-277). The trial court also questioned Dr. Mujgan Inciler (Tr. Vol. II, Mitigation, pgs.307-309). It was during the questioning of William Taraschke that the trial courts questioning was the most prejudicial to Appellant. For example, the court questioned Mr. Taraschke as follows, “[w]hen you said it was obvious that he had problems, you mentioned both substance abuse and mental health. Was the mental health obvious?” Mr. Taraschke, “[i] mean, I could only go off what information I received from various counselors and mental health people. They would indicate that there were some issues, but they really didn’t know how to address them, or that he wasn’t compliant with them, so they couldn’t help him” (Tr. Vol. III, Mitigation, pg.122). The witness, because he was questioned by the judge, was allowed to testify to hearsay, indicating how others viewed Appellant. This witness was repeatedly questioned by the court during the questioning by the defense, many of the questions requiring the witness to speculate or to answer questions that were not relevant to Appellant (Tr. Vol. III, Mitigation, pgs.321-322, 324-327, 328-329, 329-330, 358-360). The trial court also interrupted the state on several occasions to question this witness, however the questions were beneficial for the state. For example, defense counsel objected to a question as requiring a hearsay answer. The court inquired of Mr. Taraschke by asking him whether the speaker “[w]as he giving you what seemed to be his present state of mind at that point?....And was he doing it in present tense, so to speak? Not like saying in the past, but this is how I feel right now?” After the witness responded in the affirmative, the court overruled the objection (Tr. Vol. III,

Mitigation, pgs.331-322). (*See, also, Tr. Vol. III, Mitigation, pgs.341-342, 343-344, 351-352*). The trial court continued to interject during the testimony of the state's witness, Dr. Dennis Eshbaugh. During the direct examination of the doctor by the state, defense counsel objected to a question. The court questioned the doctor to the benefit of the state. For example, the court asked as follows, "...is it the normal experience of a psychologist to give an opinion of the kind Mr. Holman's asking for based only on a review of the records?" After further questioning by the court of the witness, the court overruled defense counsel's objection (*Tr. Vol. III, Mitigation, pgs. 514-517*). (*See, also, Tr. Vol. III, Mitigation, pgs.580-587*). The trial court also interrupted defense counsel on several occasions during the questioning of the doctor (*Tr. Vol. III, Mitigation, pgs. 534-536, 545-548, 554-556, 567-568*).

This Court has held that "a criminal trial before a biased judge is fundamentally unfair and denies a defendant due process of law." *State v. LaMar*, 95 Ohio St. 3d 181, 189, 767 N.E.2d 166, 185 (2002). This Court has further defined judicial bias as "a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts." *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, syl. para. 4, 132 N.E.2d 191 (1956). Moreover, if a criminal defendant demonstrates the presence of a biased trial court, reversal is required and is not subject to harmless-error analysis. *State v. Sanders*, 92 Ohio St. 3d 245, 278, 750 N.E.2d 90, 127 (2001).

As set forth above, the trial court repeatedly interrupted defense counsel. If there was an interruption by the court of the state, it was to assist the state. Further, the court's interruptions led to defense counsel's requesting that a mistrial be granted based upon the answers provided by

a witness (*See*, Proposition of Law Two). Here, the trial courts actions made him more than a mere moderator or governor of the trial for the purpose of assuring its proper functioning. The judge became a litigant, a third attorney in the trial who cross examined witnesses, the end result being to the determinant of Appellant.

The prejudicial impact of the trial court's actions deprived Appellant of his right to a fair trial, due process, and a reliable determination of his guilt and punishment in a capital case as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I of the Ohio Constitution. For these reasons Appellant's convictions should be overturned, or, at a minimum, his death sentence vacated.

PROPOSITION OF LAW NO. SEVEN

OHIO'S DEATH PENALTY LAW IS UNCONSTITUTIONAL. OHIO REV. CODE ANN. §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, AND 2929.05 DO NOT MEET THE PRESCRIBED CONSTITUTIONAL REQUIREMENTS AND ARE UNCONSTITUTIONAL ON THEIR FACE AND AS APPLIED TO JASON DEAN. 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.³

The Eighth Amendment to the Constitution and Article I, § 9 of the Ohio Constitution prohibit the infliction of cruel and unusual punishment. The Eighth Amendment's protections are applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962). Punishment that is "excessive" constitutes cruel and unusual punishment. *Coker v. Georgia*, 433 U.S. 584 (1977). The underlying principle of governmental respect for human dignity is the Court's guideline to determine whether this statute is constitutional. *See Furman v. Georgia*, 408 U.S. 238 (1972) (Brennan, J., concurring); *Rhodes v. Chapman*, 452 U.S. 337, 361 (1981); *Trop v. Dulles*, 356 U.S. 86 (1958). The Ohio scheme offends this bedrock principle in the following ways:

A. Arbitrary And Unequal Punishment

The Fourteenth Amendment's guarantee of equal protection requires similar treatment of similarly situated persons. This right extends to the protection against cruel and unusual punishment. *Furman*, 408 U.S. at 249 (Douglas, J., concurring). A death penalty imposed in violation of the Equal Protection guarantee is a cruel and unusual punishment. *See id.* Any arbitrary use of the death penalty also offends the Eighth Amendment. *Id.*

³ In *State v. Jenkins*, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), this Court upheld this death penalty statute and this Court may, therefore, reject this claim on its merits if it disagrees with Appellant's federal constitutional arguments. *State v. Poindexter*, 36 Ohio St. 3d 1, 520 N.E.2d 568 (1988).

Ohio's capital punishment scheme allows the death penalty to be imposed in an arbitrary and discriminatory manner in violation of *Furman* and its progeny. Prosecutors' virtually uncontrolled indictment discretion allows arbitrary and discriminatory imposition of the death penalty. Mandatory death penalty statutes were deemed fatally flawed because they lacked standards for imposition of a death sentence and were therefore removed from judicial review. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Prosecutors' uncontrolled discretion violates this requirement.

Due process prohibits the taking of life unless the state can show a legitimate and compelling state interest. *Commonwealth v. O'Neal*, 339 N.E.2d 676, 678 (Mass. 1975) (Tauro, C.J., concurring); *State v. Pierre*, 572 P.2d 1338 (Utah 1977) (Maughan, J., concurring and dissenting). Moreover, where fundamental rights are involved personal liberties cannot be broadly stifled "when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). To take a life by mandate, the State must show that it is the "least restrictive means" to a "compelling governmental end." *O'Neal II*, 339 N.E.2d at 678.

The death penalty is neither the least restrictive nor an effective means of deterrence. Both isolation of the offender and retribution can be effectively served by less restrictive means. Society's interests do not justify the death penalty.

B. Unreliable Sentencing Procedures

The Due Process and Equal Protection Clauses prohibit arbitrary and capricious procedures in the State's application of capital punishment. *Gregg v. Georgia*, 428 U.S. 153, 188, 193-95 (1976); *Furman*, 408 U.S. at 255, 274. Ohio's scheme does not meet those requirements. The statute does not require the State to prove the absence of any mitigating factors or that death is the only appropriate penalty.

The statutory scheme is unconstitutionally vague, which leads to the arbitrary imposition of the death penalty. The language “that the aggravating circumstances ... outweigh the mitigating factors” invites arbitrary and capricious jury decisions. “Outweigh” preserves reliance on the lesser standard of proof by a preponderance of the evidence. The statute requires only that the sentencing body be convinced beyond a reasonable doubt that the aggravating circumstances were marginally greater than the mitigating factors. This creates an unacceptable risk of arbitrary or capricious sentencing.

Additionally, the mitigating circumstances are vague. The jury must be given “specific and detailed guidance” and be provided with “clear and objective standards” for their sentencing discretion to be adequately channeled. *Gregg; Godfrey v. Georgia*, 446 U.S. 420 (1980).

Ohio courts continually hold that the weighing process and the weight to be assigned to a given factor are within the individual decision-maker’s discretion. *State v. Fox*, 69 Ohio St. 3d 183, 193, 631 N.E.2d 124, 132 (1994). Giving so much discretion to juries inevitably leads to arbitrary and capricious judgments. The Ohio open discretion scheme further risks that constitutionally relevant mitigating factors that must be considered as mitigating, [youth or childhood abuse [*Eddings v. Oklahoma*, 455 U.S. 104 (1982)], mental disease or defect [*Penry v. Lynaugh*, 492 U.S. 302 (1989) *rev’d on other grounds Penry v. Johnson*, 532 U.S. 782 (2001)], level of involvement in the crime [*Enmund v. Florida*, 458 U.S. 782 (1982)], or lack of criminal history [*Delo v. Lashley*, 507 U.S. 272 (1993)], will not be factored into the sentencer’s decision. While the federal constitution may allow states to shape consideration of mitigation, *see Johnson v. Texas*, 509 U.S. 350 (1993), Ohio’s capital scheme fails to provide adequate guidelines to sentencers, and fails to assure against arbitrary, capricious, and discriminatory results.

Empirical evidence is developing in Ohio and around the country that, under commonly used penalty phase jury instructions, juries do not understand their responsibilities and apply inaccurate standards for decision. *See* Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision To Impose Death*, 85 J. Crim. L. & Criminology 532, 549-557 (1994), and findings of Zeisel discussed in *Free v. Peters*, 12 F.3d 700 (7th Cir. 1993). This confusion violates the federal and state constitutions. Because of these deficiencies, Ohio's statutory scheme does not meet the requirements of *Furman, supra*, and its progeny.

C. Defendant's Right to a Jury is Burdened

The Ohio scheme is unconstitutional because it imposes an impermissible risk of death on capital defendants who choose to exercise their right to a jury trial. A defendant who pleads guilty or no contest benefits from a trial judge's discretion to dismiss the specifications "in the interest of justice." Ohio Crim. R. 11(C)(3). Accordingly, the capital indictment may be dismissed regardless of mitigating circumstances. There is no corresponding provision for a capital defendant who elects to proceed to trial before a jury.

Justice Blackmun found this discrepancy to be constitutional error. *Lockett v. Ohio*, 438 U.S. 586, 617 (1978) (Blackmun, J., concurring). This disparity violated *United States v. Jackson*, 390 U.S. 570 (1968), and needlessly burdened the defendant's exercise of his right to a trial by jury. Since *Lockett*, this infirmity has not been cured and Ohio's statute remains unconstitutional.

D. Mandatory Submission of Reports and Evaluations

Ohio's capital statutes are unconstitutional because they require submission of the pre-sentence investigation report and the mental evaluation to the jury or judge once requested by a capital defendant. R.C. § 2929.03(D)(1). This mandatory submission prevents defense counsel

from giving effective assistance and prevents the defendant from effectively presenting his case in mitigation.

E. R.C. § 2929.03(D)(1) and 2929.04 are Unconstitutionally Vague.

R.C. § 2929.03(D)(1)'s reference to "the nature and circumstances of the aggravating circumstance" incorporates the nature and circumstances of the offense into the factors to be weighed in favor of death. The nature and circumstances of an offense are, however, statutory mitigating factors under R.C. § 2929.04(B). R.C. § 2929.03(D)(1) makes Ohio's death penalty weighing scheme unconstitutionally vague because it gives the sentencer unfettered discretion to weigh a statutory mitigating factor as an aggravator.

To avoid arbitrariness in capital sentencing, states must limit and channel the sentencer's discretion with clear and specific guidance. *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). A vague aggravating circumstance fails to give that guidance. *Walton v. Arizona*, 497 U.S. 639, 653 (1990), *vacated on other grounds Ring v. Arizona*, 536 U.S. 584 (2002); *Godfrey*, 446 U.S. at 428. Moreover, a vague aggravating circumstance is unconstitutional whether it is an eligibility or a selection factor. *Tuilaepa v. California*, 512 U.S. 967 (1994). The aggravating circumstances in R.C. § 2929.04(A)(1)-(8) are both.

F. Proportionality and Appropriateness Review

Ohio Revised Code § 2929.021 and 2929.03 require data be reported to the courts of appeals and to the Ohio Supreme Court. There are substantial doubts as to the adequacy of the information received after guilty pleas to lesser offenses or after charge reductions at trial. R.C. § 2929.021 requires only minimal information on these cases. Additional data is necessary to make an adequate comparison in these cases. This prohibits adequate appellate review.

Adequate appellate review is a precondition to the constitutionality of a state death penalty system. *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *Pulley v. Harris*, 465 U.S. 37 (1984). The standard for review is one of careful scrutiny. *Zant*, 462 U.S. at 884-85. Review must be based on a comparison of similar cases and ultimately must focus on the character of the individual and the circumstances of the crime. *Id.*

Ohio's statutes' failure to require the jury or three-judge panel recommending life imprisonment to identify the mitigating factors undercuts adequate appellate review. Without this information, no significant comparison of cases is possible. Absent a significant comparison of cases, there can be no meaningful appellate review. *See State v. Murphy*, 91 Ohio St. 3d 516, 562, 747 N.E.2d 765, 813 (2001) (Pfeifer, J., dissenting) ("When we compare a case in which the death penalty was imposed only to other cases in which the death penalty was imposed, we continually lower the bar of proportionality. The lowest common denominator becomes the standard.")

The comparison method is also constitutionally flawed. Review of cases where the death penalty was imposed satisfies the proportionality review required by O.R.C. § 2929.05(A). *State v. Steffen*, 31 Ohio St. 3d 111, 509 N.E.2d 383, syl. 1 (1987). However, this prevents a fair proportionality review. There is no meaningful manner to distinguish capital defendants who deserve the death penalty from those who do not.

This Court's appropriateness analysis is also constitutionally infirm. R.C. § 2929.05(A) requires appellate courts to determine the appropriateness of the death penalty in each case. The statute directs affirmance only where the court is persuaded that the aggravating circumstances outweigh the mitigating factors and that death is the appropriate sentence. *Id.* This Court has not followed these dictates. The appropriateness review conducted is very cursory. It does not

“rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.” *Spaziano v. Florida*, 468 U.S. 447, 460 (1984).

The cursory appropriateness review also violates the capital defendant's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution. The General Assembly provided capital appellants with the statutory right of proportionality review. When a state acts with significant discretion, it must act in accordance with the Due Process Clause. *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). The review currently used violates this constitutional mandate. An insufficient proportionality review violates Jason Dean's due process and liberty interest in R.C. § 2929.05.

G. Ohio's Statutory Death Penalty Scheme Violates International Law.

International law binds each of the states that comprise the United States. Ohio is bound by international law whether found in treaty or in custom. Because the Ohio death penalty scheme violates international law, Steven Cepec's capital convictions and sentences cannot stand.

1. *International Law Binds Ohio.*

“International law is a part of our law[.]” *The Paquete Habana*, 175 U.S. 677, 700 (1900). A treaty made by the United States is the supreme law of the land. Article VI, United States Constitution. Where state law conflicts with international law, it is the state law that must yield. *See Zschernig v. Miller*, 389 U.S. 429, 440 (1968). In fact, international law creates remediable rights for United States citizens. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D. Cal. 1987).

2. *Ohio's Obligations Under International Charters, Treaties, and Conventions*

The United States' membership and participation in the United Nations (U.N.) and the Organization of American States (OAS) creates obligations in all fifty states. Through the U.N. Charter, the United States committed itself to promote and encourage respect for human rights and fundamental freedoms. Art. 1(3). The United States bound itself to promote human rights in cooperation with the U.N. Art. 55-56. The United States again proclaimed the fundamental rights of the individual when it became a member of the OAS. OAS Charter, Art. 3.

The U.N. has sought to achieve its goal of promoting human rights and fundamental freedoms through the creation of numerous treaties and conventions. The United States has ratified several of these including: the International Covenant on Civil and Political Rights (ICCPR) ratified in 1992, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) ratified in 1994, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) ratified in 1994. Ratification of these treaties by the United States expressed its willingness to be bound by these treaties. Pursuant to the Supremacy Clause, the ICCPR, the ICERD, and the CAT are the supreme laws of the land.

Ohio is not fulfilling the United States' obligations under these conventions. Rather, Ohio's death penalty scheme violates each convention's requirements and thus must yield to the requirements of international law. (*See* discussion *infra* Subsection 1).

- a. Ohio's statutory scheme violates the ICCPR's and ICERD's guarantees of equal protection and due process.

Both the ICCPR, ratified in 1992, and the ICERD, ratified in 1994, guarantee equal protection of the law. ICCPR Art. 2(1), 3, 14, 26; ICERD Art. 5(a). The ICCPR further guarantees due process via Articles 9 and 14, which includes numerous considerations: a fair hearing [Art. 14(1)], an independent and impartial tribunal [Art. 14(1)], the presumption of innocence [Art. 14(2)], adequate time and facilities for the preparation of a defense [Art.

14(3)(a)], legal assistance [Art. 14(3)(d)], the opportunity to call and question witnesses [Art. 14(3)(e)], the protection against self-incrimination [Art. 14(3)(g)], and the protection against double jeopardy [Art. 14(7)]. However, Ohio's statutory scheme fails to provide equal protection and due process to capital defendants as contemplated by the ICCPR and the ICERD.

b. Ohio's Statutory Scheme Violates the ICCPR's Protection Against Arbitrary Execution.

The ICCPR speaks explicitly to the use of the death penalty. The ICCPR guarantees the right to life and provides that there shall be no arbitrary deprivation of life. Art. 6(1). It allows the imposition of the death penalty only for the most serious offenses. Art. 6(2). Juveniles and pregnant women are protected from the death penalty. Art. 6(5). Moreover, the ICCPR contemplates the abolition of the death penalty. Art. 6(6).

However, several aspects of Ohio's statutory scheme allow for the arbitrary deprivation of life. (*See*, discussion, *infra* Sections a–f).

c. Ohio's Statutory Scheme Violates the ICERD's Protections Against Race Discrimination.

The ICERD, speaking to racial discrimination, requires that each state take affirmative steps to end race discrimination at all levels. Art. 2. It requires specific action and does not allow states to sit idly by when confronted with practices that are racially discriminatory. However, Ohio's statutory scheme imposes the death penalty in a racially discriminatory manner. (*See infra* Section A). A scheme that sentences blacks and those who kill white victims more frequently and which disproportionately places African-Americans on death row is in clear violation of the ICERD. Ohio's failure to rectify this discrimination is a direct violation of international law and of the Supremacy Clause of the United States Constitution.

d. Ohio's Statutory Scheme Violates The ICCPR'S and the CAT'S Prohibitions Against Cruel, Inhuman or Degrading Punishment.

The ICCPR prohibits subjecting any person to torture or to cruel, inhuman, or degrading treatment or punishment. Art. 7. Similarly, the CAT requires that states take action to prevent torture, which includes any act by which severe mental or physical pain is intentionally inflicted on a person for the purpose of punishing him for an act committed. *See* Art. 1-2. As administered, Ohio's death penalty inflicts unnecessary pain and suffering. Thus, there is a violation of international law and the Supremacy Clause.

e. Ohio's Obligations Under the ICCPR, the ICERD, and the CAT Are Not Limited By The Reservations and Conditions Placed In These Conventions By the Senate.

While conditions, reservations, and understandings accompanied the United States' ratification of the ICCPR, the ICERD, and the CAT, those conditions, reservations, and understandings cannot stand for two reasons. Article II, § 2 of the United States Constitution provides for the advice and consent of two-thirds of the Senate when a treaty is adopted. However, the Constitution makes no provision for the Senate to modify, condition, or make reservations to treaties. The Senate is not given the power to determine what aspects of a treaty the United States will and will not follow. Their role is to simply advise and consent.

Thus, the Senate's inclusion of conditions and reservations in treaties goes beyond that role of advice and consent. The Senate picks and chooses which items of a treaty will bind the United States and which will not. This is the equivalent of the line item veto, which is unconstitutional. *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). The Supreme Court specifically spoke to the enumeration of the president's powers in the Constitution in finding that the president did not possess the power to issue line item vetoes. *Id.* If it is not listed, then the President lacks the power to do it. *See id.* Similarly, the Constitution does not give the power to the Senate to make conditions and reservations, picking and choosing what aspects of a treaty

will become law. Thus the Senate lacks the power to do just that. Therefore, any conditions or reservations made by the Senate are unconstitutional. *See id.*

The Vienna Convention on the Law of Treaties further restricts the Senate's imposition of reservations. It allows reservations unless: they are prohibited by the treaty, the treaty provides that only specified reservations, not including the reservation in question, may be made, or the reservation is incompatible with the object and purpose of the treaty. [Art. 19(a)-(c)]. The ICCPR specifically precludes derogation of Articles 6-8, 11, 15-16, and 18. Under the Vienna Convention, the United States' reservations to these articles are invalid under the language of the treaty. *See id.* Further, the ICCPR's purpose is to protect the right to life and any reservation inconsistent with that purpose violates the Vienna Convention. Thus, United States reservations cannot stand under the Vienna Convention as well.

f. Ohio's Obligations Under The ICCPR Are Not Limited By The Senate's Declaration That It Is Not Self-Executing.

The Senate indicated that the ICCPR is not self-executing. However, the question of whether a treaty is self-executing is left to the judiciary. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985) [Restatement (Second) of Foreign Relations Law of the United States, Sec. 154(1) (1965)]. It is the function of the courts to say what the law is. *See, Marbury v. Madison*, 5 U.S. 137 (1803).

Further, requiring the passage of legislation to implement a treaty necessarily implicates the participation of the House of Representatives. By requiring legislation to implement a treaty, the House can effectively veto a treaty by refusing to pass the necessary legislation. However, Article 2, § 2 excludes the House of Representatives from the treaty process. Therefore, declaring a treaty to be not self-executing gives power to the House of Representatives not

contemplated by the United States Constitution. Thus, any declaration that a treaty is not self-executing is unconstitutional. *See Clinton*, 524 U.S. at 438.

3. *Ohio's Obligations Under Customary International Law*

International law is not merely discerned in treaties, conventions and covenants.

International law “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law.” *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

Regardless of the source “international law is a part of our law[.]” *The Paquete Habana*, 75 U.S. at 700.

The judiciary and commentators recognize the Universal Declaration of Human Rights (DHR) as binding international law. The DHR “no longer fits into the dichotomy of ‘binding treaty’ against ‘non-binding pronouncement,’ but is rather an authoritative statement of the international community.” *Filartiga*, 630 F.2d at 883 (internal citations omitted).

The DHR guarantees equal protection and due process (Art. 1, 2, 7, 11), recognizes the right to life (Art. 3), prohibits the use of torture or cruel, inhuman or degrading punishment (Art. 5) and is largely reminiscent of the ICCPR. Each of the guarantees found in the DHR are violated by Ohio’s statutory scheme. Thus, Ohio’s statutory scheme violates customary international law as codified in the DHR and cannot stand.

However, the DHR is not alone in its codification of customary international law. *Smith* directs courts to look to “the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decision recognizing and enforcing that law” in ascertaining international law. 18 U.S. (5 Wheat.) at 160-61. Ohio should be cognizant of the fact that its statutory scheme violates numerous declarations and conventions drafted and

adopted by the United Nations and the OAS, which may, because of the sheer number of countries that subscribe to them, codify customary international law. *See id.*

Ohio's statutory scheme is in violation of customary international law.

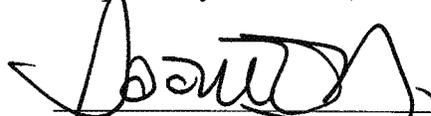
H. Conclusion

Ohio's death penalty scheme fails to ensure that arbitrary and discriminatory imposition of the death penalty will not occur. The procedures actually promote the imposition of the death penalty and, thus, are constitutionally intolerable. Ohio Revised Code §§ 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution and Article I, §§ 2, 9, 10, and 16 of the Ohio Constitution and international law. Steven Cepec's death sentence must be vacated.

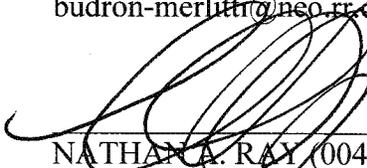
CONCLUSION

For all of the reasons contained herein, Appellant Steven Cepec requests that this conviction and/or sentence herein be reversed, and that he be granted all other and further relief to which here he entitled herein.

Respectfully submitted,



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ATTORNEYS FOR THE APPELLANT

PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been sent via regular United States Mail on this 4th day of August, 2014 to Dean Holman, Medina County Prosecuting Attorney, 72 Public Square, Medina, Ohio 44256.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Adam M. Vanho', written over a horizontal line.

ADAM M. VANHO (0073974)
NATHAN A. RAY (0041570)

ATTORNEYS FOR THE APPELLANT

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	*	CASE NO. 13 0915
Appellee	*	
-vs-	*	CAPITAL CASE
STEVEN E. CEPEC	*	
Appellant	*	

APPENDIX TO MERIT BRIEF
OF APPELLANT STEVEN E. CEPEC

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee

-vs-

STEVEN E. CEPEC

Appellant

*

CASE NO.

13-0915

*

On Appeal from the Medina County
Common Pleas Court

*

Case No. 10 CR 0588

*

*

CAPITAL CASE

NOTICE OF APPEAL OF APPELLANT, STEVEN E. CEPEC

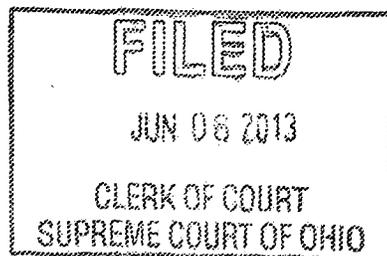
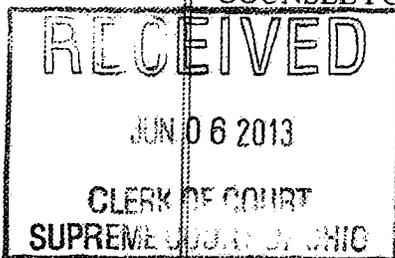
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COUNSEL FOR APPELLANT

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NOTICE OF APPEAL OF APPELLANT, STEVEN E. CEPEC

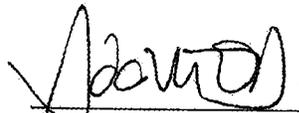
Appellant, STEVEN E. CEPEC, hereby gives notice of appeal to the Supreme Court of Ohio from the Conviction, Judgment and Sentence of the Medina County Court of Common Pleas, entered in Case No. 10 CR 0588, on April 25, 2013

Appellant Cepec, in his direct appeal of right, appeals both the conviction and sentence in this matter.



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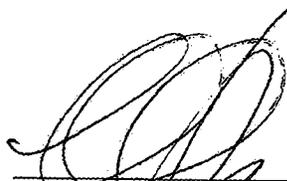
Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been mailed by regular U.S. Mail this 31st day of May, 2013, to Dean Holman, Medina County Prosecutor, 72 Public Square, Medina, Ohio 44256.



NATHAN A. RAY
ADAM M. VAN HO
Counsel for Appellant

IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

COMMON PLEAS COURT
2013 APR 25 PM 2:51

STATE of OHIO,

Plaintiff,

Case No. 10CR0588

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS

vs.

Judge James L. Kimbler

STEVEN E. CEPEC,

Defendant.

Judgment Entry

This matter came before the Court for a sentencing hearing on April 25, 2013, pursuant to R.C. 2929.19. Present was the State of Ohio, represented by Medina County Prosecuting Attorney Dean Holman; the Defendant, Mr. Steven E. Cepec, represented by Attorney Kerry O'Brien and Attorney Russell Buzzelli, and Court Reporter, Ms. Leanne Haswell.

Mr. Cepec was indicted by the Medina County Grand Jury and tried on the following counts:

Count I was for Aggravated Murder in violation of R. C. 2903.01 (A). The court alleged that Mr. Cepec committed aggravated murder with prior calculation and design.

Count II was for Aggravated Murder in violation of R.C. 2903.01 (B). The indictment alleged that Mr. Cepec committed aggravated murder in the course of committing Aggravated Robbery.

Count III was for Aggravated Murder in violation of R.C. 2903.01 (B). The indictment alleged that Mr. Cepec committed aggravated murder in the course of committing Kidnapping.

Count IV was for Aggravated Murder in violation of R.C. 2903.01 (B). The indictment alleged that Mr. Cepec committed aggravated murder in the course of committing Aggravated Burglary.

All four counts of Aggravated Murder had four specifications attached to them. Three specifications were made pursuant to R.C. 2929.04 (A) (7) and R.C. 2941.14. Those specifications alleged that Mr. Cepec committed the offenses while committing Aggravated Robbery; Kidnapping; and while committing Aggravated Burglary.

The fourth specification attached to each count of Aggravated Murder was that Mr. Cepec committed the offense while being at large after having broken detention. This specification was made pursuant to R.C. 2929.04 (A) (4) and R.C. 2941.14.

Count V alleged that Mr. Cepec committed Murder by purposely causing the death of Frank Muntz, in violation of R.C. 2903.02 (A).

Count VI alleged that Mr. Cepec committed the offense of Murder as a proximate result of committing or attempting to commit an offense of violence that was a felony of the first or second degree, but that was not a violation of R.C. 2903.03 or 2903.04. Count VI alleged a violation of R.C. 2903.02 (B).

Count VII alleged that Mr. Cepec committed the offense of Aggravated Robbery, in violation of R.C. 2911.01 (A) (3) and Count VIII alleged that Mr. Cepec committed the offense of Aggravated Burglary in violation of R. C. 2911.11 (A) (1) and 2911.11 (A) (2). Both Count VII and VIII carried a Repeat Violent Offender specification which alleged that Mr. Cepec had been previously been convicted of Aggravated Burglary. That specification was made pursuant to R.C. 2941.14.

Counts I through VIII were all tried to a duly impaneled jury. With respect to the Repeat Violent Offender specification, Mr. Cepec waived his right to be tried by a jury and consented to be tried by the Court. The Court found Mr. Cepec guilty of the repeat violent offender specification.

The jury returned verdicts of not guilty on Count I, guilty on Counts II through VIII. The Court returned a verdict of guilty on the repeat violent offender specification. Since Counts II through IV were charges of Aggravated Murder with Aggravated Specifications, the Court recessed the trial for one week to allow the parties to prepare for the trial regarding the penalty to be imposed for Aggravated Murder with Aggravated Specifications. Mr. Cepec waived a pre-sentence investigation report.

Prior to the beginning of that trial, the State moved to merge Counts III and IV into Count II and moved to merge the specification of Kidnapping into the remaining specifications. That motion was granted.

The jury heard the evidence offered by the State and Mr. Cepec, received the unsworn statement of Mr. Cepec and heard the closing arguments of counsel. The jury then deliberated and returned a verdict of Death on Count II.

The Court then undertook an independent evaluation of the evidence offered by both parties, the unsworn statement of Mr. Cepec, and the arguments of counsel. After having conducted that analysis, the Court found that the State of Ohio had proved beyond a reasonable doubt that the aggravating circumstances as set forth in the specifications outweighed the mitigating factors and ordered that a sentence of death be imposed on Count II.

Because Counts II, V, and VI are allied offenses of similar import, the State had to elect under which count the State wanted Mr. Cepec sentenced. The State of Ohio elected to have Mr. Cepec sentenced on Count II, for Aggravated Murder with death penalty specifications as opposed to being sentenced for Murder in Counts V and VI. The Court then proceeded to sentence Mr. Cepec on Count II, VIII, and the Repeat Violent Offender Specification. The Court finds that Count VII is merged into Count II.

Prior to imposing sentence the Court heard elocution from the State of Ohio; heard from any victim's representatives that wished to speak; informed Mr. Cepec of the decision of the jury as to Counts II through Count VII and asked him if he knew of any reason why sentence should not be pronounced. Mr. Cepec, through his attorneys, replied that he did not.

The Court then proceeded to listen to elocution from Mr. Cepec's attorneys and gave Mr. Cepec an opportunity to make a statement in mitigation. Before imposing sentence the Court considered the criteria for imposing sentences in capital cases set forth in R.C. 2929.04. The Court also considered the principles and purposes of sentencing under R.C. 2929.11 and has balanced the seriousness and recidivism factors under R.C. 2929.12. The Court also considered whether the presumption in favor of imprisonment for Count VIII had been overcome and found that it had not.

The Court then imposed the following sentence:

On Count II the Court imposed a sentence of death by lethal injection for the offense of Aggravated Murder with death penalty specifications pursuant to R.C. 2929.02 (A). The Court further orders that the death penalty be carried out on June 3, 2014.

On Count VIII the Court imposed a prison sentence of 10 years for the offense of Aggravated Burglary pursuant to R.C. 2929.13 and R.C. 2929.14.

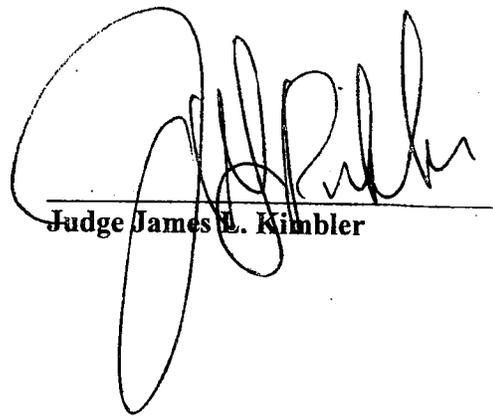
The State elected to have the Court impose punishment on the Repeat Violent Offender specification to Count VIII of the indictment. The Court then imposed a prison sentence of 10 years on that specification.

The Court then found that consecutive prison sentences were necessary to protect the public and to punish Mr. Cepec and further found that consecutive sentences were not disproportionate to the seriousness of Mr. Cepec's conduct and to the danger that he poses to the public. After making those findings the Court then found that one or more of the offenses were committed as parts of the same course of conduct and the harm caused by the offenses was so great that no single prison term would adequately reflect the seriousness of Mr. Cepec's conduct.

Having made those findings, the Court then ordered that the prison terms imposed on Counts VIII and the Repeat Violent Offender specification be served consecutively to each other and to the sentence imposed on Count II.

The Court further ordered that all court costs be waived and that no fine be imposed.

So Ordered, Adjudged, and Decreed.



Judge James L. Kimbler

IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

COMMON PLEAS COURT

2013 APR 25 AM 11:41

STATE of OHIO,

Plaintiff,

Case No. 10CR0588

DAVID B. [REDACTED]
MEDINA COUNTY
CLERK OF COURT

vs.

Judge James L. Kimbler

STEVEN E. CEPEC,

Defendant.

Sentencing Opinion

Introduction

Mr. Cepec was indicted by the Medina County Grand Jury on November 24, 2010. The indictment listed four counts of aggravated murder; two counts of murder; one count of aggravated robbery and one count of aggravated burglary. All of the counts concerned crimes committed against [REDACTED]

The aggravated murder counts were as follows:

Count I was for aggravated murder in violation of R. C 2903.01 (A). The court alleged that Mr. Cepec committed aggravated murder with prior calculation and design.

Count II was for aggravated murder in violation of R.C. 2903.01 (B). The indictment alleged that Mr. Cepec committed aggravated murder in the course of committing Aggravated robbery.

Count III was for aggravated murder in violation of R.C. 2903.01 (B). The indictment alleged that Mr. Cepec committed aggravated murder in the course of committing kidnapping.

Count IV was for aggravated murder in violation of R.C. 2903.01 (B). The indictment alleged that Mr. Cepec committed aggravated murder in the course of committing aggravated burglary.

All four counts of aggravated murder had four specifications attached to them. Three specifications were made pursuant to R.C. 2929.04 (A) (7) and R.C. 2941.14. Those specifications alleged that Mr. Cepec committed the offenses while committing aggravated robbery; kidnapping; and while committing aggravated burglary.

The fourth specification attached to each count of aggravated murder was that Mr. Cepec committed the offense while being at large after having broken detention. This specification was made pursuant to R.C. 2929.04 (A) (4) and R.C. 2941.14.

Count V alleged that Mr. Cepec committed Murder by purposely causing the death of [REDACTED] in violation of R.C. 2903.02 (A).

Count VI alleged that Mr. Cepec committed the offense of Murder as a proximate result of committing or attempting to commit an offense of violence that was a felony of the first or second degree, but that was not a violation of R.C. 2903.03 or 2903.04. Count VI alleged a violation of R.C. 2903.02 (B).

Count VII alleged that Mr. Cepec committed the offense of aggravated robbery, in violation of R.C. 2911.01 (A) (3) and Count VIII alleged that Mr. Cepec committed the offense of aggravated burglary in violation of R. C. 2911.11 (A) (1) and 2911.11 (A) (2). Both Count VII and VIII carried a repeat violent offender specification which alleged that Mr. Cepec had been previously been convicted of aggravated burglary. That specification was made pursuant to R.C. 2941.14.

Mr. Cepec entered not guilty pleas to all eight counts and all of the specifications attached to each count. A jury was selected during the week of February 4, 2013 and the case was tried on February 11. On February 22, 2013, the jury returned its verdict. The jury found Mr. Cepec not guilty of Count I, but guilty of all other Counts, including three counts of aggravated murder. In rendering its verdicts, the jury found that the four specifications attached to Counts II, III, and IV had all been proved beyond a reasonable doubt.

Since Mr. Cepec had waived his right to a jury trial on the repeat violent offender specification, that issue was tried to the Court, which found beyond a reasonable doubt that Mr. Cepec was a repeat violent offender.

The Court then recessed the trial for one week to allow the parties to prepare for the penalty trial on the three counts of Aggravated murder set forth in Counts II, III, and IV. Prior to the start of the penalty trial the State made a motion to merge Count III and IV into Count II. The State also moved to merge the specification that Mr. Cepec had committed the offense of kidnapping while committing Aggravated murder into the other three specifications. Therefore the jury was to consider the aggravating circumstances that Mr. Cepec committed aggravated

murder while committing aggravated robbery; aggravated burglary; and having escaped from detention.

The jury was to determine whether the State had shown beyond a reasonable doubt that the aggravating circumstances of the aggravated murder in Count II outweighed the mitigating factors as set forth in R.C. 2929.04 (B).

Of the seven mitigating factors set forth in R.C. 2929.04 (B), counsel for Mr. Cepec agreed that five of the factors did not apply. Those were R.C. 2929.04 (B) (1), (inducement or facilitation by [REDACTED], (B) (2), (Mr. Cepec being under duress, coercion, or strong provocation); B (4), (youth of Mr. Cepec); (B) (5), (Mr. Cepec's lack of significant history of prior criminal convictions and delinquency adjudications); and (B) (6), (Mr. Cepec not being the principal offender).

Consequently only two of the mitigating factors set forth in R.C. 2929.04 (B) were considered by the jury. Those were the factors set forth in R.C. 2929.04 (B) (3) and in R.C. 2929.04 (B) (7).

After hearing the evidence, the Jury returned a verdict of death for the offense of aggravated murder as set forth in Count II. The matter is now before the Court so that the Court, pursuant to R.C. 2929.03 (D) (3) can undertake an independent analysis of the relevant evidence presented at trial including the testimony; the unsworn statement of Mr. Cepec; other evidence; and the arguments of counsel to determine whether the State has shown that the aggravating circumstances outweigh, beyond a reasonable doubt, the mitigating factors.

Findings of Fact as to Aggravating Circumstances

The aggravating circumstances regarding Count II were that Mr. Cepec committed aggravated murder while doing the following:

- Committing an aggravated burglary at the residence of [REDACTED]
- Committing an aggravated robbery at the residence of [REDACTED] and [REDACTED]
- Committing after breaking from detention.

The facts supporting the jury's conclusion that the State had established the above aggravating circumstances beyond a reasonable doubt are as follows:

On June 3, 2010, Mr. Cepec entered the home of [REDACTED] carrying a pellet pistol that closely resembled a firearm; a roll of duct tape; and a claw hammer. Mr. Cepec entered the premises with the intention of taking money from [REDACTED] residence in order to purchase

drugs of abuse, particularly heroin. He entered the home without any permission and by coming through the door that led from the garage to the main part of the home.

On June 3, 2010, Mr. Cepec was under the supervision of the Ohio Adult Parole Authority, and had been previously ordered by an Adult Parole Authority hearing officer to undergo treatment for drug abuse at the Oriana House program in Summit County, Ohio. This order had followed a hearing on a parole violation that had been filed by his parole officer. He was on supervision for a felony conviction.

Mr. Cepec was delivered to the Oriana House facility by his parole officer. By the next day he had left the facility claiming that he needed to go to an hospital emergency room. He never returned to the facility.

Over the next few days Mr. Cepec went back to Medina County and was living with his girlfriend. On the morning of June 3, 2010, Mr. Cepec was in Cleveland, Ohio, with his girlfriend. They had been told to leave the premises where they were staying by one of the owners of the premises.

At some point Mr. Cepec and his girlfriend separated. She went to visit her adult daughter and he went with two of their friends back to Medina County. Mr. Cepec had the friends drop him off at a barn owned by his girlfriend's father. He picked up the pellet pistol, the roll of duct tape, and the hammer.

When Mr. Cepec entered the [REDACTED] residence he found [REDACTED] at home. He pulled the pellet pistol out and told [REDACTED] that he is there to steal from him. He bound Mr. [REDACTED] hands with the duct tape. While he was doing that, [REDACTED] began to resist Mr. Cepec. [REDACTED] Cepec then struck him four times with the claw end of the hammer and also strangled him with an electrical cord that he takes from a lamp in the home. [REDACTED] died from both the wounds to his head and the strangulation. Either injury was sufficient to kill him.

After striking [REDACTED] and strangling him, Mr. Cepec took money from Mr. Muntz's wallet. He also went through the home looking for money and took coins from the home. While he was in the home, Mr. Cepec was not alone. [REDACTED] adult nephew was also in the house and he called the Medina County Sheriff's Department.

Mr. Cepec was in [REDACTED] garage when a Sheriff's cruiser arrived. He took off running, but was eventually apprehended. Over the next few days he admitted to Detectives from

the Sheriff's Department that he had struck [REDACTED] with the hammer and had strangled him. He also admitted that he had robbed [REDACTED]

Although at one point during his statements to the Detectives he suggested that his girlfriend was with him when he entered the [REDACTED] residence and that she had struck the first blow with the hammer, during his unsworn statement to the jury Mr. Cepec admitted that he acted alone on June 3rd.

Conclusions of Law as to Aggravating Circumstances

The State of Ohio is required to prove the aggravating circumstances listed in the indictment beyond a reasonable doubt. See R.C. 2929.04 (B).

"Reasonable doubt" is defined in R.C. 2901.05 (D). That definition reads as follows:

"Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs.

In this particular case the State of Ohio's aggravating circumstances are as set forth in R.C. 2929.04 (A) (4) and (A) (7).

The aggravating circumstance listed pursuant to R.C. 2929.04 (A) (4) is that Mr. Cepec committed the murder while he had escaped from detention after being incarcerated for a felony and then released and placed on supervision.

The aggravating circumstances listed pursuant to R.C. 2929.04 (A) (7) were that Mr. Cepec committed the offense of murder while committing an aggravated burglary and an aggravated robbery.

The elements of the crime of Aggravated burglary, R.C. 2929.11 are as follows:

- (1). Trespassing, by force, stealth, or deception
- (2). In an occupied structure
- (3). When any person other than an accomplice of the offender is present
- (4). With purpose to commit in the structure any criminal offense
- (5). And any of the following apply:

- (a). The offender inflicts, or attempts or threatens to inflict physical harm on another and/or
- (b). The offender has a deadly weapon or dangerous ordnance on or about his person or under his control.

R.C. 2901.01 (A) (1) defines force as follows: "Force" means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing

"Stealth", although undefined in the Revised Code, has been defined as "any secret, sly or clandestine act to avoid discovery, and to gain entrance into or to remain within a residence of another without permission." *State v. Ward* (1993), 85 Ohio App.3d 537, 540, 620 N.E.2d 168, quoting *State v. Lane* (1976), 50 Ohio App.2d 41, 361 N.E.2d 535.

"Deception" is defined in R.C. 2913.01 (A) as follows: (A) "Deception" means knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.

"Trespass" as used for both aggravated robbery and aggravated burglary refers to the crime defined in R.C. 2911.21. A trespass occurs when a person knowingly enters or remains on the land or premises of another without privilege.

"Privilege" means an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity.

"Knowingly" is defined in R.C. 2901.22 (B) as follows:

A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

Occupied structure is defined in R.C. 2909.01 (C) as follows:

"Occupied structure" includes any house that is maintained as a permanent or temporary habitation of any person, whether or not any person is actually present.

A person acts with "purpose" when he or she does an act with the specific intention of causing a certain result.

"Physical harm" is defined in R.C. 2901.01 (A) (3) as follows: "Physical harm to persons" means any injury, illness, or other physiological impairment, regardless of its gravity or duration.

"Deadly weapon" is defined in R.C. 2923.11 (A) as follows: "Deadly weapon" means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.

The elements of the offense of Aggravated robbery in violation of R.C. 2911.01 are

- (1). Committing or attempting to commit a theft offense
- (2). While inflicting or attempting to inflict serious physical harm on another.

"Theft offense" as defined in R.C. 2913.01 includes both an aggravated burglary as well as a theft.

For purposes of the crime of Aggravated burglary the definition of a "deadly weapon" is the definition set forth in R.C. 2923.11 (A).

As used in R.C. 2911.01 (A), the term "serious physical harm" includes any physical harm that carries a substantial risk of death.

"Detention" is defined in R.C. 2921.01 (E) and includes being supervised by an employee of the Department of Rehabilitation and Correction for the State of Ohio.

Holding

The State of Ohio established beyond a reasonable doubt that Mr. Cepec committed aggravated murder and that in the course of committing that aggravated murder, he committed the aggravating circumstances that were set forth in the indictment.

Discussion

Mr. Cepec entered the home of [REDACTED] without permission and by sneaking in through a doorway. The act of entry into the [REDACTED] residence constituted a trespass, and there was no evidence that Mr. Cepec had any privilege to come into the [REDACTED] residence without invitation.

When he entered, he was carrying what appeared to be a firearm, although, in reality, it was a pellet gun. He used the threat of the pellet gun to persuade [REDACTED] to allow him to bind his hands with the duct tape. Once he had [REDACTED] hands tied, there was a struggle and he struck him with the claw end of the hammer he brought with him and also strangled him with the electrical cord from a lamp.

Ohio law recognizes the concept of a continuing trespass while an offender is committing an aggravated burglary. See, for example, *State v. Tyson*, 2011 Ohio 4981, at P31.

In this case the jury could find, beyond a reasonable doubt, that Mr. Cepec used force, stealth, and deception to trespass in the [REDACTED] residence. Stealth by coming in without an invitation; deception by convincing [REDACTED] that the pellet gun was a real firearm; and force by striking [REDACTED] with the claw hammer and strangling him with the electrical cord. Striking [REDACTED] and then strangling him certainly constituted physical harm to [REDACTED] indeed, those acts constituted serious physical harm to [REDACTED] and both the claw hammer and the electrical cord were used as a deadly weapon in that they were used in such a way as to cause death.

The jury could also find, beyond a reasonable doubt, that when he was committing the trespass onto [REDACTED] home, Mr. Cepec had the purpose to steal from [REDACTED] thus, committing the offenses of theft and aggravated robbery.

These findings, which were obviously made by the jury, since the jury also convicted Mr. Cepec of aggravated burglary and aggravated robbery, constituted proof beyond a reasonable doubt that Mr. Cepec committed the specification of aggravated burglary.

The same facts also allowed the jury to find beyond a reasonable doubt that Mr. Cepec committed the offense of aggravated robbery. He took money from [REDACTED] person and residence after inflicting serious physical harm on [REDACTED]

Finally, there is no doubt that Mr. Cepec committed these offenses after having escaped detention by walking away from the Oriana House program which he had been ordered to attend by the parole hearing officer. He was ordered to attend that program after having been found to have violated the terms of his supervision.

Findings of Fact as to Mitigating Factors

Mr. Cepec was born to a woman who was a drug user and perhaps engaged in prostitution. She and Mr. Cepec's father parted ways when Mr. Cepec was young and he was primarily raised by his grandparents and his father. Mr. Cepec was primarily raised by his grandparents, who, along with Mr. Cepec's father, would administer corporal punishment if Mr. Cepec violated the household rules, as well as, according to his uncle, Ricky Cepec, "yelling" at him.

Economically the household was described as "lower middle class" by Mr. Ricky Cepec. Mr. Cepec's father, also known as Steve Cepec, worked for various employers, although the for last 20 years or so, he has worked for the City of Medina.

When Mr. Cepec started school, his academic progress was either satisfactory or above satisfactory, but he began having problems with unstructured time, as when he was on recess from class. He also began having problems interacting with his classmates. As a result of these difficulties Mr. Cepec was placed in a learning disabled category. The designation of Mr. Cepec as learning disabled wasn't because of his inability to comprehend material but was due to his interactions with others.

While he was going through school, Mr. Cepec started using drugs. He was introduced to marijuana by his older brother. His drug use continued through high school. At one point his family learned of a drug program in Minnesota and his father enrolled him in that program, but after he returned to Medina County, his drug use continued.

His drug use also may have contributed to a decline in scores on his I.Q. tests. He went from having a score of 115 to 85, which was a score on an I.Q. test administered by Dr. James Siddall, a clinical psychologist retained by Mr. Cepec's attorneys.

As he became an adult, Mr. Cepec began committing felony offenses that resulted in him being incarcerated in the State penal system. He interacted with psychologists in prison, who diagnosed him as having anti-social personality disorder and perhaps borderline personality disorder. While in prison he was able to take part in counseling programs, but, when he was out of prison, he didn't co-operate with his parole officer in programs designed to reduce his use of illegal drugs.

His parole officer, Mr. Jeff Taraschke testified that he tried to get Mr. Cepec into several drug abuse and mental health programs. According to Mr. Taraschke, who supervised Mr. Cepec from 2009 until his arrest in 2010 for the present offense, he was almost "totally non-compliant." Mr. Cepec repeatedly told Mr. Taraschke that he did not have a drug abuse problem or a mental health problem, although it seemed obvious to Mr. Taraschke that he did.

Although Mr. Taraschke testified that he supervised Mr. Cepec for a little over a year, he thought that he got to know Mr. Cepec better than anyone other than his closest friends and family. Mr. Taraschke discussed with Mr. Cepec whether he had been prescribed drugs for mental health issues. Mr. Cepec told Mr. Taraschke that he had been prescribed such medicines,

but he didn't like the way they made him feel, so he didn't take them. Mr. Cepec also told Mr. Taraschke that he didn't need such medicines.

Mr. Taraschke also testified that while he was supervising Mr. Cepec, he filed parole violations on Mr. Cepec for fighting with men over women. He also testified that he believed Mr. Cepec to be highly manipulative.

There was testimony from witnesses other than Mr. Cepec that Mr. Cepec is remorseful over the death of [REDACTED]. These witnesses included Dr. Bruce Maaser, a clinical psychologist employed by the State of Ohio and also by Dr. James Siddall. There was also testimony from Dr. Maaser and Dr. Siddall that since he has been incarcerated for aggravated murder he suffers from depression.

Dr. Siddall testified that, in his opinion, there were several mitigating factors in Mr. Cepec's case. These included a history of drug dependency in his family and the problems that existed for the first couple of years of his development. Dr. Siddell testified that such issues would lead to lack of trust in an young child and inability to form relationships as the child got older.

Dr. Siddell also testified that children who grow up in environments like the one that Mr. Cepec grew up in are at a higher risk for anxiety, substance abuse, and aggressive behavior, as well as personality disorders. Such individuals also lack maturity and have difficulty controlling impulsivity.

Regarding personality disorders, Dr. Siddell testified that he also believed that Mr. Cepec suffered from antisocial personality disorder. He also testified that there were indications that Mr. Cepec suffered from borderline personality disorder.

An employer of Mr. Cepec also testified. Mr. Kevin Minor testified that he employed Mr. Cepec for several months prior to June 3, 2010 and that he was a fairly reliable employee.

Conclusions of Law Regarding Mitigating Factors

Personality disorders do not qualify as either mental disease or a mental defect for purposes of R.C. 2929.04 (B) (3). See *State v. Lorraine* (1993), 66 Ohio St. 3d 414, and *State v. Richey* (1992), 64 Ohio St. 3d 353

Although personality disorders do not qualify as either a "mental disease" or a "mental defect" under R.C. 2929.04 (B) (3), they can be considered in mitigation under R.C. 2929.04 (B) (7). See *State v. Foust* (2004), 105 Ohio St. 3d 137 at P156

Drug abuse is entitled to minimal weight or modest weight when considering mitigating factors. See *State v. Smith* (2000), 87 Ohio St. 3d 424, *State v. Hill* (1995), 73 Ohio St. 3d 433, and *State v. Green* (1993), 66 Ohio St. 3d 141.

Remorse is a mitigating factor under R.C. 2929.04 (B) (7). See *State v. Trimble* (2009), 122 Ohio St. 3d 297 at P327.

Although remorse is a mitigating factor, retrospective remorse is not entitled to great weight when weighting aggravating circumstances against mitigating factors. See *State v. Gaper* (2004), 104 Ohio St. 3d 358 at P180.

A sporadic history of employment is only entitled to "minimal weight" as a mitigating factor under R.C. 2929.04 (B)(7). See *State v. Ketterer* (2006), 111 Ohio St. 3d 70, 99, at P99.

Holding

The State of Ohio established beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating factors and, consequently, the death penalty is appropriate.

Discussion

This Court finds that Mr. Cepec's mental health issues do not cause him to lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Thus, the mitigating factor set out in R.C. 2929.04 (B) (3) does not exist in this case.

The Court, however, also believes that while it may not consider Mr. Cepec's mental health issues as a mitigating factor under R.C. 2929.04 (B) (3), it may consider those issues under R.C. 2929.04 (B) (7).

Under that subsection, the Court finds that the following mitigating factors based on Mr. Cepec's psychological history exist:

1. Mr. Cepec was not raised in a particularly stable household;
2. He is drug dependent and/or drug addicted;
3. He suffers from personality disorders;

4. These personality disorders cause him to have trouble developing relationships with others; and
5. He suffers from depression.

Even though this Court finds that the above mitigating factors exist, it does not find that they outweigh the aggravating circumstances. The reasons for this conclusion are set forth below.

Mr. Cepec was not raised in a particularly stable household or a particularly supportive one. The defense focused its attention on Mr. Cepec's lack of a mother and his treatment by his father. Yet, the Court would note, that this same father raised two other sons, neither of which, to the Court's knowledge, have ever been charged with murder. Indeed, his younger brother, who testified on his behalf, at one time worked for the Medina County Juvenile Justice system.

Mr. Cepec's problems result in no small part from his history of drug use and drug addiction. The Court finds, however, that this mitigating factor is entitled to little weight since Mr. Cepec has consistently refused to get treatment for his drug abuse. In fact, this particular crime was committed after he had walked away from a treatment facility that he was ordered to attend.

The same thing is true for his mental health issues. He consistently refused to get treatment or take prescribed medicines which would have potentially helped him with these issues.

The Court also gives little weight to Mr. Cepec's expressions of remorse. This Court would note that Mr. Cepec's parole officer described him as highly manipulative. Further, after killing ██████████ Mr. Cepec went through ██████████ residence looking for property and money to steal.

Finally, while this Court has no reason to doubt that diagnosis of depression, the Court would note that this diagnosis follows his incarceration and charges for aggravated murder. Clearly it is hard to tell whether Mr. Cepec's depression is biological or environmental. Further, even if biological, there is no evidence that his depression contributed to his commission of the offenses against ██████████

Likewise the Court finds that Mr. Cepec's history of sporadic employment is only entitled to be given minimal weight.

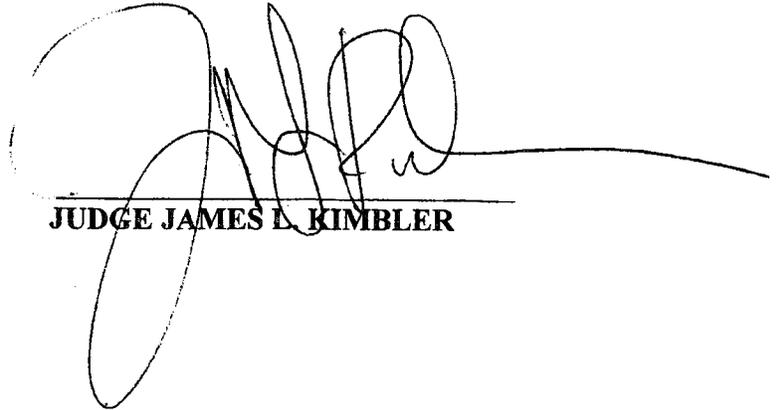
Mr. Cepec's attorneys argue that this Court should impose a sentence of life in prison without parole and that there is evidence that Mr. Cepec would not be likely to commit other crimes while in prison. Mr. Cepec's attorneys apparently want this Court to consider imposing such a sentence on Mr. Cepec.

This Court, however, is only mandated to consider imposing such a sentence if it has a reasonable doubt that the aggravating circumstances outweigh the mitigating factors. Since it does not have such a doubt, it is not obligated to consider imposing such a sentence.

Order

The Court, having found that the aggravating circumstances outweigh the mitigating factors, orders that a sentence of death by lethal injection shall be imposed on Mr. Cepec at the sentencing hearing to be held on April 25, 2013.

SO ORDERED.



JUDGE JAMES L. KIMBLER

IN THE COURT OF COMMON PLEAS
MEDINA COUNTY, OHIO

COMMON PLEAS COURT
2013 FEB -4 AM 9:24

FILED
DAVID B. WATSWORTH
MEDINA COUNTY
CLERK OF COURTS

STATE of OHIO,

Case No. 10CR0588

Plaintiff,

Vs.

Judge James L. Kimbler

STEVEN E. CEPEC,

Defendant.

JOURNAL ENTRY

Introduction

Mr. Cepec filed a motion to suppress statements that he made to law enforcement officers. These statements were made both on the day of his arrest and following his arrest. He contends that the statements were made in violation of his right not to incriminate himself and his right to an attorney. This Court hereby denies Mr. Cepec's motion to suppress.

Findings of Fact

Pursuant to Crim. R. 12, this Court hereby makes the following findings of fact:

On June 3, 2010, Medina County Sheriff Deputies responded to a call regarding a burglary at the residence of a Mr. Frank Muntz in Chatham Township. The call came in at around 2:30 pm and Sgt. Steven Herte responded to the call. He found an individual in the residence's garage. The individual was Mr. Cepec.

Mr. Cepec started advancing toward Sgt. Herte. Sgt. Herte told him to show his hands, at which point Mr. Cepec took off running out of the garage. There were two other deputies at the residence when Mr. Cepec took off running. The deputies started chasing Mr. Cepec.

There was a wood about 200 yards from the Muntz residence and a soybean field about 100 yards from the residence. The deputies fanned out through the soybean field but did not find Mr. Cepec. They started to backtrack when Sgt. Herte heard another deputy yell "show me your hands". Sgt. Herte saw that the deputy was pointing his service weapon at a bush.

Sgt. Herte ran over to the bush and found Mr. Cepec lying on the ground under the bush. Sgt. Herte told him to come out from under the bush. Mr. Cepec started to stand up but the deputies had him lie down and then they handcuffed him.

After he was handcuffed Dep. Kohler advised him of his *Miranda* rights. Dep. Kohler told Mr. Cepec that he had the right to remain silent, that anything he said could be used against him in a court of law, he had the right to talk to an attorney and have one present while being questioned, and if he couldn't afford an attorney, one would be appointed. Dep. Kohler then asked Mr. Cepec if he understood his rights. Mr. Cepec did not respond to that question and, in fact, never said anything to Dep. Kohler.

While Dep. Kohler was giving the *Miranda* warnings to Mr. Cepec, Sgt. Cartwright joined them. When Sgt. Cartwright came up he identified Mr. Cepec. While he was with Mr. Cepec a notice came through the walkie-talkies that the deputies carried that an individual in the house, who was Mr. Frank Muntz, was seriously injured. Mr. Cepec overheard that radio traffic and said "I didn't do it."

After Mr. Cepec was handcuffed and Dep. Kohler had given him the warnings described above, Mr. Cepec was escorted by the Spencer Police Chief, who had also responded to the call to his police cruiser.

After Mr. Cepec had been placed in the Spencer cruiser Dep. Todd Hicks arrived on the scene. On June 3, 2010 Dep. Hick was assigned to the Medina County Sheriff Department's Detective Bureau. Dep. Hicks entered the Spencer cruiser and encountered Mr. Cepec. Before Dep. Hicks could give *Miranda* warnings to Mr. Cepec he started saying "I didn't do it. I didn't do it."

Dep. Hicks then gave *Miranda* warnings to Mr. Cepec by reading from a pre-printed form that the Medina County Sheriff's Department uses. After he had read the form to Mr. Cepec, he asked him if he understood what Dep. Hicks had said and he nodded.

The form that Dep. Hicks read to Mr. Cepec advised him that anything he said would be used against him, that he had a right to an attorney, and for the attorney to be present during any questioning, that if he couldn't afford an attorney, one would be appointed by the court to represent him, and if he decided to answer questions without an attorney being present, he could stop at any time or he could stop at any time and then ask for an attorney.

Following Mr. Cepec's nod Dep. Hicks asked him what happened. Mr. Cepec responded that he didn't do it and that Paul Muntz, Frank Muntz's nephew, had done it. He kept repeating that over and over.

Following the interview between Mr. Cepec and Dep. Hicks Mr. Cepec was transported to the Medina County Jail by Dep. Dave Porter. Dep. Porter did not give Mr. Cepec any *Miranda* warnings. During a five minute part of the 20 minute drive Mr. Cepec initiated conversation with Dep. Porter. He told Dep. Porter that he did not attack Mr. Frank Muntz that it must have been Mr. Paul Muntz and then he asked the deputy about Mr. Frank Muntz's physical condition. The deputy told Mr. Cepec that he didn't know anything about Mr. Muntz's condition because he hadn't been inside the house.

The next interaction between Mr. Cepec and Medina County Sheriff Deputies took place at the Medina County Jail on June 3, 2010. Mr. Cepec was interviewed by two deputies of the Medina County Sheriff's Department. One of the deputies was Tadd Davis, who was then assigned to the Detective Bureau and the other was Samo Mernik, who was also assigned to the Detective Bureau.

At the onset of the interview with Mr. Cepec, Detective Davis informed Mr. Cepec of his constitutional rights by administering the *Miranda* warnings. He told Mr. Cepec that anything he said can and would be used against him in a court of law, that he had the right to consult with a lawyer before answering any questions, that he had the right to have a lawyer during the questioning, and that if he could not afford a lawyer one would be provided "free of cost". He then asked Mr. Cepec if he understood his rights.

Instead of answering the question about understanding his rights, Mr. Cepec launched into an explanation of what happened over at Mr. Frank Muntz's residence. He started off by saying that "Went over to use the phone."

During the ensuing interrogation Det. Mernik asked Mr. Cepec if he had done drugs that day and Mr. Cepec responded that he had smoked crack the night before, but had not done any drugs during the day of June 3, 2010. He also denied that he consumed any alcoholic beverages.

During the interrogation Mr. Cepec asked about dinner, (this question took place at about 6:45 pm), and he was told that the Sheriff's Department had a dinner waiting for him. During that time period he also asked if there was a water fountain he could walk to and he was told that

there was not. A few minutes later, however, he asked Detective Mernik if he could have some water and Detective Mernik told another Deputy, Travis, to get Mr. Cepec a cup of water.

During the interrogation of June 3, 2010, Detective Mernik noticed that Mr. Cepec was yawning and he asked Mr. Cepec if he was tired. Mr. Cepec responded that he was not tired but that he was "freaking out".

At points during the conversation Mr. Cepec asked to use the bathroom, for water, or for a meal. He was told that he would be given a box lunch. At some point in the interrogation Detective Davis brings food in for Mr. Cepec., which consisted of a piece of pizza. At around 10 pm there was a discussion between Mr. Cepec and a deputy over whether Mr. Cepec could have a tray of food. The deputy pointed out that he had had a dinner tray at around 4:00 to 4:30 pm, but Mr. Cepec insisted that the tray had been his lunch tray.

Although at times Mr. Cepec asked for a drink of water and food, most of the time was spent with Mr. Cepec answering questions posed by the deputies and an assistant Medina County Prosecutor, Scott Salisbury. At one point during the June 3, 2010 interrogation Mr. Cepec was given the use of a cell phone and he called a person named "Ted". At no time during the June 3, 2010 interrogation did he ask to speak to an attorney.

On June 4, 2010, Detective Davis resumed the questioning of Mr. Cepec. Before he questioned Mr. Cepec he advised him on his rights and asked that Mr. Cepec verbally state that he understood those rights.

He told Mr. Cepec that he had a right to remain silent and asked Mr. Cepec if he understood that right. Mr. Cepec answered that he did.

He told Mr. Cepec that anything that he said can and would be used against him in court and asked Mr. Cepec if he understood that warning. Mr. Cepec stated that he did.

He told Mr. Cepec that he had the right to consult with an attorney before answering any questions and to have a lawyer present while being questioned. He asked Mr. Cepec if he understood those rights and Mr. Cepec stated that he did.

He then told Mr. Cepec that if he couldn't afford a lawyer, one would be provided "free of cost". He asked Mr. Cepec if he understood that and Mr. Cepec responded with the word "Yes."

On June 4, 2010, Mr. Cepec was interviewed by Detective Davis and Detective Mernik. Detective Davis talked with Mr. Cepec about the Frank Muntz murder and Detective Mernik talked with him about a jewelry theft.

During the June 4, 2010 interrogation there were requests by Mr. Cepec for water, although not more than two or three and he was told that he would have water. He mentioned he was hungry and the deputies told him that they would see about getting food. He told the deputies that his stomach hurt and asked whether the nurse had given them more information. The deputies told him that they were waiting for x-ray reports.

On June 4, 2010, Mr. Cepec was transported to the Medina General Hospital due to having ingested some foreign objects. During the transport to the Medina General Hospital, Medina County Deputy Sheriff Marie Kriz was with Mr. Cepec. During his examination by medical personnel Deputy Kriz, who has since retired, heard Mr. Cepec tell the medical staff that he didn't mean to kill Mr. Muntz and that he shouldn't have done it. Mr. Cepec also said that he wanted to "die for it." At no time during this conversation was Deputy Kriz or any other deputy engaging in an interrogation of Mr. Cepec.

While Mr. Cepec was at Medina General Hospital he tried to cut himself with a spoon. This apparently led to him being transported to the Cleveland Clinic on June 5, 2010. Again Deputy Kriz was assigned to guard Mr. Cepec. Again she heard Mr. Cepec say that he didn't mean to do it, apparently referring to the death of Mr. Muntz, and that he deserved to die for it. Again, as on June 4, 2010, these statements were not made in response to any questioning by Deputy Kriz or any other deputy.

On June 4 and 5, 2010, other deputies were also with Mr. Cepec. One of those deputies was Deputy Chris Falkenstein. Mr. Falkenstein was with Mr. Cepec on June 5, 2010, at the Cleveland Clinic. Deputy Falkenstein had his laptop computer with him. Mr. Cepec wanted the Deputy to look up and see if he could get the death penalty for the death of Mr. Muntz. He went on to tell the Deputy that "he wasn't going to do anything unless he would get the death penalty."

The above statements were not made in response to any interrogation by Deputy Falkenstein. Indeed Deputy Falkenstein told Mr. Cepec that he didn't want to talk to him about his case.

On June 9, 2010, after Mr. Cepec had been returned to the Medina County Jail, he made a request to see Detective Davis. Detective Davis responded to the request. As with the interrogation on June 4, 2010, Detective Davis asked Mr. Cepec if he understood his right to remain silent, his right to have an attorney, his right to have an attorney "free of cost" and that anything he said can and would be used against him. Mr. Cepec responded "yes" to these

questions and then proceeded to tell Detective Davis that his girlfriend, Michelle, was the first person to strike Mr. Muntz in the head with a hammer.

After June 9, 2010, there were other incriminating statements made by Mr. Cepec to Medina County Sheriff Department personnel when they were transporting him to and from the Orient Correctional facility where he was housed because of a post release control violation based on the murder charge.

During these trips Mr. Cepec would volunteer information such as he wanted to die, he believed in the philosophy of an eye for an eye and a tooth for a tooth and that he deserved the death penalty. These statements were not made as the result of any interrogation and were volunteered by Mr. Cepec.

At no time during the questioning of Mr. Cepec on June 3 and June 4, or during his time at the Medina General Hospital or the Cleveland Clinic or during the questioning on June 9, did Mr. Cepec request that he be allowed to talk with counsel.

Conclusions of Law

A suspect in police custody "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona* (1966), 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694.

A suspect may waive or relinquish a known right. In the context of *Miranda*, the United States Supreme Court has explained the two aspects of waiver. "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an un-coerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran v. Burbine* (1986), 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410, quoting *Fare v. Michael C.* (1979), 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197.

A suspect's decision to waive his Fifth Amendment privilege against compulsory self-incrimination is made voluntarily absent evidence that his will was overborne and his capacity

for self-determination was critically impaired because of coercive police conduct." *State v. Dailey* (1990), 53 Ohio St.3d 88, 559 N.E.2d 459, at paragraph two of the syllabus.

A court may infer from the totality of the circumstances that a suspect voluntarily, knowingly, and intelligently waived his rights. *State v. Clark* (1988), 38 Ohio St.3d 252, 261, 527 N.E.2d 844, 853; *State v. Gapen*, 104 Ohio St.3d 358, 2004 Ohio 6548, 819 N.E.2d 1047, P 52. The totality of the circumstances includes "e.g., the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Dixon*, 101 Ohio St.3d 328, 2004 Ohio 1585, 805 N.E.2d 1042, P 25, quoting *State v. Eley* (1996), 77 Ohio St.3d 174, 178, 1996 Ohio 323, 672 N.E.2d 640. By definition of "totality," a court is to look to all of the evidence to determine a suspect's understanding, which can be implied by his conduct and the situation.

"In order for a waiver of the rights required by *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, to be valid, the State bears the burden of demonstrating a knowing, intelligent, voluntary waiver based upon the totality of the facts and circumstances surrounding the interrogation. What is essential is that the defendant has a full awareness of the nature of the constitutional rights being abandoned and the consequences of his decision to abandon them, and that the waiver not be the product of official coercion. An express written or oral waiver, while strong proof of the validity of that waiver, is neither necessary nor sufficient to establish waiver. The question is not one of form, but whether defendant in fact knowingly and voluntarily waived his rights." *State v. Dotson*, Clark App. No. 97-CA-0071, 1997 Ohio App. LEXIS 6092 (citations omitted).

The burden to establish the voluntariness of a confession, by a preponderance of the evidence, rests upon the state after a challenge has been mounted as to its admissibility. *State v. Melchior* (1978), 56 Ohio St.2d 15, 25, 10 Ohio Op. 3d 8, 381 N.E.2d 195. Further, an express written or oral statement waiving *Miranda* rights is strong proof of the validity of the waiver. *North Carolina v. Butler* (1979), 441 U.S. 369, 373, 60 L. Ed. 2d 286, 99 S. Ct. 1755.

An express written or oral statement of waiver of the right to remain silent or the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in *Miranda v.*

Arizona, 384 U.S. 436. *State v. Scott* (1980), 61 Ohio St. 2d 155; 400 N.E.2d 375; 1980 Ohio LEXIS 630; 15 Ohio Op. 3d 182, in first paragraph of the opinion syllabus.

If the State establishes that a suspect was given the warnings required by *Miranda*; stated that he or she understands those rights; answers questions in an appropriate manner; is not subject to any coercive activity by an officer of the State; appears to be of ordinary intelligence; and is not deprived of food, rest, or drink during the interrogation, then the State has made a prima facie case that any statements made by the suspect were voluntary and were made after an effective waiver of his or her constitutional rights.

In such a situation, the burden then shifts to the suspect to show that there was something peculiar to him or her that prevented him or her from either understanding the *Miranda* warnings or prevented him or her from making a knowing, intelligent, and voluntary waiver of his or her constitutional rights.

The *Miranda* warnings given to a suspect prior to being questioned don't have to be a word for word recitation of the language used in the *Miranda* opinion. It is sufficient if the police fully inform a suspect that the state intends to use his or her statements to secure a conviction, that the suspect has a right to remain silent, and a right to have an attorney present. The lack of a specific warning concerning the right to stop the questioning does not automatically require the invalidation of a suspect's statement. See *State v. Cedeno* (1st. Dist.) 192 Ohio App. 3d 738, 2011 Ohio 674.

Miranda warnings are only required if a police officer is interrogating a suspect who is in custody. See *State v. Simin* (9th. Dist.), 2012 Ohio 4389 at P14.

Discussion

In this case Mr. Cepec was given multiple versions of the warnings required by *Miranda*. Although some were more complete than others, all of the warnings informed Mr. Cepec that he had a right to remain silent, that anything he said can and would be used against him, that he had the right to an attorney, and that if he couldn't afford an attorney, one would be provided to him free of cost.

Although the warnings issued by then Detective Tadd Davis did not include the right to stop questioning at any time, as was pointed out in *State v. Cedeno*, supra, the lack of such a specific warning does not automatically require the invalidation of a suspect's statement.

While a written waiver is preferable every time the State argues that a defendant or suspect waived his constitutional rights, a written waiver is not mandatory nor is an oral waiver. What is mandatory is that the State show by a preponderance that the suspect was made aware of his rights and that he voluntarily waived them. In this case, Mr. Cepec indicated by either nodding or by speaking that he understood his rights. After such acknowledgments, he continued to speak to the Deputies. The circumstances surrounding these statements show that Mr. Cepec was aware of his rights and was voluntarily waiving them.

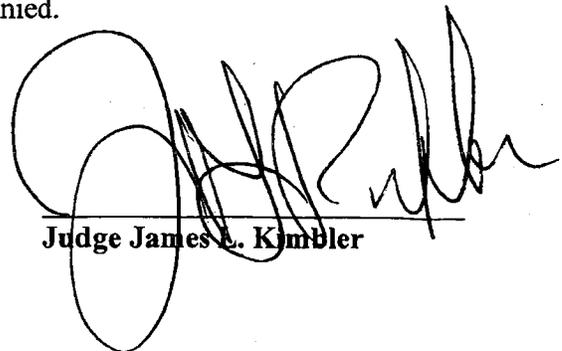
Once the State establishes that a suspect was advised of his or her constitutional rights, understood them, and waived them, the burden then shifts to the defense to show that that was something peculiar about the defendant that prevented him or her from either understanding the *Miranda* warnings or prevented him or her from making a knowing and voluntary waiver of his or her rights. In this case, Mr. Cepec has not met this burden.

Additionally there is no evidence that the State used coercion to obtain the statements. There were scattered requests by Mr. Cepec for food and water, which were fulfilled. He requested to see a doctor on June 4, 2010, and he was taken to the Medina General Hospital. He was not threatened with physical harm, he was not threatened with non-physical harm, his family and friends weren't threatened, and he wasn't told that he would get food and water only if he operated.

Finally regarding the statements that Mr. Cepec volunteered to various deputies, this Court finds that they were not the result of any custodial interrogation but were, rather, the result of Mr. Cepec talking to the deputies for reasons of his own. These statements were not made under circumstances that show any coercion. Therefore, they were not obtained by the State in violation of Mr. Cepec's constitutional rights.

Therefore, Mr. Cepec's suppression motion is denied.

So Ordered.

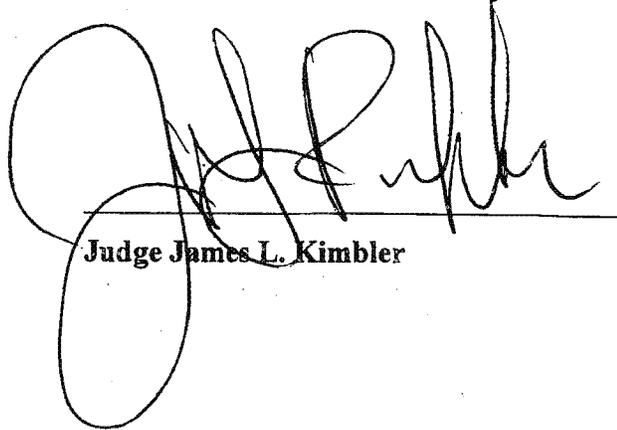


Judge James E. Kimbler

Instructions to the Clerk

The Medina County Clerk of Courts is hereby instructed to send notice of the filing of this journal entry to all counsel of record. Such notice shall indicate the date on which the journal entry was filed.

SO ORDERED.



A handwritten signature in black ink, appearing to read 'J. Kimbler', is written over a horizontal line. The signature is stylized and cursive.

Judge James L. Kimbler

UNITED STATES CONSTITUTION

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

EIGHT AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article

OHIO CONSITUTION

ARTICLE I, SECTION 2

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly

ARTICLE I, SECTION 5

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.

ARTICLE I, SECTION 9

All persons shall beailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

The general assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(B) of the Constitution of the state of Ohio.

ARTICLE I, SECTION 10

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

ARTICLE I, SECTION 16

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law

2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.

(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

(1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.

(2) It is the offender's specific purpose to kill a law enforcement officer.

(F) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(G) As used in this section:

(1) "Detention" has the same meaning as in section 2921.01 of the Revised Code.

(2) "Law enforcement officer" has the same meaning as in section 2911.01 of the Revised Code.

Amended by 129th General Assembly File No. 29, HB 86, §1, eff. 9/30/2011.

Effective Date: 05-15-2002

2903.02 Murder.

- (A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.
- (B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.
- (C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.
- (D) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Effective Date: 06-30-1998

2903.03 Voluntary manslaughter.

(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another or the unlawful termination of another's pregnancy.

(B) No person, with a sexual motivation, shall violate division (A) of this section.

(C) Whoever violates this section is guilty of voluntary manslaughter, a felony of the first degree.

(D) As used in this section, "sexual motivation" has the same meaning as in section 2971.01 of the Revised Code.

Amended by 129th General Assembly File No.178, SB 160, §1, eff. 3/22/2013.

Effective Date: 09-06-1996

2903.04 Involuntary manslaughter.

(A) No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony.

(B) No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a misdemeanor of any degree, a regulatory offense, or a minor misdemeanor other than a violation of any section contained in Title XLV of the Revised Code that is a minor misdemeanor and other than a violation of an ordinance of a municipal corporation that, regardless of the penalty set by ordinance for the violation, is substantially equivalent to any section contained in Title XLV of the Revised Code that is a minor misdemeanor.

(C) Whoever violates this section is guilty of involuntary manslaughter. Violation of division (A) of this section is a felony of the first degree. Violation of division (B) of this section is a felony of the third degree.

(D) If an offender is convicted of or pleads guilty to a violation of division (A) or (B) of this section and if the felony, misdemeanor, or regulatory offense that the offender committed or attempted to commit, that proximately resulted in the death of the other person or the unlawful termination of another's pregnancy, and that is the basis of the offender's violation of division (A) or (B) of this section was a violation of division (A) or (B) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance or included, as an element of that felony, misdemeanor, or regulatory offense, the offender's operation or participation in the operation of a snowmobile, locomotive, watercraft, or aircraft while the offender was under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, both of the following apply:

(1) The court shall impose a class one suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege as specified in division (A)(1) of section 4510.02 of the Revised Code.

(2) The court shall impose a mandatory prison term for the violation of division (A) or (B) of this section from the range of prison terms authorized for the level of the offense under section 2929.14 of the Revised Code.

Effective Date: 01-01-2004

2909.01 Arson and related offenses definitions.

As used in sections 2909.01 to 2909.07 of the Revised Code:

(A) To "create a substantial risk of serious physical harm to any person" includes the creation of a substantial risk of serious physical harm to any emergency personnel.

(B) "Emergency personnel" means any of the following persons:

(1) A peace officer, as defined in section 2935.01 of the Revised Code;

(2) A member of a fire department or other firefighting agency of a municipal corporation, township, township fire district, joint fire district, other political subdivision, or combination of political subdivisions;

(3) A member of a private fire company, as defined in section 9.60 of the Revised Code, or a volunteer firefighter;

(4) A member of a joint ambulance district or joint emergency medical services district;

(5) An emergency medical technician-basic, emergency medical technician-intermediate, emergency medical technician-paramedic, ambulance operator, or other member of an emergency medical service that is owned or operated by a political subdivision or a private entity;

(6) The state fire marshal, the chief deputy state fire marshal, or an assistant state fire marshal;

(7) A fire prevention officer of a political subdivision or an arson, fire, or similar investigator of a political subdivision.

(C) "Occupied structure" means any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

(1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.

(2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.

(3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.

(4) At the time, any person is present or likely to be present in it.

(D) "Political subdivision" and "state" have the same meanings as in section 2744.01 of the Revised Code.

(E) "Computer," "computer hacking," "computer network," "computer program," "computer software," "computer system," "data," and "telecommunications device" have the same meanings as in section 2913.01 of the Revised Code.

(F) "Computer contaminant" means a computer program that is designed to modify, damage, destroy, disable, deny or degrade access to, allow unauthorized access to, functionally impair, record, or transmit information within a computer, computer system, or computer network without the express or implied consent of the owner or other person authorized to give consent and that is of a type or kind described in divisions (F)(1) to (4) of this section or of a type or kind similar to a type or kind described in divisions (F)(1) to (4) of this section:

(1) A group of computer programs commonly known as "viruses" and "worms" that are self-replicating or self-propagating and that are designed to contaminate other computer programs, compromise computer security, consume computer resources, modify, destroy, record, or transmit data, or disrupt the normal operation of the computer, computer system, or computer network;

(2) A group of computer programs commonly known as "Trojans" or "Trojan horses" that are not self-replicating or self-propagating and that are designed to compromise computer security, consume computer resources, modify, destroy, record, or transmit data, or disrupt the normal operation of the computer, computer system, or computer network;

(3) A group of computer programs commonly known as "zombies" that are designed to use a computer without the knowledge and consent of the owner, or other person authorized to give consent, and that are designed to send large quantities of data to a targeted computer network for the purpose of degrading the targeted computer's or network's performance, or denying access through the network to the targeted computer or network, resulting in what is commonly known as "Denial of Service" or "Distributed Denial of Service" attacks;

(4) A group of computer programs commonly know as "trap doors," "back doors," or "root kits" that are designed to bypass standard authentication software and that are designed to allow access to or use of a computer without the knowledge or consent of the owner, or other person authorized to give consent.

(G) "Internet" has the same meaning as in section 341.42 of the Revised Code.

Effective Date: 03-19-2003; 09-23-2004

2911.01 Aggravated robbery.

(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

- (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it;
- (2) Have a dangerous ordnance on or about the offender's person or under the offender's control;
- (3) Inflict, or attempt to inflict, serious physical harm on another.

(B) No person, without privilege to do so, shall knowingly remove or attempt to remove a deadly weapon from the person of a law enforcement officer, or shall knowingly deprive or attempt to deprive a law enforcement officer of a deadly weapon, when both of the following apply:

- (1) The law enforcement officer, at the time of the removal, attempted removal, deprivation, or attempted deprivation, is acting within the course and scope of the officer's duties;
- (2) The offender knows or has reasonable cause to know that the law enforcement officer is a law enforcement officer.

(C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

(D) As used in this section:

- (1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.
- (2) "Law enforcement officer" has the same meaning as in section 2901.01 of the Revised Code and also includes employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties.

Effective Date: 09-16-1997

2911.11 Aggravated burglary.

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

- (1) The offender inflicts, or attempts or threatens to inflict physical harm on another;
- (2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

(B) Whoever violates this section is guilty of aggravated burglary, a felony of the first degree.

(C) As used in this section:

- (1) "Occupied structure" has the same meaning as in section 2909.01 of the Revised Code.
- (2) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

Effective Date: 07-01-1996

2913.01 [Effective Until 9/16/2014] Theft and fraud general definitions.

As used in this chapter, unless the context requires that a term be given a different meaning:

(A) "Deception" means knowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.

(B) "Defraud" means to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another.

(C) "Deprive" means to do any of the following:

(1) Withhold property of another permanently, or for a period that appropriates a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration;

(2) Dispose of property so as to make it unlikely that the owner will recover it;

(3) Accept, use, or appropriate money, property, or services, with purpose not to give proper consideration in return for the money, property, or services, and without reasonable justification or excuse for not giving proper consideration.

(D) "Owner" means, unless the context requires a different meaning, any person, other than the actor, who is the owner of, who has possession or control of, or who has any license or interest in property or services, even though the ownership, possession, control, license, or interest is unlawful.

(E) "Services" include labor, personal services, professional services, rental services, public utility services including wireless service as defined in division (F)(1) of section 128.01 of the Revised Code, common carrier services, and food, drink, transportation, entertainment, and cable television services and, for purposes of section 2913.04 of the Revised Code, include cable services as defined in that section.

(F) "Writing" means any computer software, document, letter, memorandum, note, paper, plate, data, film, or other thing having in or upon it any written, typewritten, or printed matter, and any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification.

(G) "Forge" means to fabricate or create, in whole or in part and by any means, any spurious writing, or to make, execute, alter, complete, reproduce, or otherwise purport to authenticate any writing, when the writing in fact is not authenticated by that conduct.

(H) "Utter" means to issue, publish, transfer, use, put or send into circulation, deliver, or display.

(I) "Coin machine" means any mechanical or electronic device designed to do both of the following:

(1) Receive a coin, bill, or token made for that purpose;

(2) In return for the insertion or deposit of a coin, bill, or token, automatically dispense property, provide a service, or grant a license.

(J) "Slug" means an object that, by virtue of its size, shape, composition, or other quality, is capable of being inserted or deposited in a coin machine as an improper substitute for a genuine coin, bill, or token made for that purpose.

(K) "Theft offense" means any of the following:

(1) A violation of section 2911.01, 2911.02, 2911.11, 2911.12, 2911.13, 2911.31, 2911.32, 2913.02, 2913.03, 2913.04, 2913.041, 2913.05, 2913.06, 2913.11, 2913.21, 2913.31, 2913.32, 2913.33, 2913.34, 2913.40, 2913.42,

2913.43, 2913.44, 2913.45, 2913.47, 2913.48, former section 2913.47 or 2913.48, or section 2913.51, 2915.05, or 2921.41 of the Revised Code;

(2) A violation of an existing or former municipal ordinance or law of this or any other state, or of the United States, substantially equivalent to any section listed in division (K)(1) of this section or a violation of section 2913.41, 2913.81, or 2915.06 of the Revised Code as it existed prior to July 1, 1996;

(3) An offense under an existing or former municipal ordinance or law of this or any other state, or of the United States, involving robbery, burglary, breaking and entering, theft, embezzlement, wrongful conversion, forgery, counterfeiting, deceit, or fraud;

(4) A conspiracy or attempt to commit, or complicity in committing, any offense under division (K)(1), (2), or (3) of this section.

(L) "Computer services" includes, but is not limited to, the use of a computer system, computer network, computer program, data that is prepared for computer use, or data that is contained within a computer system or computer network.

(M) "Computer" means an electronic device that performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses. "Computer" includes, but is not limited to, all input, output, processing, storage, computer program, or communication facilities that are connected, or related, in a computer system or network to an electronic device of that nature.

(N) "Computer system" means a computer and related devices, whether connected or unconnected, including, but not limited to, data input, output, and storage devices, data communications links, and computer programs and data that make the system capable of performing specified special purpose data processing tasks.

(O) "Computer network" means a set of related and remotely connected computers and communication facilities that includes more than one computer system that has the capability to transmit among the connected computers and communication facilities through the use of computer facilities.

(P) "Computer program" means an ordered set of data representing coded instructions or statements that, when executed by a computer, cause the computer to process data.

(Q) "Computer software" means computer programs, procedures, and other documentation associated with the operation of a computer system.

(R) "Data" means a representation of information, knowledge, facts, concepts, or instructions that are being or have been prepared in a formalized manner and that are intended for use in a computer, computer system, or computer network. For purposes of section 2913.47 of the Revised Code, "data" has the additional meaning set forth in division (A) of that section.

(S) "Cable television service" means any services provided by or through the facilities of any cable television system or other similar closed circuit coaxial cable communications system, or any microwave or similar transmission service used in connection with any cable television system or other similar closed circuit coaxial cable communications system.

(T) "Gain access" means to approach, instruct, communicate with, store data in, retrieve data from, or otherwise make use of any resources of a computer, computer system, or computer network, or any cable service or cable system both as defined in section 2913.04 of the Revised Code.

(U) "Credit card" includes, but is not limited to, a card, code, device, or other means of access to a customer's account for the purpose of obtaining money, property, labor, or services on credit, or for initiating an electronic fund transfer at a point-of-sale terminal, an automated teller machine, or a cash dispensing machine. It also includes a county procurement card issued under section 301.29 of the Revised Code.

(V) "Electronic fund transfer" has the same meaning as in 92 Stat. 3728, 15 U.S.C.A. 1693a, as amended.

(W) "Rented property" means personal property in which the right of possession and use of the property is for a short and possibly indeterminate term in return for consideration; the rentee generally controls the duration of possession of the property, within any applicable minimum or maximum term; and the amount of consideration generally is determined by the duration of possession of the property.

(X) "Telecommunication" means the origination, emission, dissemination, transmission, or reception of data, images, signals, sounds, or other intelligence or equivalence of intelligence of any nature over any communications system by any method, including, but not limited to, a fiber optic, electronic, magnetic, optical, digital, or analog method.

(Y) "Telecommunications device" means any instrument, equipment, machine, or other device that facilitates telecommunication, including, but not limited to, a computer, computer network, computer chip, computer circuit, scanner, telephone, cellular telephone, pager, personal communications device, transponder, receiver, radio, modem, or device that enables the use of a modem.

(Z) "Telecommunications service" means the providing, allowing, facilitating, or generating of any form of telecommunication through the use of a telecommunications device over a telecommunications system.

(AA) "Counterfeit telecommunications device" means a telecommunications device that, alone or with another telecommunications device, has been altered, constructed, manufactured, or programmed to acquire, intercept, receive, or otherwise facilitate the use of a telecommunications service or information service without the authority or consent of the provider of the telecommunications service or information service. "Counterfeit telecommunications device" includes, but is not limited to, a clone telephone, clone microchip, tumbler telephone, or tumbler microchip; a wireless scanning device capable of acquiring, intercepting, receiving, or otherwise facilitating the use of telecommunications service or information service without immediate detection; or a device, equipment, hardware, or software designed for, or capable of, altering or changing the electronic serial number in a wireless telephone.

(BB)

(1) "Information service" means, subject to division (BB)(2) of this section, the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, including, but not limited to, electronic publishing.

(2) "Information service" does not include any use of a capability of a type described in division (BB)(1) of this section for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(CC) "Elderly person" means a person who is sixty-five years of age or older.

(DD) "Disabled adult" means a person who is eighteen years of age or older and has some impairment of body or mind that makes the person unable to work at any substantially remunerative employment that the person otherwise would be able to perform and that will, with reasonable probability, continue for a period of at least twelve months without any present indication of recovery from the impairment, or who is eighteen years of age or older and has been certified as permanently and totally disabled by an agency of this state or the United States that has the function of so classifying persons.

(EE) "Firearm" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(FF) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(GG) "Dangerous drug" has the same meaning as in section 4729.01 of the Revised Code.

(HH) "Drug abuse offense" has the same meaning as in section 2925.01 of the Revised Code.

(II)

(1) "Computer hacking" means any of the following:

(a) Gaining access or attempting to gain access to all or part of a computer, computer system, or a computer network without express or implied authorization with the intent to defraud or with intent to commit a crime;

(b) Misusing computer or network services including, but not limited to, mail transfer programs, file transfer programs, proxy servers, and web servers by performing functions not authorized by the owner of the computer, computer system, or computer network or other person authorized to give consent. As used in this division, "misuse of computer and network services" includes, but is not limited to, the unauthorized use of any of the following:

(i) Mail transfer programs to send mail to persons other than the authorized users of that computer or computer network;

(ii) File transfer program proxy services or proxy servers to access other computers, computer systems, or computer networks;

(iii) Web servers to redirect users to other web pages or web servers.

(c)

(i) Subject to division (II)(1)(c)(ii) of this section, using a group of computer programs commonly known as "port scanners" or "probes" to intentionally access any computer, computer system, or computer network without the permission of the owner of the computer, computer system, or computer network or other person authorized to give consent. The group of computer programs referred to in this division includes, but is not limited to, those computer programs that use a computer network to access a computer, computer system, or another computer network to determine any of the following: the presence or types of computers or computer systems on a network; the computer network's facilities and capabilities; the availability of computer or network services; the presence or versions of computer software including, but not limited to, operating systems, computer services, or computer contaminants; the presence of a known computer software deficiency that can be used to gain unauthorized access to a computer, computer system, or computer network; or any other information about a computer, computer system, or computer network not necessary for the normal and lawful operation of the computer initiating the access.

(ii) The group of computer programs referred to in division (II)(1)(c)(i) of this section does not include standard computer software used for the normal operation, administration, management, and test of a computer, computer system, or computer network including, but not limited to, domain name services, mail transfer services, and other operating system services, computer programs commonly called "ping," "tcpdump," and "traceroute" and other network monitoring and management computer software, and computer programs commonly known as "nslookup" and "whois" and other systems administration computer software.

(d) The intentional use of a computer, computer system, or a computer network in a manner that exceeds any right or permission granted by the owner of the computer, computer system, or computer network or other person authorized to give consent.

(2) "Computer hacking" does not include the introduction of a computer contaminant, as defined in section 2909.01 of the Revised Code, into a computer, computer system, computer program, or computer network.

(JJ) "Police dog or horse" has the same meaning as in section 2921.321 of the Revised Code.

(KK) "Anhydrous ammonia" is a compound formed by the combination of two gaseous elements, nitrogen and hydrogen, in the manner described in this division. Anhydrous ammonia is one part nitrogen to three parts hydrogen (NH₃). Anhydrous ammonia by weight is fourteen parts nitrogen to three parts hydrogen, which is approximately eighty-two per cent nitrogen to eighteen per cent hydrogen.

(LL) "Assistance dog" has the same meaning as in section 955.011 of the Revised Code.

(MM) "Federally licensed firearms dealer" has the same meaning as in section 5502.63 of the Revised Code.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Amended by 130th General Assembly File No. 7, HB 51, §101.01, eff. 7/1/2013.

Amended by 129th General Assembly File No. 166, HB 360, §1, eff. 12/20/2012.

Amended by 129th General Assembly File No. 132, SB 193, §1, eff. 9/28/2012.

Amended by 129th General Assembly File No. 29, HB 86, §1, eff. 9/30/2011.

Effective Date: 02-12-2004; 09-23-2004; 11-26-2004; 04-15-2005; 05-06-2005; 06-30-2006; 03-14-2007; 2008 SB320 04-07-2009

This section is set out twice. See also § 2913.01 , as amended by 130th General Assembly File No. TBD, HB 488, §1, eff. 9/16/2014.

2923.11 Weapons control definitions.

As used in sections 2923.11 to 2923.24 of the Revised Code:

(A) "Deadly weapon" means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.

(B)

(1) "Firearm" means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. "Firearm" includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.

(2) When determining whether a firearm is capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant, the trier of fact may rely upon circumstantial evidence, including, but not limited to, the representations and actions of the individual exercising control over the firearm.

(C) "Handgun" means any of the following:

(1) Any firearm that has a short stock and is designed to be held and fired by the use of a single hand;

(2) Any combination of parts from which a firearm of a type described in division (C)(1) of this section can be assembled.

(D) "Semi-automatic firearm" means any firearm designed or specially adapted to fire a single cartridge and automatically chamber a succeeding cartridge ready to fire, with a single function of the trigger.

(E) "Automatic firearm" means any firearm designed or specially adapted to fire a succession of cartridges with a single function of the trigger. "Automatic firearm" also means any semi-automatic firearm designed or specially adapted to fire more than thirty-one cartridges without reloading, other than a firearm chambering only .22 caliber short, long, or long-rifle cartridges.

(F) "Sawed-off firearm" means a shotgun with a barrel less than eighteen inches long, or a rifle with a barrel less than sixteen inches long, or a shotgun or rifle less than twenty-six inches long overall.

(G) "Zip-gun" means any of the following:

(1) Any firearm of crude and extemporized manufacture;

(2) Any device, including without limitation a starter's pistol, that is not designed as a firearm, but that is specially adapted for use as a firearm;

(3) Any industrial tool, signalling device, or safety device, that is not designed as a firearm, but that as designed is capable of use as such, when possessed, carried, or used as a firearm.

(H) "Explosive device" means any device designed or specially adapted to cause physical harm to persons or property by means of an explosion, and consisting of an explosive substance or agency and a means to detonate it. "Explosive device" includes without limitation any bomb, any explosive demolition device, any blasting cap or detonator containing an explosive charge, and any pressure vessel that has been knowingly tampered with or arranged so as to explode.

(I) "Incendiary device" means any firebomb, and any device designed or specially adapted to cause physical harm to persons or property by means of fire, and consisting of an incendiary substance or agency and a means to ignite it.

(J) "Ballistic knife" means a knife with a detachable blade that is propelled by a spring-operated mechanism.

(K) "Dangerous ordnance" means any of the following, except as provided in division (L) of this section:

- (1) Any automatic or sawed-off firearm, zip-gun, or ballistic knife;
- (2) Any explosive device or incendiary device;
- (3) Nitroglycerin, nitrocellulose, nitrostarch, PETN, cyclonite, TNT, picric acid, and other high explosives; amatol, tritonal, tetrytol, pentolite, pecretol, cyclotol, and other high explosive compositions; plastic explosives; dynamite, blasting gelatin, gelatin dynamite, sensitized ammonium nitrate, liquid-oxygen blasting explosives, blasting powder, and other blasting agents; and any other explosive substance having sufficient brisance or power to be particularly suitable for use as a military explosive, or for use in mining, quarrying, excavating, or demolitions;
- (4) Any firearm, rocket launcher, mortar, artillery piece, grenade, mine, bomb, torpedo, or similar weapon, designed and manufactured for military purposes, and the ammunition for that weapon;
- (5) Any firearm muffler or silencer;
- (6) Any combination of parts that is intended by the owner for use in converting any firearm or other device into a dangerous ordnance.

(L) "Dangerous ordnance" does not include any of the following:

- (1) Any firearm, including a military weapon and the ammunition for that weapon, and regardless of its actual age, that employs a percussion cap or other obsolete ignition system, or that is designed and safe for use only with black powder;
- (2) Any pistol, rifle, or shotgun, designed or suitable for sporting purposes, including a military weapon as issued or as modified, and the ammunition for that weapon, unless the firearm is an automatic or sawed-off firearm;
- (3) Any cannon or other artillery piece that, regardless of its actual age, is of a type in accepted use prior to 1887, has no mechanical, hydraulic, pneumatic, or other system for absorbing recoil and returning the tube into battery without displacing the carriage, and is designed and safe for use only with black powder;
- (4) Black powder, priming quills, and percussion caps possessed and lawfully used to fire a cannon of a type defined in division (L)(3) of this section during displays, celebrations, organized matches or shoots, and target practice, and smokeless and black powder, primers, and percussion caps possessed and lawfully used as a propellant or ignition device in small-arms or small-arms ammunition;
- (5) Dangerous ordnance that is inoperable or inert and cannot readily be rendered operable or activated, and that is kept as a trophy, souvenir, curio, or museum piece.
- (6) Any device that is expressly excepted from the definition of a destructive device pursuant to the "Gun Control Act of 1968," 82 Stat. 1213, 18 U.S.C. 921(a)(4) , as amended, and regulations issued under that act.

(M) "Explosive" means any chemical compound, mixture, or device, the primary or common purpose of which is to function by explosion. "Explosive" includes all materials that have been classified as division 1.1, division 1.2, division 1.3, or division 1.4 explosives by the United States department of transportation in its regulations and includes, but is not limited to, dynamite, black powder, pellet powders, initiating explosives, blasting caps, electric blasting caps, safety fuses, fuse igniters, squibs, cordeau detonant fuses, instantaneous fuses, and igniter cords and igniters. "Explosive" does not include "fireworks," as defined in section 3743.01 of the Revised Code, or any substance or material otherwise meeting the definition of explosive set forth in this section that is manufactured, sold, possessed, transported, stored, or used in any activity described in section 3743.80 of the Revised Code, provided the activity is conducted in accordance with all applicable laws, rules, and regulations, including, but not limited to, the provisions of section 3743.80 of the Revised Code and the rules of the fire marshal adopted pursuant to section 3737.82 of the Revised Code.

(N)

(1) "Concealed handgun license" or "license to carry a concealed handgun" means, subject to division (N)(2) of this section, a license or temporary emergency license to carry a concealed handgun issued under section 2923.125 or

2923.1213 of the Revised Code or a license to carry a concealed handgun issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code.

(2) A reference in any provision of the Revised Code to a concealed handgun license issued under section 2923.125 of the Revised Code or a license to carry a concealed handgun issued under section 2923.125 of the Revised Code means only a license of the type that is specified in that section. A reference in any provision of the Revised Code to a concealed handgun license issued under section 2923.1213 of the Revised Code, a license to carry a concealed handgun issued under section 2923.1213 of the Revised Code, or a license to carry a concealed handgun on a temporary emergency basis means only a license of the type that is specified in section 2923.1213 of the Revised Code. A reference in any provision of the Revised Code to a concealed handgun license issued by another state or a license to carry a concealed handgun issued by another state means only a license issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code.

(O) "Valid concealed handgun license" or "valid license to carry a concealed handgun" means a concealed handgun license that is currently valid, that is not under a suspension under division (A)(1) of section 2923.128 of the Revised Code, under section 2923.1213 of the Revised Code, or under a suspension provision of the state other than this state in which the license was issued, and that has not been revoked under division (B)(1) of section 2923.128 of the Revised Code, under section 2923.1213 of the Revised Code, or under a revocation provision of the state other than this state in which the license was issued.

Amended by 129th General Assembly File No.190, HB 495, §1, eff. 3/27/2013.

Effective Date: 04-08-2004; 2008 HB562 09-22-2008

2941.14 Indictment for aggravated murder, murder, or voluntary or involuntary manslaughter - specifications.

(A) In an indictment for aggravated murder, murder, or voluntary or involuntary manslaughter, the manner in which, or the means by which the death was caused need not be set forth.

(B) Imposition of the death penalty for aggravated murder is precluded unless the indictment or count in the indictment charging the offense specifies one or more of the aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code. If more than one aggravating circumstance is specified to an indictment or count, each shall be in a separately numbered specification, and if an aggravating circumstance is specified to a count in an indictment containing more than one count, such specification shall be identified as to the count to which it applies.

(C) A specification to an indictment or count in an indictment charging aggravated murder shall be stated at the end of the body of the indictment or count, and may be in substantially the following form:

"SPECIFICATION (or, SPECIFICATION 1, SPECIFICATION TO THE FIRST COUNT, or SPECIFICATION 1 TO THE FIRST COUNT). The Grand Jurors further find and specify that (set forth the applicable aggravating circumstance listed in divisions (A)(1) to (10) of section 2929.04 of the Revised Code. The aggravating circumstance may be stated in the words of the subdivision in which it appears, or in words sufficient to give the accused notice of the same)."

Effective Date: 05-15-2002

2941.149 Repeat violent offender specification.

(A) The determination by a court that an offender is a repeat violent offender is precluded unless the indictment, count in the indictment, or information charging the offender specifies that the offender is a repeat violent offender. The specification shall be stated at the end of the body of the indictment, count, or information, and shall be stated in substantially the following form:

"SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person's or prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender is a repeat violent offender)."

(B) The court shall determine the issue of whether an offender is a repeat violent offender.

(C) At the arraignment of the defendant or as soon thereafter as is practicable, the prosecuting attorney may give notice to the defendant of the prosecuting attorney's intention to use a certified copy of the entry of judgment of a prior conviction as proof of that prior conviction. The defendant must then give notice to the prosecuting attorney of the defendant's intention to object to the use of the entry of judgment. If the defendant pursuant to Criminal Rule 12 does not give notice of that intention to the prosecuting attorney before trial, the defendant waives the objection to the use of an entry of judgment as proof of the defendant's prior conviction, as shown on the entry of judgment.

(D) As used in this section, "repeat violent offender" has the same meaning as in section 2929.01 of the Revised Code.

Effective Date: 07-01-1996; 08-03-2006

2929.01 Penalties and sentencing general definitions.

As used in this chapter:

(A)

(1) "Alternative residential facility" means, subject to division (A)(2) of this section, any facility other than an offender's home or residence in which an offender is assigned to live and that satisfies all of the following criteria:

(a) It provides programs through which the offender may seek or maintain employment or may receive education, training, treatment, or habilitation.

(b) It has received the appropriate license or certificate for any specialized education, training, treatment, habilitation, or other service that it provides from the government agency that is responsible for licensing or certifying that type of education, training, treatment, habilitation, or service.

(2) "Alternative residential facility" does not include a community-based correctional facility, jail, halfway house, or prison.

(B) "Basic probation supervision" means a requirement that the offender maintain contact with a person appointed to supervise the offender in accordance with sanctions imposed by the court or imposed by the parole board pursuant to section 2967.28 of the Revised Code. "Basic probation supervision" includes basic parole supervision and basic post-release control supervision.

(C) "Cocaine," "hashish," "L.S.D.," and "unit dose" have the same meanings as in section 2925.01 of the Revised Code.

(D) "Community-based correctional facility" means a community-based correctional facility and program or district community-based correctional facility and program developed pursuant to sections 2301.51 to 2301.58 of the Revised Code.

(E) "Community control sanction" means a sanction that is not a prison term and that is described in section 2929.15, 2929.16, 2929.17, or 2929.18 of the Revised Code or a sanction that is not a jail term and that is described in section 2929.26, 2929.27, or 2929.28 of the Revised Code. "Community control sanction" includes probation if the sentence involved was imposed for a felony that was committed prior to July 1, 1996, or if the sentence involved was imposed for a misdemeanor that was committed prior to January 1, 2004.

(F) "Controlled substance," "marihuana," "schedule I," and "schedule II" have the same meanings as in section 3719.01 of the Revised Code.

(G) "Curfew" means a requirement that an offender during a specified period of time be at a designated place.

(H) "Day reporting" means a sanction pursuant to which an offender is required each day to report to and leave a center or other approved reporting location at specified times in order to participate in work, education or training, treatment, and other approved programs at the center or outside the center.

(I) "Deadly weapon" has the same meaning as in section 2923.11 of the Revised Code.

(J) "Drug and alcohol use monitoring" means a program under which an offender agrees to submit to random chemical analysis of the offender's blood, breath, or urine to determine whether the offender has ingested any alcohol or other drugs.

(K) "Drug treatment program" means any program under which a person undergoes assessment and treatment designed to reduce or completely eliminate the person's physical or emotional reliance upon alcohol, another drug, or alcohol and another drug and under which the person may be required to receive assessment and treatment on an

outpatient basis or may be required to reside at a facility other than the person's home or residence while undergoing assessment and treatment.

(L) "Economic loss" means any economic detriment suffered by a victim as a direct and proximate result of the commission of an offense and includes any loss of income due to lost time at work because of any injury caused to the victim, and any property loss, medical cost, or funeral expense incurred as a result of the commission of the offense. "Economic loss" does not include non-economic loss or any punitive or exemplary damages.

(M) "Education or training" includes study at, or in conjunction with a program offered by, a university, college, or technical college or vocational study and also includes the completion of primary school, secondary school, and literacy curricula or their equivalent.

(N) "Firearm" has the same meaning as in section 2923.11 of the Revised Code.

(O) "Halfway house" means a facility licensed by the division of parole and community services of the department of rehabilitation and correction pursuant to section 2967.14 of the Revised Code as a suitable facility for the care and treatment of adult offenders.

(P) "House arrest" means a period of confinement of an offender that is in the offender's home or in other premises specified by the sentencing court or by the parole board pursuant to section 2967.28 of the Revised Code and during which all of the following apply:

(1) The offender is required to remain in the offender's home or other specified premises for the specified period of confinement, except for periods of time during which the offender is at the offender's place of employment or at other premises as authorized by the sentencing court or by the parole board.

(2) The offender is required to report periodically to a person designated by the court or parole board.

(3) The offender is subject to any other restrictions and requirements that may be imposed by the sentencing court or by the parole board.

(Q) "Intensive probation supervision" means a requirement that an offender maintain frequent contact with a person appointed by the court, or by the parole board pursuant to section 2967.28 of the Revised Code, to supervise the offender while the offender is seeking or maintaining necessary employment and participating in training, education, and treatment programs as required in the court's or parole board's order. "Intensive probation supervision" includes intensive parole supervision and intensive post-release control supervision.

(R) "Jail" means a jail, workhouse, minimum security jail, or other residential facility used for the confinement of alleged or convicted offenders that is operated by a political subdivision or a combination of political subdivisions of this state.

(S) "Jail term" means the term in a jail that a sentencing court imposes or is authorized to impose pursuant to section 2929.24 or 2929.25 of the Revised Code or pursuant to any other provision of the Revised Code that authorizes a term in a jail for a misdemeanor conviction.

(T) "Mandatory jail term" means the term in a jail that a sentencing court is required to impose pursuant to division (G) of section 1547.99 of the Revised Code, division (E) of section 2903.06 or division (D) of section 2903.08 of the Revised Code, division (E) or (G) of section 2929.24 of the Revised Code, division (B) of section 4510.14 of the Revised Code, or division (G) of section 4511.19 of the Revised Code or pursuant to any other provision of the Revised Code that requires a term in a jail for a misdemeanor conviction.

(U) "Delinquent child" has the same meaning as in section 2152.02 of the Revised Code.

(V) "License violation report" means a report that is made by a sentencing court, or by the parole board pursuant to section 2967.28 of the Revised Code, to the regulatory or licensing board or agency that issued an offender a professional license or a license or permit to do business in this state and that specifies that the offender has been

convicted of or pleaded guilty to an offense that may violate the conditions under which the offender's professional license or license or permit to do business in this state was granted or an offense for which the offender's professional license or license or permit to do business in this state may be revoked or suspended.

(W) "Major drug offender" means an offender who is convicted of or pleads guilty to the possession of, sale of, or offer to sell any drug, compound, mixture, preparation, or substance that consists of or contains at least one thousand grams of hashish; at least one hundred grams of cocaine; at least two thousand five hundred unit doses or two hundred fifty grams of heroin; at least five thousand unit doses of L.S.D. or five hundred grams of L.S.D. in a liquid concentrate, liquid extract, or liquid distillate form; at least fifty grams of a controlled substance analog; or at least one hundred times the amount of any other schedule I or II controlled substance other than marihuana that is necessary to commit a felony of the third degree pursuant to section 2925.03, 2925.04, 2925.05, or 2925.11 of the Revised Code that is based on the possession of, sale of, or offer to sell the controlled substance.

(X) "Mandatory prison term" means any of the following:

(1) Subject to division (X)(2) of this section, the term in prison that must be imposed for the offenses or circumstances set forth in divisions (F)(1) to (8) or (F)(12) to (18) of section 2929.13 and division (B) of section 2929.14 of the Revised Code. Except as provided in sections 2925.02, 2925.03, 2925.04, 2925.05, and 2925.11 of the Revised Code, unless the maximum or another specific term is required under section 2929.14 or 2929.142 of the Revised Code, a mandatory prison term described in this division may be any prison term authorized for the level of offense.

(2) The term of sixty or one hundred twenty days in prison that a sentencing court is required to impose for a third or fourth degree felony OVI offense pursuant to division (G)(2) of section 2929.13 and division (G)(1)(d) or (e) of section 4511.19 of the Revised Code or the term of one, two, three, four, or five years in prison that a sentencing court is required to impose pursuant to division (G)(2) of section 2929.13 of the Revised Code.

(3) The term in prison imposed pursuant to division (A) of section 2971.03 of the Revised Code for the offenses and in the circumstances described in division (F)(11) of section 2929.13 of the Revised Code or pursuant to division (B)(1)(a), (b), or (c), (B)(2)(a), (b), or (c), or (B)(3)(a), (b), (c), or (d) of section 2971.03 of the Revised Code and that term as modified or terminated pursuant to section 2971.05 of the Revised Code.

(Y) "Monitored time" means a period of time during which an offender continues to be under the control of the sentencing court or parole board, subject to no conditions other than leading a law-abiding life.

(Z) "Offender" means a person who, in this state, is convicted of or pleads guilty to a felony or a misdemeanor.

(AA) "Prison" means a residential facility used for the confinement of convicted felony offenders that is under the control of the department of rehabilitation and correction but does not include a violation sanction center operated under authority of section 2967.141 of the Revised Code.

(BB) "Prison term" includes either of the following sanctions for an offender:

- (1) A stated prison term;
- (2) A term in a prison shortened by, or with the approval of, the sentencing court pursuant to section 2929.143, 2929.20, 2967.26, 5120.031, 5120.032, or 5120.073 of the Revised Code.

(CC) "Repeat violent offender" means a person about whom both of the following apply:

- (1) The person is being sentenced for committing or for complicity in committing any of the following:
 - (a) Aggravated murder, murder, any felony of the first or second degree that is an offense of violence, or an attempt to commit any of these offenses if the attempt is a felony of the first or second degree;
 - (b) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense described in division (CC)(1)(a) of this section.

(2) The person previously was convicted of or pleaded guilty to an offense described in division (CC)(1)(a) or (b) of this section.

(DD) "Sanction" means any penalty imposed upon an offender who is convicted of or pleads guilty to an offense, as punishment for the offense. "Sanction" includes any sanction imposed pursuant to any provision of sections 2929.14 to 2929.18 or 2929.24 to 2929.28 of the Revised Code.

(EE) "Sentence" means the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense.

(FF) "Stated prison term" means the prison term, mandatory prison term, or combination of all prison terms and mandatory prison terms imposed by the sentencing court pursuant to section 2929.14, 2929.142, or 2971.03 of the Revised Code or under section 2919.25 of the Revised Code. "Stated prison term" includes any credit received by the offender for time spent in jail awaiting trial, sentencing, or transfer to prison for the offense and any time spent under house arrest or house arrest with electronic monitoring imposed after earning credits pursuant to section 2967.193 of the Revised Code. If an offender is serving a prison term as a risk reduction sentence under sections 2929.143 and 5120.036 of the Revised Code, "stated prison term" includes any period of time by which the prison term imposed upon the offender is shortened by the offender's successful completion of all assessment and treatment or programming pursuant to those sections.

(GG) "Victim-offender mediation" means a reconciliation or mediation program that involves an offender and the victim of the offense committed by the offender and that includes a meeting in which the offender and the victim may discuss the offense, discuss restitution, and consider other sanctions for the offense.

(HH) "Fourth degree felony OVI offense" means a violation of division (A) of section 4511.19 of the Revised Code that, under division (G) of that section, is a felony of the fourth degree.

(II) "Mandatory term of local incarceration" means the term of sixty or one hundred twenty days in a jail, a community-based correctional facility, a halfway house, or an alternative residential facility that a sentencing court may impose upon a person who is convicted of or pleads guilty to a fourth degree felony OVI offense pursuant to division (G)(1) of section 2929.13 of the Revised Code and division (G)(1)(d) or (e) of section 4511.19 of the Revised Code.

(JJ) "Designated homicide, assault, or kidnapping offense," "violent sex offense," "sexual motivation specification," "sexually violent offense," "sexually violent predator," and "sexually violent predator specification" have the same meanings as in section 2971.01 of the Revised Code.

(KK) "Sexually oriented offense," "child-victim oriented offense," and "tier III sex offender/child-victim offender" have the same meanings as in section 2950.01 of the Revised Code.

(LL) An offense is "committed in the vicinity of a child" if the offender commits the offense within thirty feet of or within the same residential unit as a child who is under eighteen years of age, regardless of whether the offender knows the age of the child or whether the offender knows the offense is being committed within thirty feet of or within the same residential unit as the child and regardless of whether the child actually views the commission of the offense.

(MM) "Family or household member" has the same meaning as in section 2919.25 of the Revised Code.

(NN) "Motor vehicle" and "manufactured home" have the same meanings as in section 4501.01 of the Revised Code.

(OO) "Detention" and "detention facility" have the same meanings as in section 2921.01 of the Revised Code.

(PP) "Third degree felony OVI offense" means a violation of division (A) of section 4511.19 of the Revised Code that, under division (G) of that section, is a felony of the third degree.

(QQ) "Random drug testing" has the same meaning as in section 5120.63 of the Revised Code.

(RR) "Felony sex offense" has the same meaning as in section 2967.28 of the Revised Code.

(SS) "Body armor" has the same meaning as in section 2941.1411 of the Revised Code.

(TT) "Electronic monitoring" means monitoring through the use of an electronic monitoring device.

(UU) "Electronic monitoring device" means any of the following:

(1) Any device that can be operated by electrical or battery power and that conforms with all of the following:

(a) The device has a transmitter that can be attached to a person, that will transmit a specified signal to a receiver of the type described in division (UU)(1)(b) of this section if the transmitter is removed from the person, turned off, or altered in any manner without prior court approval in relation to electronic monitoring or without prior approval of the department of rehabilitation and correction in relation to the use of an electronic monitoring device for an inmate on transitional control or otherwise is tampered with, that can transmit continuously and periodically a signal to that receiver when the person is within a specified distance from the receiver, and that can transmit an appropriate signal to that receiver if the person to whom it is attached travels a specified distance from that receiver.

(b) The device has a receiver that can receive continuously the signals transmitted by a transmitter of the type described in division (UU)(1)(a) of this section, can transmit continuously those signals by a wireless or landline telephone connection to a central monitoring computer of the type described in division (UU)(1)(c) of this section, and can transmit continuously an appropriate signal to that central monitoring computer if the device has been turned off or altered without prior court approval or otherwise tampered with. The device is designed specifically for use in electronic monitoring, is not a converted wireless phone or another tracking device that is clearly not designed for electronic monitoring, and provides a means of text-based or voice communication with the person.

(c) The device has a central monitoring computer that can receive continuously the signals transmitted by a wireless or landline telephone connection by a receiver of the type described in division (UU)(1)(b) of this section and can monitor continuously the person to whom an electronic monitoring device of the type described in division (UU)(1)(a) of this section is attached.

(2) Any device that is not a device of the type described in division (UU)(1) of this section and that conforms with all of the following:

(a) The device includes a transmitter and receiver that can monitor and determine the location of a subject person at any time, or at a designated point in time, through the use of a central monitoring computer or through other electronic means.

(b) The device includes a transmitter and receiver that can determine at any time, or at a designated point in time, through the use of a central monitoring computer or other electronic means the fact that the transmitter is turned off or altered in any manner without prior approval of the court in relation to the electronic monitoring or without prior approval of the department of rehabilitation and correction in relation to the use of an electronic monitoring device for an inmate on transitional control or otherwise is tampered with.

(3) Any type of technology that can adequately track or determine the location of a subject person at any time and that is approved by the director of rehabilitation and correction, including, but not limited to, any satellite technology, voice tracking system, or retinal scanning system that is so approved.

(VV) "Non-economic loss" means nonpecuniary harm suffered by a victim of an offense as a result of or related to the commission of the offense, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss.

(WW) "Prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

(XX) "Continuous alcohol monitoring" means the ability to automatically test and periodically transmit alcohol consumption levels and tamper attempts at least every hour, regardless of the location of the person who is being monitored.

(YY) A person is "adjudicated a sexually violent predator" if the person is convicted of or pleads guilty to a violent sex offense and also is convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment, count in the indictment, or information charging that violent sex offense or if the person is convicted of or pleads guilty to a designated homicide, assault, or kidnapping offense and also is convicted of or pleads guilty to both a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information charging that designated homicide, assault, or kidnapping offense.

(ZZ) An offense is "committed in proximity to a school" if the offender commits the offense in a school safety zone or within five hundred feet of any school building or the boundaries of any school premises, regardless of whether the offender knows the offense is being committed in a school safety zone or within five hundred feet of any school building or the boundaries of any school premises.

(AAA) "Human trafficking" means a scheme or plan to which all of the following apply:

(1) Its object is one or more of the following:

(a) To subject a victim or victims to involuntary servitude, as defined in section 2905.31 of the Revised Code or to compel a victim or victims to engage in sexual activity for hire, to engage in a performance that is obscene, sexually oriented, or nudity oriented, or to be a model or participant in the production of material that is obscene, sexually oriented, or nudity oriented;

(b) To facilitate, encourage, or recruit a victim who is less than sixteen years of age or is a developmentally disabled person, or victims who are less than sixteen years of age or are developmentally disabled persons, for any purpose listed in divisions (A)(2)(a) to (c) of section 2905.32 of the Revised Code;

(c) To facilitate, encourage, or recruit a victim who is sixteen or seventeen years of age, or victims who are sixteen or seventeen years of age, for any purpose listed in divisions (A)(2)(a) to (c) of section 2905.32 of the Revised Code, if the circumstances described in division (A)(5), (6), (7), (8), (9), (10), (11), (12), or (13) of section 2907.03 of the Revised Code apply with respect to the person engaging in the conduct and the victim or victims.

(2) It involves at least two felony offenses, whether or not there has been a prior conviction for any of the felony offenses, to which all of the following apply:

(a) Each of the felony offenses is a violation of section 2905.01, 2905.02, 2905.32, 2907.21, 2907.22, or 2923.32, division (A)(1) or (2) of section 2907.323, or division (B)(1), (2), (3), (4), or (5) of section 2919.22 of the Revised Code or is a violation of a law of any state other than this state that is substantially similar to any of the sections or divisions of the Revised Code identified in this division.

(b) At least one of the felony offenses was committed in this state.

(c) The felony offenses are related to the same scheme or plan and are not isolated instances.

(BBB) "Material," "nudity," "obscene," "performance," and "sexual activity" have the same meanings as in section 2907.01 of the Revised Code.

(CCC) "Material that is obscene, sexually oriented, or nudity oriented" means any material that is obscene, that shows a person participating or engaging in sexual activity, masturbation, or bestiality, or that shows a person in a state of nudity.

(DDD) "Performance that is obscene, sexually oriented, or nudity oriented" means any performance that is obscene, that shows a person participating or engaging in sexual activity, masturbation, or bestiality, or that shows a person in a state of nudity.

Amended by 130th General Assembly File No. TBD, HB 130, §1, eff. 6/20/2014.

Amended by 129th General Assembly File No.189, HB 334, §1, eff. 12/20/2012.

Amended by 129th General Assembly File No.127, HB 487, §101.01, eff. 9/10/2012.

Amended by 129th General Assembly File No.29, HB 86, §1, eff. 9/30/2011.

Amended by 128th General Assembly File No.58, SB 235, §1, eff. 3/24/2011.

Amended by 128th General Assembly File No.43, SB 162, §1, eff. 9/13/2010.

Effective Date: 12-23-2003; 06-01-2004; 09-23-2004; 04-29-2005; 08-03-2006; 10-12-2006; 01-02-2007; 04-04-2007; 2007 SB10 01-01-2008; 2008 SB220 09-30-2008; 2008 HB280 04-07-2009; 2008 HB130 04-07-2009

Related Legislative Provision: See 129th General Assembly File No.29, HB 86, §3

2929.02 Murder penalties.

(A) Whoever is convicted of or pleads guilty to aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.022 , 2929.03 , and 2929.04 of the Revised Code, except that no person who raises the matter of age pursuant to section 2929.023 of the Revised Code and who is not found to have been eighteen years of age or older at the time of the commission of the offense shall suffer death. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B)

(1) Except as otherwise provided in division (B)(2) or (3) of this section, whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life.

(2) Except as otherwise provided in division (B)(3) of this section, if a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code, the victim of the offense was less than thirteen years of age, and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the court shall impose an indefinite prison term of thirty years to life pursuant to division (B)(3) of section 2971.03 of the Revised Code.

(3) If a person is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code and also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information that charged the murder, the court shall impose upon the offender a term of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(4) In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to the offender or to the dependents of the offender, or will prevent the offender from making reparation for the victim's wrongful death.

(D)

(1) In addition to any other sanctions imposed for a violation of section 2903.01 or 2903.02 of the Revised Code, if the offender used a motor vehicle as the means to commit the violation, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(2) As used in division (D) of this section, "motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

Effective Date: 07-29-1998; 04-04-2007; 2007 SB10 01-01-2008

2929.021 Notice to supreme court of indictment charging aggravated murder with aggravating circumstances.

(A) If an indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the clerk of the court in which the indictment is filed, within fifteen days after the day on which it is filed, shall file a notice with the supreme court indicating that the indictment was filed. The notice shall be in the form prescribed by the clerk of the supreme court and shall contain, for each charge of aggravated murder with a specification, at least the following information pertaining to the charge:

- (1) The name of the person charged in the indictment or count in the indictment with aggravated murder with a specification;
- (2) The docket number or numbers of the case or cases arising out of the charge, if available;
- (3) The court in which the case or cases will be heard;
- (4) The date on which the indictment was filed.

(B) If the indictment or a count in an indictment charges the defendant with aggravated murder and contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the defendant pleads guilty or no contest to any offense in the case or if the indictment or any count in the indictment is dismissed, the clerk of the court in which the plea is entered or the indictment or count is dismissed shall file a notice with the supreme court indicating what action was taken in the case. The notice shall be filed within fifteen days after the plea is entered or the indictment or count is dismissed, shall be in the form prescribed by the clerk of the supreme court, and shall contain at least the following information:

- (1) The name of the person who entered the guilty or no contest plea or who is named in the indictment or count that is dismissed;
- (2) The docket numbers of the cases in which the guilty or no contest plea is entered or in which the indictment or count is dismissed;
- (3) The sentence imposed on the offender in each case.

Effective Date: 10-19-1981

2929.022 Sentencing hearing - determining existence of aggravating circumstance.

(A) If an indictment or count in an indictment charging a defendant with aggravated murder contains a specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, the defendant may elect to have the panel of three judges, if the defendant waives trial by jury, or the trial judge, if the defendant is tried by jury, determine the existence of that aggravating circumstance at the sentencing hearing held pursuant to divisions (C) and (D) of section 2929.03 of the Revised Code.

(1) If the defendant does not elect to have the existence of the aggravating circumstance determined at the sentencing hearing, the defendant shall be tried on the charge of aggravated murder, on the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code, and on any other specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code in a single trial as in any other criminal case in which a person is charged with aggravated murder and specifications.

(2) If the defendant does elect to have the existence of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code determined at the sentencing hearing, then, following a verdict of guilty of the charge of aggravated murder, the panel of three judges or the trial judge shall:

(a) Hold a sentencing hearing pursuant to division (B) of this section, unless required to do otherwise under division (A) (2)(b) of this section;

(b) If the offender raises the matter of age at trial pursuant to section 2929.023 of the Revised Code and is not found at trial to have been eighteen years of age or older at the time of the commission of the offense, conduct a hearing to determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. After conducting the hearing, the panel or judge shall proceed as follows:

(i) If that aggravating circumstance is proven beyond a reasonable doubt or if the defendant at trial was convicted of any other specification of an aggravating circumstance, the panel or judge shall impose sentence according to division (E) of section 2929.03 of the Revised Code.

(ii) If that aggravating circumstance is not proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance, except as otherwise provided in this division, the panel or judge shall impose sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender. If that aggravating circumstance is not proven beyond a reasonable doubt, the defendant at trial was not convicted of any other specification of an aggravating circumstance, the victim of the aggravated murder was less than thirteen years of age, and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the panel or judge shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(B) At the sentencing hearing, the panel of judges, if the defendant was tried by a panel of three judges, or the trial judge, if the defendant was tried by jury, shall, when required pursuant to division (A)(2) of this section, first determine if the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt. If the panel of judges or the trial judge determines that the specification of the aggravating circumstance of a prior conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt or if they do not determine that the specification is proven beyond a reasonable doubt but the defendant at trial was convicted of a specification of any other aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge and trial jury shall impose sentence on the offender pursuant to division (D) of section 2929.03 and section 2929.04 of the Revised Code. If the panel of judges or the trial judge does not determine that the specification of the aggravating circumstance of a prior

conviction listed in division (A)(5) of section 2929.04 of the Revised Code is proven beyond a reasonable doubt and the defendant at trial was not convicted of any other specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, the panel of judges or the trial judge shall terminate the sentencing hearing and impose sentence on the offender as follows:

(1) Subject to division (B)(2) of this section, the panel or judge shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the victim of the aggravated murder was less than thirteen years of age and the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, the panel or judge shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

Effective Date: 10-19-1981; 2007 SB10 01-01-2008

2929.023 Raising the matter of age at trial.

A person charged with aggravated murder and one or more specifications of an aggravating circumstance may, at trial, raise the matter of his age at the time of the alleged commission of the offense and may present evidence at trial that he was not eighteen years of age or older at the time of the alleged commission of the offense. The burdens of raising the matter of age, and of going forward with the evidence relating to the matter of age, are upon the defendant. After a defendant has raised the matter of age at trial, the prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the defendant was eighteen years of age or older at the time of the alleged commission of the offense.

Effective Date: 10-19-1981

2929.03 Imposition of sentence for aggravated murder.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:

(1) Except as provided in division (A)(2) of this section, the trial court shall impose one of the following sentences on the offender:

- (a) Life imprisonment without parole;
- (b) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;
- (c) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;
- (d) Subject to division (A)(1)(e) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(e) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (A)(1)(a) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be served pursuant to that section.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)

(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 of the Revised Code, the trial court shall impose sentence on the offender as follows:

- (a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose one of the following sentences on the offender:
 - (i) Life imprisonment without parole;

(ii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty years of imprisonment;

(iii) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iv) Subject to division (C)(1)(a)(v) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(v) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (C)(1)(a)(i) of this section, the trial court shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(2)

(a) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be one of the following:

(i) Except as provided in division (C)(2)(a)(ii) or (iii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(ii) Except as provided in division (C)(2)(a)(iii) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of death or life imprisonment without parole on the offender pursuant to division (C)(2)(a)(i) of this section, the penalty to be imposed on the offender shall be an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that shall be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.

(iii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(b) A penalty imposed pursuant to division (C)(2)(a)(i), (ii), or (iii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:

(i) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(ii) By the trial jury and the trial judge, if the offender was tried by jury.

(D)

(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and was not found at trial to have been eighteen years of age or older

at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to one of the following:

- (a) Except as provided in division (D)(2)(b) or (c) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;
- (b) Except as provided in division (D)(2)(c) of this section, if the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the jury does not recommend a sentence of life imprisonment without parole pursuant to division (D)(2)(a) of this section, to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section.
- (c) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, life imprisonment with parole eligibility after serving thirty full years of imprisonment, or an indefinite term consisting of a minimum term of thirty years and a

maximum term of life imprisonment to be imposed pursuant to division (B)(3) of section 2971.03 of the Revised Code, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment imposed as described in division (D)(2)(b) of this section or a sentence of life imprisonment without parole imposed under division (D)(2)(c) of this section, the sentence shall be served pursuant to section 2971.03 of the Revised Code. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Except as provided in division (D)(3)(b) of this section, one of the following:

(i) Life imprisonment without parole;

(ii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iii) Subject to division (D)(3)(a)(iv) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(iv) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (D)(3)(a)(i) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Except as provided in division (E)(2) of this section, one of the following:

(a) Life imprisonment without parole;

(b) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(d) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (E)(2)(a) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(F) 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 court or panel, when it imposes life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G)

(1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

Effective Date: 01-01-1997; 03-23-2005; 2007 SB10 01-01-2008

2929.04 Death penalty or imprisonment - aggravating and mitigating factors.

(A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section 2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

(a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.

(b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.

(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(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.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

Effective Date: 05-15-2002

2929.05 Supreme court review upon appeal of sentence of death.

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall review upon appeal the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They also shall review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

A court of appeals that reviews a case in which the sentence of death is imposed for an offense committed before January 1, 1995, shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

(B) The court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed and, except as otherwise provided in this section, shall conduct the review in accordance with the Rules of Appellate Procedure.

(C) At any time after a sentence of death is imposed pursuant to section 2929.022 or 2929.03 of the Revised Code, the court of common pleas that sentenced the offender shall vacate the sentence if the offender did not present evidence at trial that the offender was not eighteen years of age or older at the time of the commission of the aggravated murder for which the offender was sentenced and if the offender shows by a preponderance of the evidence that the offender was less than eighteen years of age at the time of the commission of the aggravated murder for which the offender was sentenced. The court is not required to hold a hearing on a motion filed pursuant to this division unless the court finds, based on the motion and any supporting information submitted by the defendant, any information submitted by the prosecuting attorney, and the record in the case, including any previous hearings and orders, probable cause to believe that the defendant was not eighteen years of age or older at the time of the commission of the aggravated murder for which the defendant was sentenced to death.

Effective Date: 07-29-1998

ARTICLE IV. RELEVANCY AND ITS LIMITS

RULE 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[Effective: July 1, 1980.]

RULE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay

(A) Exclusion mandatory. Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(B) Exclusion discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.

[Effective: July 1, 1980; amended effective July 1, 1996.]

ARTICLE VI. WITNESSES

RULE 601. General Rule of Competency

Every person is competent to be a witness except:

(A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

(B) A spouse testifying against the other spouse charged with a crime except when either of the following applies:

- (1) a crime against the testifying spouse or a child of either spouse is charged;
- (2) the testifying spouse elects to testify.

(C) An officer, while on duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.

(D) A person giving expert testimony on the issue of liability in any claim asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person by a physician or podiatrist, unless the person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state, and unless the person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school. This division shall not prohibit other medical professionals who otherwise are competent to testify under these rules from giving expert testimony on the appropriate standard of care in their own profession in any claim asserted in any civil action against a physician, podiatrist, medical professional, or hospital arising out of the diagnosis, care, or treatment of any person.

(E) As otherwise provided in these rules.

[Effective: July 1, 1980; amended effective July 1, 1991.]

RULE 11. Pleas, Rights Upon Plea

(A) **Pleas.** A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or the defendant's attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) **Effect of guilty or no contest pleas.** With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court, except as provided in divisions (C)(3) and (4) of this rule, shall proceed with sentencing under Crim.R. 32.

(C) **Pleas of guilty and no contest in felony cases.**

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim.R. 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept a plea of guilty or no contest without first addressing the defendant personally and doing all of the following:

(a) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing.

(b) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty or no contest, and that the court, upon acceptance of the plea, may proceed with judgment and sentence.

(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.

(3) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest the court shall so advise the defendant and determine that the defendant understands the consequences of the plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications that are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (a) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(4) With respect to all other cases the court need not take testimony upon a plea of guilty or no contest.

(D) Misdemeanor cases involving serious offenses. In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing the defendant of the effect of the pleas of guilty, no contest, and not guilty and determining that the defendant is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he or she has the right to be represented by retained counsel, or pursuant to Crim.R. 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses. In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such pleas without first informing the defendant of the effect of the plea of guilty, no contest, and not guilty.

The counsel provisions of Crim.R. 44(B) and (C) apply to division (E) of this rule.

(F) Negotiated plea in felony cases. When, in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged or to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea. If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity. The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial.

[Effective: July 1, 1973; amended effective July 1, 1976; July 1, 1980; July 1, 1998.]

Staff Note (September 1, 2012)

Courts and litigants are advised that the Revised Code contains additional requirements, not contained in Crim.R. 11, for advising certain defendants at a plea of guilty or no contest of other possible consequences in specified circumstances. See, e.g., Sections 2943.031 (possible immigration consequences), 2943.032 (possible extension of prison term), and 2943.033 (possible firearm restriction) of the Ohio Revised Code. Other plea requirements not contained in Crim.R. 11 may also apply. See, e.g., Section 2937.07 (requiring explanation of circumstances in certain misdemeanor cases) of the Ohio Revised Code.

RULE 52. Harmless Error and Plain Error

(A) Harmless error. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

[Effective: July 1, 1973.]

RULE 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible.

[Effective: July 1, 1980.]

RULE 405. Methods of Proving Character

(A) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(B) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

[Effective: July 1, 1980.]

RULE 609. Impeachment by Evidence of Conviction of Crime

(A) General rule. For the purpose of attacking the credibility of a witness:

(1) subject to Evid.R. 403, evidence that a witness other than the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the witness was convicted.

(2) notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(3) notwithstanding Evid.R. 403(A), but subject to Evid.R. 403(B), evidence that any witness, including an accused, has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance.

(B) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement, or the termination of community control sanctions, post-release control, or probation, shock probation, parole, or shock parole imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(C) Effect of pardon, annulment, expungement, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, expungement, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, expungement, or other equivalent procedure based on a finding of innocence.

(D) Juvenile adjudications. Evidence of juvenile adjudications is not admissible except as provided by statute enacted by the General Assembly.

(E) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(F) Methods of proof. When evidence of a witness's conviction of a crime is admissible under this rule, the fact of the conviction may be proved only by the testimony of the witness on direct or cross-examination, or by public record shown to the witness during his or her examination. If the witness denies that he or she is the person to whom the public record refers, the court may permit the introduction of additional evidence tending to establish that the witness is or is not the person to whom the public record refers.

[Effective: July 1, 1980; amended effective July 1, 1991; July 1, 2003.]

Staff Note (July 1, 2003 amendment)

Rule 609 Impeachment by Evidence of Conviction of Crime

Rule 609(B) Time limit

The amendment added references to "community control sanctions" and "post-release control" in division (B) to reflect the availability of those forms of sanction along with the traditional devices of probation and parole already referred to in the rule. Under the rule as amended, the termination of community control sanctions and post-release control become additional events from which to date the staleness of a conviction under the rule's presumptive exclusion of convictions that are remote in time.

Staff Note (July 1, 1991 Amendment)

Rule 609 Impeachment by Evidence of Conviction of Crime

The amendment makes several changes. One change concerns the trial court's discretion to exclude evidence of prior convictions, and the other change concerns permissible methods of proving prior convictions.

Rule 609(A) Discretion to exclude

The amended rule clarifies the issue of the trial court's discretion in excluding prior convictions. As adopted in 1980, the Ohio rule differed from its federal counterpart. A clause in Federal Rule 609(a)(1) explicitly authorized the trial court to exclude "felony" convictions; these convictions were admissible only if the "court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." This clause was deleted from the Ohio rule.

It could have been argued that this deletion meant that Ohio courts did not have the authority to exclude prior felony convictions. In other words, any felony conviction was automatically admissible. Indeed, the rule specified that these convictions "shall be admitted." The Ohio Staff Note (1980), however, suggested otherwise. The Staff Note reads:

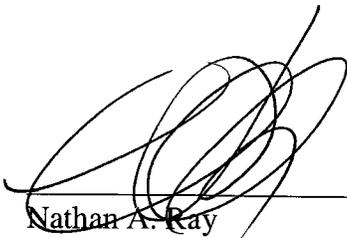
In limiting that discretionary grant, Rule 609(A) is directed to greater uniformity in application subject only to the provisions of Rule 403. The removal of the reference to the defendant insures that the application of the rule is not limited to criminal prosecutions.

The Supreme Court addressed the issue in *State v. Wright* (1990), 48 Ohio St.3d 5, 548 N.E.2d 923. The Court wrote: "Evid. R. 609 must be considered in conjunction with Evid. R. 403. The trial judge therefore has broad discretion in determining the extent to which testimony will be admitted under Evid. R. 609."

The amended rule makes clear that Ohio trial judges have discretion to exclude prior convictions. It also specifies how this discretion is to be exercised. Evid. R. 609(A) is divided into three divisions.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Merit Brief of Appellant Steven E. Cepec and the attached Appendix to Merit Brief was forwarded by regular U.S. Mail to Dean Holman, Prosecuting Attorney, Medina County Prosecutors Office, 72 Public Square, Medina, Ohio 44256, this 4th day of August, 2014.



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